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An Examination of Social Standards in Biofuels Sustainability Criteria

By Steve Charnovitz, Jane Earley and Robert Howse

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FROM IPC CHAIRMAN AND CEO

The question of linking social standards to trade continues to be a very controversial one. Biofuels — in particular questions about their environmental sustainability and their impact on food security — have also become controversial. The German Agency for Technical Cooperation (GTZ) on behalf of the German Federal Ministry for Economic Cooperation and Development asked IPC to tackle both of these controversies jointly by undertaking this WTO analysis of social standards linked to the trade of biofuels and their feedstocks.

This analysis of Social Standards in Biofuels Sustainability Criteria serves as a companion piece to the seminal IPC/REIL 2006 Discussion Paper "WTO Disciplines and Biofuels: Opportunities and Constraints in the Creation of a Global Marketplace." Neither publication seeks to provide definitive answers as to what types of measures are or are not WTO compliant; indeed such answers can only come through agreement among WTO members or through WTO jurisprudence. Rather, this paper serves to zero in on the most relevant WTO provisions and on the considerable legal uncertainty, which exists not only for social standards, but indeed for other types of "non-trade related concerns."

A draft of this paper was extensively discussed at IPC's plenary meeting in Des Moines on October 19, 2008. Many IPC members remain concerned about the possibility that social standards can be abused for protectionist motives. On the question of clarifying WTO rules on "non-trade related concerns," the lively discussion showed that some IPC members would advocate such a clarification, whereas others believe it best not to take such a proactive approach.

Carlo Trojan
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Project Development and Guidance

Charlotte Hebebrand, IPC Chief Executive

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EXECUTIVE SUMMARY

The rapid expansion of biofuels markets has triggered calls for the inclusion of sustainability criteria for international trade of biofuels. Environmental sustainability criteria, i.e., the requirement for a biofuel to provide a certain percentage of greenhouse gas savings compared to fossil fuel, or for the agricultural feedstock to be sustainably cultivated, have garnered the greatest attention. Although environmental conditionality is the main thrust of most sustainable biofuels initiatives, some also call for the inclusion of social criteria, and it is these social criteria that are examined in this paper. Once considered a boon to rural populations, biofuels have also been reexamined in light of whether they contribute to food insecurity and poor labor conditions and violation of land rights.

All governments prescribe social standards for their own nationals and their own territory, and that exercise of sovereign power is not the subject of this paper. Rather, we want to introduce the topic of international (or transnational) social standards, that is, the prescription by one country or customs union of the social standards to be followed by producers of another country as a condition for access to the prescribing country or customs union's markets. In particular, we are interested in standards related to the production of goods (or inputs thereof) in international trade.

Distinguishing social concerns from ecological and economic concerns is fraught with difficulty because the categories overlap. Some may say that ecological and social concerns are non-economic, or non-market, whereas others might argue that environmental and labor practices do affect prices and output. Some might say that ecological concerns are physical while social concerns are psychological, but others might argue that social issues do have physical effects, such as war and conflict, refugees and migration, and health and infectious disease. Such divergences are but one element of a vast debate about linking social criteria to trade. As this paper will show, there are many policy as well as legal questions about such linkages. The purpose of this paper is to clarify what those controversies are. Beyond clarifying the complexity and controversies of the topic, the paper will conclude with a number of recommendations on how to constructively advance the debate over linking social criteria to trade measures. Although the paper is about social standards applied to biofuels trade in particular, it is also illustrative of the topic with regard to trade of agricultural products, or indeed of all products in general.

Prior to examining the types of linkages being suggested for biofuels specifically, this paper reviews the broader debate about trade and labor. In Section I, we provide a brief overview of the origins of the international labor and international trade regimes with special attention to how trade and labor issues intersected. Although there are a number of ideological differences at play, the most potent pertains to the question of whether linking social standards to trade is motivated by altruism or protectionism. Advocates of labor-trade conditionality view such linkages as a way to make trade fairer to the importing countries while others favor it as a way to improve human development in exporting countries. The opponents of conditionality typically oppose the concept of linkage and sometimes argue that losing trade access will make it harder for developing countries to raise labor standards and argue that such conditionality is at bottom motivated by protectionism. A somewhat uneasy truce was reached at the 1996 WTO Singapore Ministerial, during which WTO members clearly pointed to the International Labor Organisation (ILO) as the appropriate body to address labor issues, but also spoke out against the use of labour standards for protectionist purposes (although not excluding non-protectionist motivated linkages), and endorsed ongoing collaboration between the ILO and the WTO. The WTO has thus not taken any steps to establish a formal linkage between social criteria and trade, but — as the proliferation of sustainability standards for biofuels trade demonstrates — such linkages are clearly being made by governments, industry and other stakeholders.

With this backdrop, Section II examines the WTO compliance issues raised by such linkages. The legal questions are arguably as difficult as the ideological questions, in particular since some WTO provisions or jurisprudence can be interpreted in different ways. Traditionally thorny issues, such as how non-product-related process and production methods should be viewed under a WTO lens, or to what extent WTO rules apply to private-sector standards, abound in this analysis. The purpose of this section is not intended as a roadmap for those who would like to create social standards-trade linkages, but rather to highlight the legal complexities.

In the midst of this legal uncertainty, however, there are important concepts in international trade law, ranging from the core obligations of non-discrimination and national treatment, to a clear preference for internationally agreed standards, which must be taken into account in this rush to create sustainability criteria for biofuels (at the same time, as will be shown, there is a lack of clear definition of what is an international standard, creating further complexity).

By highlighting the complex and controversial nature of the topic, this paper seeks to inspire and inform greater deliberation about whether and how to apply social standards to biofuels trade. The broader debate about linking social conditionality to trade measures is likely to continue. For it to be resolved would require much greater common ground globally than now exists on the best method for advancing social rights around the world. Should trade measures be seen by the international community as an effective way to promote such rights, there will also be a need to clarify how WTO rules relate to such measures. Without such clarification, greater clarity may eventually be established through WTO jurisprudence, but this would be a lengthy process. Social standards for biofuels, however, are being developed and linked to trade without such common ground having been reached. In light of this, Section III recommends that greater consideration be given to the following questions:

- A multitude of different social standards schemes and certification schemes imposes considerable costs on producers, is especially harmful for developing country producers, and risks confusion among consumers. While competition and experimentation may have some advantages, international coordinating mechanisms are desirable, to ensure that the multiplication of different schemes does not have negative effects, and to ensure a minimum level of coherence.

- Many social issues raised in the context of biofuels production, i.e. unfavorable labor conditions and displacement of indigenous people, are not unique to the biofuels sector. This reality puts into serious question the wisdom of applying such social standards only to biofuels and their feedstocks. In the words of EU Commissioner Mandelson, "Why should we suggest that there is an obligation on producers who export sugar cane biofuel, but not on those who export plain sugar cane?"[1]

- One social issue, which is arguably unique to biofuels, as opposed to agricultural production more generally, is their impact on food security. Biofuels impact food security since they are produced from agricultural feedstock which might otherwise enter the food supply, or on land which otherwise might be used for the cultivation of food crops, and because they can contribute to higher food prices. Interestingly enough, however, food security is not included as a social standard in many of the sustainability schemes we examine in this paper, or if it is, is not well elaborated. Seen in this light, the mitigating effects that better labor standards might provide to poor populations producing biofuels would be completely undone if those same populations were impoverished by higher food prices.

- Since biofuels — rather than agricultural production more generally — are therefore uniquely tied to food security, this connection deserves to be examined on its own. Yet, it appears difficult to devise effective food security criteria through standards and therefore questionable whether the use of standards would be the most effective way to address this serious social problem. A simpler and faster alternative would arguably be to reconsider ambitious mandates for biofuels in transportation fuel or to promote more specifically biofuels produced from feedstocks, which do not compete with food, or which are produced on land, that does not compete with agricultural land.

[1] Peter Mandelson, "Keeping the crop in hand: By imposing rigorous sustainability standards, we can make a global market in biofuels work," The Guardian, 29 April 2008.

I. BROADER TRADE AND LABOR DEBATE

The political consciousness of the need for international social law came early, earlier than the calls for international environmental law or international trade law.[2] It was the industrial revolution itself, in the late 18th century that led visionaries to see a need for common and minimum international labor standards.[3] In the early 19th century, the anti-slavery movement discovered a role for consumer action as an instrument to fight human labor abuses. By the late 19th century, political parties, social movements, and intellectuals in Europe and the United States were promoting the idea of international social norms for how workers should be treated in every country.

Two events in the 1890s refocused these efforts in important and lasting ways. First, in 1890, the German Emperor William II convened an intergovernmental conference in Berlin to seek the improvement of labor standards. The conference, attended by 12 governments in Europe, agreed to a set of non-binding principles on work in mines, Sunday rest, child labor, work by women, and labor administration.[4] Second, in 1891, Pope Leo XIII delivered his famous Encyclical on the "Rights and Duties of Capital and Labor." The Encyclical provided a religious and moral underpinning for government intervention in labor relations in order to promote human dignity and justice for workpeople. Specifically, it called for regulation to protect workers and advocated labor unions and collective bargaining.[5] *Rerum Novarum* was important in both providing a moral authority for a labor rights agenda and also in fostering the idea of a universal standard.

Progress was not long in coming. In 1906, an intergovernmental conference sitting in Berne drafted the first two multilateral labor treaties to go into force. One convention addressed night work by women in industrial employment and the other dealt with a deadly occupational hazard. The Phosphorus Match Convention prohibited the use of white or yellow phosphorus to manufacture matches because working with that chemical caused jaw necrosis among match workers.[6] Furthermore, the Convention banned the importation of matches containing such phosphorus. The 1906 Convention on Matches was the first international treaty to impose an import ban based on a production method.

After the War, the allied governments moved to construct the International Labour Organization (ILO), the first public international organization with a social policy mandate. The organic act (later termed "constitution") of the ILO was written into the Treaty of Versailles in 1919. Later that year, the ILO held its first annual conference in Washington, D.C. The ILO Constitution is based on the view that labor conditions within one country affect all. This is clear in the most famous quotation from the Preamble to the ILO Constitution, namely, 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."[7] The understanding that working conditions are an international issue (rather than exclusively a domestic issue) can be seen in the Covenant of the League of Nations, which called on the League to "endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend...."[8] This was an explicit linkage of labor standards to trade relations.

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[2] Bilateral trade agreements go back to antiquity but what is being discussed here is the evolution of the multilateral trading system.

[3] See John W. Follows, ANTECEDENTS OF THE INTERNATIONAL LABOUR ORGANIZATION (Oxford: Clarendon Press, 1951); Bob Hepple, LABOUR LAWS AND GLOBAL TRADE (Oxford: Hart Publishing, 2005), at 25-29.

[4] Resolutions of the International Conference on Labor Legislation, Berlin, 29 March 1890, in James T. Shotwell (ed.), THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION (New York: Columbia University Press, 1934), Vol. 1, at 472.

[5] *Rerum Novarum*, paras. 36-49.

[6] Convention respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches, 26 September 1906, 99 BFSP 986, Art. 1. The matches were also unsafe for consumers if misused.

[7] Treaty of Versailles, 28 June 1919, 112 BFSP 1, 191, Part XIII Preamble.

[8] League of Nations Covenant, Art. 23(a).

During its first decade, the League began the construction of the international trade regime.[9] In 1927, the League convened a trade conference that produced the first multilateral treaty to discipline national trade restrictions. The 1927 Convention contained an article providing exceptions for trade restrictions "imposed on moral or humanitarian grounds," and restrictions "imposed for the protection of public health and for the protection of animals or plants against disease, insects and harmful parasites."[10] This set of exceptions became the model for Article XX (General Exceptions) of the General Agreement on Tariffs and Trade (GATT).

During the interwar period, several countries put into place unilateral trade restrictions based on labor standards.[11] For example, in 1924, Austria authorized anti-dumping duties on products from countries, that had not ratified the ILO's Hours of Work Convention, and whose labor regulations fell substantially short of the provisions of that Convention. In 1930, motivated in part by the labor camps in the Soviet Union, the United States barred imports produced with forced labor.[12] In 1934, Spain authorized anti-dumping duties and quotas on goods produced where international labor rules were not observed.

The existence of such trade laws targeting foreign labor conditions are important context for understanding why the U.N. Conference that wrote the GATT (1947) and the Charter of the International Trade Organization (ITO) devoted attention to the labor and trade linkage. The ITO Charter (1948) contained an Article 7 on "Fair Labour Standards" within the Chapter on "Employment and Economic Activity." In Article 7, the governments recognized "that unfair labour conditions, particularly in production for export, create difficulties in international trade ...", and the Article noted that there could be ITO dispute settlement over labor standards.[13] Article 7, of course, was never implemented because the ITO Charter failed to enter into force.

The ITO negotiations in 1946-48 mark the beginnings of the trade and labor linkage debate within the trading system. Over the next six decades following the ITO Charter of 1948, the issue of labor standards (or worker rights) was brought to the GATT/WTO several times, but no significant progress was ever made.[14] The issue of fair labor standards was a statutory U.S. government negotiating objective for the Tokyo Round in the 1970s and the Uruguay Round for the late 1980s and early 1990s.[15] In adopting the WTO, the Congress called on the Administration to seek a WTO working party on worker rights. These efforts did not succeed.[16] Indeed, looking back, it seems that the vociferousness of the opposition grew in each round as the labor and trade connection became more politicized and more controversial. The moment of greatest controversy came in 1999 at the WTO Ministerial Conference in Seattle where President Bill Clinton's advocacy for placing workers' rights on the negotiating agenda became one of the torpedoes blowing up that Conference.[17]

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[9] Under the principle of sovereignty in public international law, no state is obligated to trade with any other. In other words, there is no fundamental right to trade under international law. It is this original position that spawned the need for trade agreements to provide obligations among countries on issues such as discrimination.

[10] International Convention for the Abolition of Import and Export Prohibitions and Restrictions, 8 November 1927, 46 Stat. 2461, Art. 4. A Protocol clarified that prison-made goods were also excluded from the disciplines in the Convention.

[11] The examples that follow come from Steve Charnovitz, "The Influence of International Labour Standards on the World Trading Regime. A Historical Overview," International Labour Review, Vol. 126, September-October 1987, at 565, 569, 576-77.

[12] 19 UCSC §1307. An earlier law had barred imports of goods made by penal labor. This law has since been amended to clarify that it includes certain kinds of child labor.

[13] Havana Charter for an International Trade Organization, 24 March, 1948, Art.

[14] One notable development during the Doha Round is that the European Commission has launched its own "sustainability impact assessments" of some of the Doha Agenda topics.

[15] Trade Act of 1974, Public Law 93-618, §121(a)(4); Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418, §1102(b)(14); Uruguay Round Agreements Act, Public Law 103-465, §131.

[16] For example, see Susan Ariel Aaronson, TAKING TRADE TO THE STREETS (Ann Arbor: University of Michigan Press, 2001), at 54-55, 72-7.

[17] CUTS, TRADE-LABOUR DEBATE: THE STATE OF AFFAIRS (Jaipur, India: CUTS Centre for International Trade, Economics & Environment, 2004), at 9.

Although several developing countries supported the labor standards initiative in the ITO Charter as a way to protect their domestic standards from being undermined by foreign competition,[18] by the 1980s, developing countries had modified their view and had become almost united in opposing the addition of a social clause to the GATT. This evolution in thought probably resulted from the emerging political consciousness of developing countries, a greater concern about losing export markets, and the repression of labor unions in Latin America under military governments. Another factor was the new legislation in the United States in 1984 to add labor conditions to the Generalized System of Preferences. When developing countries found themselves under review in U.S. administrative processes and some countries had their preferences yanked, the perils of a general social clause for developing countries became more apparent.

A full history of developing country views on the social clause has yet to be written, but by the 1980s and early 1990s, the developing country governments reached a common view that a social clause would be an economic threat to their own economies.

The language agreed in 1996 at the WTO's first ministerial conference in Singapore likely reflects the current state of global consensus. That conference Declaration stated in Paragraph 4:

> 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.[19]

Paragraph 4 was carefully written in a way that all sides found innocuous, and thus has had no impact within the WTO. Certainly, this paragraph did not mean that all governments had agreed to cease raising the issue of worker rights in the WTO. Indeed, three years later, the U.S. government raised workers' rights in Seattle while insisting that the working party it proposed would guard against the use of labor standards for protectionist purposes.

A full history of developing country views on the social clause has yet to be written, but by the 1980s and early 1990s, the developing country governments reached a common view that a social clause would be an economic threat to their own economies.

The main impacts from Paragraph 4 have come not in the WTO, but in the ILO. Although the ILO had occasionally discussed labor standards and trade from the 1970s on,[20] little progress had been made because of a sharp split between the employer and worker delegates and between North and South. Following the WTO Singapore Declaration of 1996, in which the WTO seemed to be delegating back to the ILO the task of promot-

[18] We are unaware of any definitive study of these negotiations, but secondary sources suggest the proposals were premised on concerns about a level-playing field rather than concerns about worker rights or human dignity. A U.S. government proposal for an ITO provision condemning forced labor elicited no support.

[19] Ministerial Declaration, WT/MIN(96)/DEC, 13 December 1996, para. 4.

[20] For example, in 1976, the ILO World Conference on Employment, Income Distribution and Social Progress had declared that "The competitiveness of new imports from developing countries should not be achieved to the detriment of fair labour standards." ILO, Declaration of Principles of Programme of Action, reprinted in ILO, EMPLOYMENT, GROWTH AND BASIC NEEDS (Geneva: ILO, 1976), at 179, 197, para. 72.

ing core labor standards in the world economy,[21] the ILO, in 1998, acted to adopt its important Declaration on Fundamental Principles and Rights at Work. The ILO Declaration affirmed the obligation of all ILO member governments to promote and to realize the principles concerning core labor standards (sometimes called the "Four Freedoms of Labor"). The Declaration identified these core labor standards as (1) the fundamental rights of freedom of association and collective bargaining, (2) elimination of forced or compulsory labor, (3) abolition of child labor, and (4) the elimination of employment discrimination.[22]

The success of the ILO Declaration gave the ILO greater confidence to renew its efforts to address the social aspects of the world economy. In 2002, the ILO established the World Commission on the Social Dimension of Globalization, which completed its Report in 2004.[23] The Commission devoted considerable attention to the WTO and made a number of recommendations for it. The Commission did not recommend a social clause, but suggested that implicit in Paragraph 4 of the Singapore Declaration was that "no country should achieve or maintain comparative advantage based on ignorance of, or deliberate violations of, core labour standards."[24] In addition, the Commission recommended that the ILO make use of its own constitutional enforcement mechanism when a government violates core labor standards in a ratified convention.[25] In 2008, the ILO adopted the Declaration on Social Justice for a Fair Globalization. The Declaration notes an objective "that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes."[26]

> Some proponents of conditionality see it as a way to make trade fairer to the importing countries while others favor it as a way to improve human development in exporting countries. The opponents of conditionality typically oppose the concept of linkage on the basis that losing trade access will make it harder for developing countries to raise labor standards, and that such conditionality is at heart motivated by protectionism.

Although a labor chapter is not being negotiated for the WTO, several governments have agreed to include labor chapters in free trade agreements (FTAs) with the United States. Indeed, all U.S. free trade agreements since the North American Free Trade Agreement in 1992 have included labor chapters or a side agreement. These provisions now cover 19 WTO members and contain specific obligations on the enforcement of labor laws. The most recent U.S. FTAs (e.g., Peru) also contain mutual obligations on the adoption of laws and regulations to provide the rights included in the ILO Declaration on Fundamental Principles and Rights at Work. These labor obligations are enforceable with monetary fines and potentially the withdrawal of trade concessions. Canada also includes labor issues in its FTAs. Specifically, the Canadian 1990s FTAs with Chile and Costa Rica include side agreements on labor.

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[21] Robert Howse & Brian Langille with Julien Burda, "The World Trade Organization and Labour Rights: Man Bites Dog," in SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS (Virginia A. Leary & Daniel Warner eds.) (Leiden: Martinus Nijhoff Publishers, 2006), at 157, 181-189.

[22] The ILO includes the WTO Singapore Declaration as an important milestone in the origins of the ILO Declaration. See http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DECLARATIONHISTORY?var_language=EN.

[23] World Commission on the Social Dimension of Globalization, A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL (Geneva: ILO, 2004). The ILO also has an ongoing Working Party on the Social Dimension of Globalization.

[24] World Commission on the Social Dimension of Globalization, *supra* note 23, para. 421.

[25] World Commission on the Social Dimension of Globalization, *supra* note 23, para. 426. Article 33 of the ILO Constitution authorizes the ILO annual Conference to take action to secure compliance. In June 2000, the Conference took such action against Myanmar and called on ILO governments, employers and workers to take appropriate measures to ensure that Myanmar cannot take advantage of its relations to perpetuate or extend its system of forced or compulsory labor. The U.S. Congress noted the ILO action in a law passed in 2003 to impose trade sanctions against Myanmar. Pub. L. 108-61.

[26] ILO, Declaration on Social Justice for a Fair Globalization, 10 June 2008, para. I.A.iv.

Other countries have not followed the U.S. and Canadian labor rights templates in their FTAs.[27] In European, Asian, and Latin American FTAs, the usual practice is to have provisions calling for labor or social cooperation (e.g., the Chile-EC FTA) or to say nothing at all about labor in the FTA.[28] In the Japan-Philippines Economic Partnership Agreement (which is not yet in force), there is a provision regarding investment modeled on the NAFTA provision which commits each party to strive to ensure that it does not derogate from national laws in a manner that weakens internationally recognized labor rights as an encouragement for investment.[29] These provisions are not enforceable in the NAFTA and have not had any noticeable impact.

Looking back at the labor-trade debate, one can detect four main underlying tensions.[30] First, there are dueling arguments about labor-trade conditionality. Some proponents of conditionality see it as a way to make trade fairer to the importing countries while others favor it as a way to improve human development in exporting countries. The opponents of conditionality typically oppose the concept of linkage on the basis that losing trade access will make it harder for developing countries to raise labor standards, and that such conditionality is at heart motivated by protectionism. Second, there is disagreement as to who should determine appropriate working conditions — like the use of child labor — for developing countries. Should each government be left alone to make its own choice, or should workers everywhere be entitled to a minimum endowment of worker rights? Are core labor standards international standards that can be recognized as such in the WTO? Third, there is a question of the boundaries of trade policy and the WTO. Should trade agreements be used for labor purposes, or should labor concerns be pursued by labor treaties and by the specialized international organization, the ILO? Fourth, there is a philosophical question whether trade sanctions are an effective tool for promoting social rights, or whether assistance, incentives or preferences are more likely to be effective in changing behavior. The major difference between the ILO and WTO dispute/supervisory systems is that the WTO makes use of a trade sanction in the event of noncompliance and the ILO does not, which is what makes social conditionalities linked to trade attractive to those who prefer the WTO's dispute settlement process. Although economic sanctions were included in the original ILO Constitution, unlike the environment regime (e.g. CITES), the ILO has not used trade controls within its conventions. The ILO has emphasized technical assistance to help countries meet standards. An exception of sorts is represented by the recent treatment of Burma in the ILO, where the ILO has recommended that individual member states take measures to ensure that their economic relations with Burma are not supporting labor practices in contravention of the ILO. By contrast, the WTO allows a WTO Member that has won a dispute settlement ruling to impose countermeasures (retaliatory trade sanctions) on the losing party if it fails to bring itself into compliance with a dispute ruling. At present, WTO rules do not recognize ILO trade sanctions as an exception to WTO rules against import bans and trade discrimination. Those who would seek to give the ILO teeth to enforce labor standards run into two main problems: First, the central paradigm of the ILO continues to be that governments should follow ILO standards because they are beneficial. Second, the ILO would not want to use an enforcement instrument that the WTO would consider a violation of its rules.

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[27] Even countries that include labor chapters in an FTA with the United States or Canada do not replicate those provisions in their other FTAs. For example, the United States has a labor chapter in the FTAs with both Chile and Australia. But the Australia-Chile FTA does not contain a labor chapter with the same type of provisions. The Agreement, however, does include a call for bilateral cooperation on labor and employment matters.

[28] Cleopatra Doumbia-Henry & Eric Gravel, "Free Trade Agreements and Labour Rights: Recent Developments," International Labour Review, Vol. 145, 2006, at 185-206; Kamala Dawar, Assessing Labour and Environmental Regimes in Regional Trading Arrangements, Society of International Economic Law, 17 July 2008. It should also be noted that the MERCOSUR Common Market has aspirational provisions on labor.

[29] Agreement between Japan and the Republic of the Philippines for an Economic Partnership, 23 May 2007, Art. 103, available at http://www.mofa.go.jp/policy/economy/fta/index.html

[30] For background and analysis, see Norbert Malanowski (ed.), SOCIAL AND ENVIRONMENTAL STANDARDS IN INTERNATIONAL TRADE AGREEMENTS: LINKS, IMPLEMENTATIONS AND PROSPECTS (Münster: Verag Westfälisches Dampfboot, 1997).

II. LEGAL ANALYSIS OF SOCIAL CONDITIONALITIES LINKED TO BIOFUELS TRADE

The fact that the WTO has not taken any steps to establish a linkage between social criteria and trade has not stopped such criteria from being developed. And although much of the WTO membership has been resistant to a "social clause" within the WTO framework itself, the system has tolerated certain kinds of labor conditionality imposed by individual WTO Members (for example trade sanctions against Burma/Myanmar by the U.S. and the EU, based in significant part on Burma's rejection of ILO disciplines) or conditions on preferences for developing countries (GSP), provided they are objectively related to the development needs of the countries in question. This reality further complicates an analysis such as this one.

Legally, the consistency of social criteria with the law of the World Trade Organization (including the GATT) depends on the way in which the criteria affect market access for the products in question, for example whether the criteria are mandatory conditions imposed by government for the sale or importation of biofuels, whether meeting the criteria is a requirement for the receipt of some benefit from government (such as a tax rebate or subsidy), or whether the criteria are terms of a government purchasing requirement. Moreover, the concept of social criteria denotes a very wide range of possible standards. Some may be based on widely accepted legally binding international agreements such as ILO Conventions (although even some of these are subscribed to only by a small subset of states), others on voluntary social criteria (codes of conduct) that are made effective through corporate responsibility and consumer choice.

This analysis is composed of three main parts: first, we examine the key tenets of the GATT — non-discrimination and national treatment, and the exceptions clause of the GATT. Secondly, we consider how the Agreement on Technical Barriers to Trade applies to government regulations and to voluntary standards. The third part addresses additional WTO considerations for different forms of social conditionality relevant to biofuels. These include mandatory import prohibitions, qualifying for targets and preference programs, mandatory reporting, government procurement, and trade preferences.

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II.A. KEY GATT PROVISIONS: ARTICLES I, III AND XX

Under the GATT, the basic agreement in the WTO system on trade in goods, WTO Members are prohibited from treating imported products less favorably than domestic like products (the National Treatment obligation in Article III of the GATT); they are also prohibited from treating less favorably products from some WTO Members than those from others (MFN, as embodied in Article I of the GATT).

These non-discrimination provisions apply wherever there is government action that regulates market behavior. This includes a wide range of governmental activities, such as government incentives conditioned on the desired behavior, and procedural requirements (such as mandatory reporting). Some measures that violate either or both aspects of the GATT non-discrimination norm may nevertheless be justified as exceptions, for example on health grounds, or public morals grounds.

However, governments may often apply conditionalities differently in the case of imports as supposed to domestic products. The same social criteria, for instance, could be applied domestically through a country's normal labor legislation and regulations, enforced through administrative and criminal law processes, whereas in the case of foreign labor practices, the sanction would be administered through a border measure. The GATT provides for such a situation, through an Interpretative Note, which explains that because a scheme is applied to imports at the border, but addressed in a different way to domestic producers, does not mean it is an illegal prohibition or restriction on trade (Article XI violation). Rather, in such a situation, the question becomes assessing even-handedness, based on the National Treatment standard: namely are the social criteria resulting in less favorable treatment of imported products than like domestic products?

Trade measures that are aimed at a particular country (such as the U.S. and EU sanctions against Burma) or a list of specific countries (i.e. in the early GATT case *Belgian Family Allowances*[31]: here imports from countries conforming to those standards were given preferential treatment) would, on their face, violate the MFN prong of the non-discrimination norm, as they explicitly single out some WTO Members for less favorable treatment than others. However, if social criteria are applied objectively to all WTO Members equally, but *enforced* through the rejection at the border of products from countries that have been determined, again on an objective basis, not to meet the criteria, is there MFN discrimination? This is controversial. We note that the actual *obligation* in Article I of the GATT is not to treat *countries* equally but to treat like *products* without discrimination as to the country of origin. On this basis, the focus should be on whether the imported products meet the objective criteria (i.e. are those particular imports produced in a socially responsible manner), not a determination about social conditions in the *country* of origin. Thus, for example, U.S. and EU sanctions against Burma, mentioned above would be inconsistent with Article I MFN treatment and would need to be justified under Article XX of the GATT, in particular as necessary for the protection of public morals.[32]

The case of conditionalities attached to preferences for developing countries (so called GSP) is somewhat different; since these preferences, even without such conditionalities, would be inconsistent with MFN, in that more favourable rates of tariff are being provided to goods entering from developing countries than from developed WTO Members. Thus, GSP is operated under a special WTO regime, the Enabling Clause, that affords a limited, conditional exception from GSP treatment. How this exception affects social conditionalities on preferences will be discussed below in a separate section of this study.

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[31] GATT Panel Report, *Belgian Family Allowances,* G/32, adopted 7 November 1952, BISD 1S/59.

[32] See R. Howse and J. Genser, "Are EU Trade Sanctions on Burma Compatible with WTO Law?" 29 *Mich.J.Int'l.L.* 165 (2008).

Like Products

The exact legal test under Article III:4 is whether "like" imported products are treated "less favorably." This entails an assessment of whether the imported products are "like" and if so, whether the border measure is of such a nature as to constitute "less favorable" treatment of imported products as a group, i.e. is it overall discriminatory?

Thus, if there is sufficient evidence that consumers distinguish between products produced in conditions violating social criteria and those produced in conditions consistent with social criteria, or *would* distinguish these products if they had perfect information, one might argue that the former products are "unlike" the latter. This would, however, be a matter of evaluation of evidence of consumer preferences by the WTO dispute settlement organs on a case by case basis and in relation to the other kinds of factors that might point to likeness or unlikeness; there is thus little legal certainty concerning the outcome with respect to an overall determination of likeness or unlikeness.

A longstanding issue in GATT and WTO jurisprudence is whether products may be considered "unlike" based upon process and production methods. Traditionally, there has been the notion, reflected in the infamous unadopted *Tuna/Dolphin*[33] GATT panel rulings, that the GATT does not permit differential treatment of products based on their method of *productio*n as opposed to their properties as products for *consumption*. Notably, the approach to "likeness" and "directly competitive and substitutable" articulated by the Appellate Body (AB) does not predetermine a conclusion one way or another concerning methods of production.

In the *Asbestos* case, the WTO AB set forth a framework for evaluating whether products are "like" under Art. III:4;[34] this framework neither explicitly endorses nor rejects the idea that process and production methods are relevant to the assessment of likeness. However, the AB's reasoning strongly suggests that products may be considered "like" or "unlike" based on consumer tastes and habits. Thus, if there is sufficient evidence that consumers distinguish between products produced in conditions violating social criteria and those produced in conditions consistent with social criteria, or *would* distinguish these products if they had perfect information, one might argue that the former products are "unlike" the latter. This would, however, be a matter of evaluation of evidence of consumer preferences by the WTO dispute settlement organs on a case by case basis and in relation to the other kinds of factors that might point to likeness or unlikeness; there is thus little legal certainty concerning the outcome with respect to an overall determination of likeness or unlikeness. It should be noted that in the *Asbestos* case the AB importantly emphasized that the principle of avoiding protectionism stated in Art. III:1 should inform determinations of "likeness."[35] Thus, in evaluating factors such as consumer preferences, the dispute settlement organs will be attentive to the possibility of protectionist manipulation or abuse as ingredients in product-based, labor-rights trade measures.

[33] GATT Panel Report, *United States — Restrictions on Imports of Tuna,* DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155.

[34] See WTO AB Report: *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products,* WT/DS135/AB/R, Mar. 12, 2001, available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/135ABR.doc [hereinafter Asbestos AB Report].

[35] Id.

As the AB has emphasized, the fact that two products are "like" does not mean that governments are simply forbidden from making regulatory distinctions between them. The obligation in Article III:4 is not one of identical treatment of "like" domestic and imported products, but no less favourable treatment. Thus, the panel in the *EC-Biotech*[36] case found that, even assuming that GMO products were like non-GMO products, the distinctions in regulatory treatment between GMO and non-GMO products in the European Community did not constitute "less favourable" treatment of imported products, since the distinctions were not biased against imports as opposed to domestic products (i.e. EC GMOs). According to the panel: "We note that Argentina does not assert that domestic biotech products have not been less favourably treated in the same way as imported biotech, or that the like domestic non-biotech varieties have been more favourably treated than the like imported nonbiotech varieties. In other words, Argentina is not alleging that the treatment of products has differed depending on their origin. In these circumstances, it is not self-evident that the alleged less favourable treatment of imported biotech products is explained by the foreign origin of these products rather than, for instance, a perceived difference between biotech products and non-biotech products in terms of their safety, etc. In our view, Argentina has not adduced arguments and evidence sufficient to raise a presumption that the alleged less favourable treatment is explained by the foreign origin of the relevant biotech products."(Paragraph 7.2505)

Article XX Exceptions

The Article XX exceptions provide that a Member may impose otherwise GATT-illegal measures under two distinct conditions. First, the measure must fall into one of 10 categories, including:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health; …

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.[37]

Second, a trade-restrictive measure must comply with Article XX's **chapeau**: it cannot be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail," and it cannot be "a disguised restriction on international trade."

During the GATT era, the *Tuna/Dolphin* rulings, never adopted by the GATT Membership as binding on the parties to the dispute, established the notion that Article XX of the GATT could not be used to justify trade measures that conditioned imports on the adoption by the exporting country of particular kinds or levels of environmental protection, in this particular instance, to protect dolphins from being trapped and killed incidental to the fishing of tuna with certain kinds of nets.[38] In the *Shrimp/Turtle* case, however, the AB of the WTO held exactly the reverse, stating:

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[36] Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products,* WT/DS291/R, WT/DS292/R, WT/DS293 Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006.

[37] Environmental conditionality, which is also part of many biofuels-specific national criteria, would presumably be justified under other Article XX exceptions.

[38] *United States Restrictions on Imports of Tuna,* 30 ILM (1991) 1594; United States-Restrictions on Imports of Tuna, 33 ILM (1994) 936.

> It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as **exceptions to substantive obligations** established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. *It is not necessary to assume that requiring from* ***exporting countries*** *compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.*[39]

This statement of the AB is crucial to understanding the applicability of Article XX in the case of social criteria. The AB makes clear that in principle a measure may be covered by Article XX not only if the measure is to facilitate a *domestic* policy in the *importing* country but also if the measure conditions imports on the existence of certain policies maintained by the *exporting* country. Here, notably, the AB refers to all of paragraphs (a) to (j) of Article XX.

Article XX(a) Public Morals

Some kinds of labor protections relate to worker health and there are obviously health related elements in the concern with food security, so Article XX(b) may be a relevant exception. Here, we address in greater detail Article XX(a).

In *U.S.-Gambling,* the WTO Dispute Settlement Body addressed the concept of public morals for the first and only time, in the course of interpreting an exception in the General Agreement on Trade in Services (GATS) that has broadly similar, though not identical, wording to that in GATT XX(a).[40] In *U.S.-Gambling,* the dispute settlement organs had to decide whether the U.S. prohibition on internet gambling was a measure "necessary to protect public morals." In its approach to the interpretation of this language, the WTO panel displayed considerable deference to the value choices of the WTO Member defending its measures, in this case the United States. "The content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[41] Analogizing to past AB decisions concerning similar provisions, the Panel concluded that "Members should be given some scope to define and apply for themselves the concepts of 'public morals' … in their respective territories, according to their own systems and scales of values."[42]

This flexibility notwithstanding, the Panel determined that "we must nonetheless give meaning to these terms in order to apply them to the facts of in [sic] this case."[43] Considering the definitions of "public" and "morals" from the *Shorter Oxford English Dictionary,* the Panel at length concluded that "'public morals' denotes stan-

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[39] AB Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DSF8/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle*].

[40] AB Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* at 296-99, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *Gambling Appellate*]. Although this case concerned the Article XIV exceptions to GATS, the AB noted that the exceptions were set out "in the same manner" as in Article XX of GATT, and thus analogized the two sections. Id. at 291.

[41] Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* ¶6.461, WT/DS285/R (Nov. 10, 2004) [hereinafter *Gambling Panel*].

[42] Id.

[43] Id. at 6.462.

dards of right and wrong conduct maintained by or on behalf of a community or nation."[44] Although this portion of the Panel's decision was not appealed, the AB quoted this definition in its final decision, indicating some support for this reasoning.[45]

Finally, to add context to this definition, the Panel looked at past precedent by other WTO Members, as well as similar language in other international agreements. The Panel first noted that several other WTO Members had used the public morals exception to justify gambling-related restrictions.[46] Next, the Panel examined the use of "moral" in a League of Nations draft convention, noting that this exception was thought to include lottery tickets.[47] The Panel also discussed past decisions of the European Court of Justice, which had allowed EU Member States to restrict gambling-related activities despite EU free trade rules.[48] Applying all the above considerations to the *U.S.-Gambling* case, the Panel determined that gambling-related restrictions fell under the "moral" exception so long as they were enforced "in pursuance of policies, the object and purpose of which is to 'protect public morals.'"[49]

Applying the *U.S.-Gambling* Panel's reasoning, there may be some support for the inclusion of social criteria that relate to human rights in the definition of "public morals." First, the Panel's overall approach demonstrates that the WTO does not intend to "second-guess" a Member's assessment of its own public moral standards. The Panel noted that these standards will "vary in time and space," and that "Members should be given some scope to define and apply [them] for themselves."[50]

Considering the *U.S.-Gambling* Panel's dictionary definition could lend further support to this argument. When based on fundamental human rights, social criteria are clearly "standards of right and wrong conduct maintained by or on behalf of" the Member that is imposing the measure. Whether all proposed social criteria would rise to this level is a matter of debate. However, again, we note that the AB appears to have allowed some deference to each Member in determining what matters are questions of "public morals" in that particular society.

It should be noted that in the *Gambling* case, the U.S. concern was the morality of gambling by its own nationals; the U.S., in invoking Article XX, did not raise concerns of international morality. The case of social criteria for biofuels is somewhat different; to the extent that the social criteria reflect international labor rights or international human rights (especially those that have the status of customary international law), the concern is one of the morality of the international community as a whole. Another facet of morality here is the morality of consumers or other users of biofuels in the importing country being complicit with reprehensible or immoral practices elsewhere. In the *Shrimp/Turtle* case, as already noted, the AB considered that in principle *all* the provisions of Article XX (*including* XX(a) "public morals") could be used to justify measures that conditioned imports on the exporting WTO Member having certain policies (para. 121); in the case of XX(a), this would mean how the exporting country is dealing with the moral concerns on its own territory. However, since in *Shrimp/Turtle* the AB was concerned only with applying the facts to XX(g), the exception for "conservation of exhaustible natural resources," it did not have to go into detail to explain its statement that other kinds of conditionalities could be justified under other paragraphs of Article XX.

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[44] Id. at 6.465.

[45] Gambling Appellate, supra note 54, at 296.

[46] Gambling Panel, supra note 55, at 6.471.

[47] Gambling Panel, supra note 55, at 6.472.

[48] Gambling Panel, supra note 55, at 369 n. 914.

[49] Gambling Panel, supra note 55, at 6.474.

[50] Gambling Panel, supra note 55, at 6.461.

Article XX has little legislative history, largely because the exceptions were seen as mirroring the terms of past international trade agreements. Many of these trade agreements included moral exceptions,[51] and included in this category were such varied items as "opium, pornography, liquor, slaves, firearms, blasphemous articles, products linked to animal cruelty, prize fight films, and abortion-inducing drugs."[52] However, to the extent that the legislative history is relevant to confirming the interpretation argued above,[53] there is evidence that these exceptions encompassed far more than obscene and controversial items. For example, in 1927, twenty-nine countries (including Britain, Belgium, France, Italy, Germany, the Netherlands, Poland, and the United States) signed the Multilateral Abolition of Import and Export Prohibitions and Restrictions.[54] Similar to GATT, this treaty allowed trade-restrictive measures only under certain circumstances. First, the measures could "[not be] applied in such a manner as to constitute a means of arbitrary discrimination between two foreign countries where the same conditions prevail, or a disguised restriction international trade" (language nearly identical to the Article XX **chapeau**).[55] Second, the measures had to fall into one of several categories, including:

1. Prohibitions or restrictions imposed on **moral or humanitarian** grounds.

2. Prohibitions or restrictions imposed for the protection of public health or for the protection of animals or plants against disease, insects, and harmful parasites.[56]

When this treaty reached the U.S. Senate for ratification, two Senators engaged in a floor debate as to whether or not "moral or humanitarian grounds" included goods produced in violation of labor standards.[57]

The "Necessity" Test

A trade-restrictive measure must not only protect public morals, but it must be "necessary" to do so. In *U.S.-Gambling*, the AB found that "necessary" was an objective standard necessitating a three-pronged test.[58] First, a panel must assess the "relative importance of the interests or values furthered by the challenged measure."[59] Next, a panel must "weigh and balance" other factors, particularly the "contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce."[60] Finally, a panel must compare the measure with possible alternatives, "and the results of such comparison should be considered in the light of the importance of the interests at issue."[61]

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[51] For a more thorough discussion of moral exemptions in pre-GATT trade agreements, see Steve Charnovitz, The Moral Exception in Trade Policy, 38 Va. J. Int'l L. 689, 698-701 (1998).

[52] Id. at 717.

[53] Article 32 of the Vienna Convention on the Law of Treaties permits recourse to the *travaux preparatoires* in order to confirm an interpretation based on inter alia, the language of the text, and the purpose object and context of that wording, or to address textual ambiguity.

[54] Convention on the Abolition of Import and Export Prohibitions and Restrictions, opened for signature Nov. 8, 1927, 46 Stat. 2461.

[55] Id. at art. 4.

[56] Id. (emphasis added).

[57] Charnovitz, supra note 65, at 707-08.

[58] Gambling Appellate, supra note 54, at 304-07.

[59] Gambling Appellate, supra note 54, at 306.

[60] Gambling Appellate, supra note 54, at 306.

[61] Gambling Appellate, supra note 54, at 307.

The Requirements of the Chapeau

A condition of maintaining measures based on an Article XX justification is that they may not be applied so as to constitute unjustifiable or arbitrary discrimination between countries where the same conditions prevail or a disguised restriction on international trade (this is based on the "chapeau" or preambular paragraph of Article XX). This condition, it must be emphasized, deals only with *application* through administrative or judicial action, not the scheme as such (*U.S.-Shrimp, U.S.-Shrimp 21.5*). Unjustifiable discrimination may result from the application of a scheme, which is rigid and unresponsive to *different* conditions in *different* countries. Arbitrary discrimination may occur if there is a lack of due process and transparency in the manner in which the criteria of the scheme are administered, if there are discriminatory effects on foreign interests (*U.S.-Shrimp*). There is lack of clear judicial guidance so far on the meaning of "disguised restriction on international trade" (*U.S.-Gasoline*[62]).

With respect to biofuels conditionalities, an issue might well arise as to why — if such conditionalities are necessary to counter human rights abuses, for example — they should be limited to biofuels, and not imposed on all imports, or at least all fuels. Certainly, labor and human rights are also issues in fossil fuels extraction and processing. Here, the *EC-Gambling* case may provide an important precedent. In that case, the complainant, Antigua, argued that, given the concerns about public morality invoked by the U.S., whether the U.S. measure was consistent with the chapeau should entail a consideration of the different treatment of internet gambling in relation to the treatment of the gambling industry as a whole (where non-internet gambling was not subject to a complete ban). The AB rejected this approach, upholding the panel's finding that some of the concerns of the United States were specific to remote gambling, and suggesting that remote gambling might call for a particular regulatory approach (Paras. 346-348). Based on this reasoning, it would only be appropriate to single out biofuels and not other fuels or other products for social conditionalities, if some of the concerns are specific to biofuels and the challenges in controlling their effects on food security, local populations, and labor conditions.[63] However, the defending country would need to provide justificatory reasons as to why the concerns at issue are not concerns that are equally raised by practices in other industrial sectors or other areas of agriculture.

In its initial ruling in the *Shrimp/Turtle* case, the AB found, under the chapeau, several shortcomings in respect of the application of the environmental conditionalities at issue in that case. First of all, the United States had pursued a negotiated agreement with some countries, whose practices raised the environmental concerns in question, but had not done so with the Asian countries, who were the complainants in the case. This finding led to a conclusion that the United States had engaged in "unjustifiable discrimination." The holding was widely interpreted as a self-standing requirement, under the chapeau, that there must be attempts at a negotiated or cooperative solution, before conditionalities are imposed. In fact, the AB was really concerned with the discrimination entailed in dealing differently with different groups of countries. Returning to the *U.S.-Gambling* case, Antigua argued — based on an erroneous interpretation of *Shrimp/Turtle* — that the U.S. would have needed to exhaust efforts at a cooperative solution with Antigua to regulate gambling. The AB made it clear that attempting negotiations is not a precondition to the justification of measures under Article XX: "Engaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case."(Para. 317)

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[62] Panel Report, *United States — Standards for Reformulated and Conventional Gasoline,* WT/DS2/R, adopted 20 May 1996, as modified by AB Report, WT/DS2/AB/R, DSR 1996:I, 29.

[63] This is reinforced by the realization that at *the level of generality,* the concerns adduced by the United States in relation to internet gambling clearly would exist for gambling in general, namely money laundering, fraud, and underage gambling, even if these concerns would possess distinctive cadences or have a distinctive intensity in the case of remote gambling.

With regard to social conditionalities for biofuels imports, therefore, an importing country would have to permit a flexible approach, where the exporting country would be allowed to satisfy conditionalities through adopting one of a number of acceptable codes or regimes for social standards. Of course, this would entail the importing country making a judgment on which of these codes or regimes is equivalent.

Thus, there are two important issues to keep in mind with regard to attempts to create potential social conditionalities on biofuels: first of all, there is no general need to attempt negotiations before imposing conditionalities, but, secondly, a two-track approach, which entails dealing with social concerns through a negotiated agreement with some WTO Members, while imposing conditionalities on others unilaterally, will be suspect under the chapeau. Thus, any negotiating process with respect to social conditionalities should ideally be open to all WTO Members, and structured in a manner that allows, if they so wish, all Members to participate. In the case of some developing countries, this might arguably entail technical assistance.

A second dimension of the AB ruling under the chapeau in *Shrimp/Turtle* is that of regulatory flexibility — the AB found the U.S. application of its conditionalities to violate the chapeau in part because a single standard, based upon the U.S. regulatory approach, was imposed on other countries, regardless of differing conditions in those countries. The AB suggested that, to be consistent with the chapeau, the application of the U.S.' conditionalities would have to allow the target countries to satisfy the environmental concerns of the United States through alternative regulatory approaches, better adapted to the local situation. With regard to social conditionalities for biofuels imports, therefore, an importing country would have to permit a flexible approach, where the exporting country would be allowed to satisfy conditionalities through adopting one of a number of acceptable codes or regimes for social standards. Of course, this would entail the importing country making a judgment on which of these codes or regimes is equivalent.

II.B. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

The Agreement on Technical Barriers to Trade (TBT) covers technical regulations and standards and imposes obligations additional to those in the GATT. It is possible that the obligations of the TBT could apply simultaneously to those of GATT, provided the measure in question falls under the definitions in both agreements. The TBT Agreement's provisions are aimed at government regulations, and they also include a Code of Conduct for non-governmental standardizing bodies.

TBT — Unnecessary Obstacle to Trade

The TBT Agreement[64] requires that technical regulations not constitute an unnecessary obstacle to trade. While this test is not couched in exactly the same language as the necessity test that pertains to Article XX exceptions in the GATT, it is unlikely that a measure found to meet the necessity test in GATT would fail this requirement in TBT. One feature of this TBT provision is that it is couched in language that relates the necessity of trade restrictiveness to the attainment of a (non-exhaustive) list of "legitimate objectives." This list, partly but not entirely, overlaps with Article XX of the GATT. The list is as follows: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment." One possible interpretation of the absence of public morals from this list is that moral regulations that relate to imported products, such as human rights or labor rights conditionalities, are not "technical regulations" within the meaning of the TBT Agreement, and are to be assessed only under the GATT. However, the meaning of "technical regulation" under TBT explicitly includes regulations concerning production processes in as much as they relate to traded products (as opposed, for example, to regulations on production processes that concern intellectual property or services, for example consulting engineering, and

[64] Available from http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm

do not concern goods trade). At the same time, various provisions of TBT appear to assume that "technical regulations" are in the nature of risk regulation, which is not how human rights or ethical standards are typically understood. Nevertheless, in the *EC-Gambling* case, the public morals exception in the GATT was held to apply to a ban on internet gambling that was explicitly argued by the U.S. to address some of the social risks or harms from gambling, especially to young people. This suggests that there may be overlap between risk regulation as a concept and the regulation of public morality. And, of course, as already noted, the list of "legitimate objectives" in the TBT Agreement is non-exhaustive.

TBT — Conformity Assessment Procedures

The TBT Agreement also contains a detailed code on conformity assessment procedures. This code will be of considerable significance in the case of social criteria, due to the many issues surrounding monitoring and certification in relation to conditions in the exporting country. The code, contained in Article V of TBT, requires that a conformity assessment respect the non-discrimination norm (both National Treatment and MFN: 5.11); while 5.12 establishes the obligation that a conformity assessment not constitute an unnecessary obstacle to trade. There are further requirements that relate to due process and the administrative burden that may be imposed on exporters seeking certification. Also, where relevant and appropriate, guides, standards or recommendations of international standardization bodies must be followed with respect to conformity assessment (TBT 5.4).

TBT — Recognition of the Exporting Country's Domestic Law and Regulations

The TBT Agreement also encourages importing Members to consider allowing market access for imports based on compliance with the regulatory standards of the exporting country, where these are equivalent or otherwise adequate to satisfy the importing country's objectives. Thus, according to Article 2.7 of TBT, "Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations." The language "positive consideration" would appear to give the importing country considerable deference or discretion in determining whether the exporting country's regulations are adequate, and certainly falls far short of a general obligation of recognition. In any case, 2.7 suggests a positive view under WTO law of biofuels conditionalities that are based on compliance of the producer of the imported biofuel product with the domestic laws of the exporting country.

TBT — International Standards

The TBT Agreement requires that mandatory government regulations use as a basis international standards where they are available, relevant and appropriate. It also sets up a presumption that mandatory regulations are not unnecessary obstacles to trade, where the regulations *are in conformity with* international standards. At the time of the Uruguay Round, it was envisaged that there would be close cooperation between the WTO and the International Standards Organisation (ISO) on standards-related issues. ISO was founded in 1946 and is composed of the national standards bodies (some governmental, some private sector, some public/private) of 157 member countries. To date, ISO has been the most prolific international standards body, generating standards in almost all areas except (for the most part) electrical standards, the province of the International Electrotechnical Commission (IEC). An ISO/IEC Information Centre was envisaged in the TBT Agreement as a clearinghouse for information concerning domestic standardization activities of WTO members, and this body keeps a list of standardizing bodies that have accepted voluntarily the TBT Code of Good Practice. Among the Uruguay Round Agreements is the Proposed Understanding on WTO-ISO Standards Information System[65], which would entail close collaboration between ISO and the WTO Secretariat in the cataloguing and classification of standards. However, such close collaboration appears to have never gotten off the ground,

[65] Available from http://intranet.corpei.ec/carpetas/cic/OMC/WTOCD/WTO%20Website/SnapshotOfWTOWebsiteInEnglish/english/docs_e/legal_e/37-dtbt1_e.htm

The majority of biofuels sustainability criteria, are being/have been developed through multi-national, multi-stakeholder processes, such as the Roundtable on Sustainable Biofuels. An important question, therefore, is whether criteria developed through such processes are considered "international standards" for the purposes of the TBT Agreement.

perhaps because of the difference in cultures between the standardization world of ISO — where engineering and related technical professions dominate — and the bureaucratic world of the WTO Secretariat, where the culture is dominated by economic policy and legal professionals.

At one time, therefore, many in the standardization community would have believed that an ISO standard, if it existed, would count as the "authoritative" international standard. Historically, however, the ISO has done relatively little in agricultural production systems, where other groups have been more active. In recent years, ISO has moved into new areas where it has perceived a market demand for standards in agriculture, environment, sustainability, food health and safety, and social responsibility. Work to define sustainability criteria for biofuels has recently been proposed in the ISO. The majority of biofuels sustainability criteria, however, are being/have been developed through multi-national, multi-stakeholder processes, such as the Roundtable on Sustainable Biofuels (see text box). An important question, therefore, is whether criteria developed through such processes are considered "international standards" for the purposes of the TBT Agreement. In other words, if a government regulation is based on standards developed through such processes, would they be considered to be in conformity with international standards, and thus not seen as unnecessary obstacles to trade?

Text Box 1: Roundtable on Sustainable Biofuels

The most prominent multinational effort potentially pertaining to all current biofuel feedstocks is the **Roundtable on Sustainable Biofuels**, which is now in the process of adopting criteria. This is not the only such initiative, but it has gained endorsement from some of the world's largest biofuel purchasers, bioenergy producers, and a variety of other civil society interests.[66] Its development is open to anyone who wants to participate at www.bioenergywiki.net. Developers hope that the Roundtable and its standards will "create a tool that consumers, policy-makers, companies, banks, and other actors can use to ensure that biofuels deliver on their promise of sustainability" and contemplate that it will reference or act as an umbrella for the many commodity-specific sustainability standards that would apply to specific biofuels feedstocks. This would include palm oil, soy, sugar cane and jatropha. They also anticipate that third-party certification to RSB criteria or use of these criteria as a purchasing guideline will guide the industry to use of best practices both in the social and in the environmental realm.

[66] The RSB's Steering board includes representatives (most serving in their personal capacities) of UNEP, Brazilian environmental and social NGO's, BP, Bunge Corporation, Dutch Ministry of Housing and the Environment, The Energy Resources Institute (TERI) of India, Swiss Federal Institute of Technology (EPFL), Federation of Swiss Oil Companies, the Forest Stewardship Council, Keio University, Japan, Mali Folkecenter, Pinho, Petrobras, The National Wildlife Federation, Shell Oil, The Swiss Energy Ministry, Toyota Motor Europe, UNCTAD, The UN Foundation, The University of California at Berkeley, The World Economic Forum, WWF International [edit] The Working Groups' Chairs, Michigan State University, Volkswagen Environment, IUCN, The National African Farmers' Union, The German NGO Forum, and Virgin Group.

Text Box 1: Roundtable on Sustainable Biofuels *(continued)*

A draft (August 2008, "Version Zero") of its principles would cover the following social conditionality:

- Human and labor rights: "Biofuel production shall not violate human rights or labor rights, and shall ensure decent work and the well-being of workers. Key guidance: Key international conventions such as the ILO's core labor conventions and the UN Declaration on Human Rights shall form the basis for this principle. Employees, contracted labour, small outgrowers, and employees of outgrowers shall all be accorded the rights described below. 'Decent work', as defined by the ILO, will be the aspirational goal for this principle."
- Rural and social development: "Biofuel production shall contribute to the social and economic development of local, rural and indigenous peoples and communities."
- Food security: "Biofuel production shall not impair food security."
- Land rights: "Biofuel production shall not violate land rights."

The TBT Agreement does not define "international standard," but it does establish criteria for an international standards body. Under the TBT Agreement, such a body is defined as one that is open to standardizing entities of all WTO Members.[67] This open-endedness in the TBT Agreement is further emphasized by the broad definition of standards as such in the Agreement. A standard is a "document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method."

This definition of standards, in contrast to "technical regulations" as norms "compliance with which is not mandatory," demarcates standards from multilateral obligations such as treaties, which create binding legal duties on states at the international level and in some cases, more innovatively, on non-state actors. By contrast, in the case of standards, it is up to governments to decide whether, as a matter of domestic law, standards will be turned into mandatory regulations, binding on those who are subject to the jurisdiction of that particular state.

Text Box 2: Multi-stakeholder Standards-setting Processes

Biofuel-specific standards:

- **The Roundtable on Sustainable Palm Oil (RSPO),** based in Malaysia and representing about 40% of global production, is applying sustainability principles and criteria in both the environmental and the social realm of palm oil. The first certificates — including smallholder certification — have already been issued. The RSPO social principles include all core labor standards in ILO and relevant UN Conventions (e.g. UN Declaration on the Rights of Indigenous Peoples). Chain of custody certification of sustainable palm oil is required in this system. RSPO Principles and Criteria will be subject to national interpretation, which may lead to some divergence of standards but will also enable regional adaptation.

[67] All Members do not have to agree to the actual standard; indeed not all members of the standards body itself have to agree, as the AB held in *EC-Sardines*.

Text Box 2: Multi-stakeholder Standards-setting Processes *(continued)*

- **Roundtable for Responsible Soy (RTRS).** The RTRS, based in Brazil, is an international multi-stakeholder initiative that brings together soy producers, processors, users and civil society groups. It is working to define responsibly-grown and processed soy including through identification of verifiable social and economic indicators, and to promote the best available practices to mitigate negative impacts throughout the value chain.

Non-Biofuel-specific

- **SA 8000,** developed by Social Accountability International (SAI), an international non-profit human rights organization, is exclusively focused on social rather than environmental conditions, and primarily on the ILO and UN Human Rights Conventions. Originally designed for factories rather than for agriculture, the agriculture sector now accounts for the largest number of workers in facilities certified to SA 8000. It was also designed to accompany use of other ISO standards, such as ISO 14000. The products themselves are not certified or labeled at this time, although SAI is reputedly considering this.

- **The Global Social Compliance Program (GSCP)** is an initiative of CIES, the International Committee of Food Retail Chains, now officially The Food Business Forum. The program's objective is to develop a set of "reference tools" and processes that describe best labor practices, based on relevant international standards, and a common interpretation of fair labor requirements and their implementation. The reference code was drafted by the five companies that initiated GSCP (Carrefour, Metro, Migros, Tesco and Walmart) and first made available for consultation in June 2007. The draft,[68] requires compliance with national and local laws, and with the core labor conventions of the ILO and the UN Human Rights Convention. It also covers corruption.

- **Fairtrade** is an internally and externally audited social and environmental standards program whose objective is to guarantee that products sold anywhere in the world with its label conform to its standards and contribute to the development of disadvantaged producers and workers.

- **Rainforest Alliance** is a third-party certified standards program whose objective is to ensure environmental and social sustainability of agricultural activities (in Latin America, the Rainforest Alliance coordinates certification activities of the Sustainable Agriculture Network, a coalition of national non-profit conservation organizations).

- **GlobalGap** is a third-party certified series of commodity-specific farm certification standards, whose objective is to respond to the demands of European consumers, retailers and their global suppliers for safe food produced respecting worker health, safety and welfare, environmental and animal welfare issues.

- **IFOAM** is a third-party certified standards system whose goal is the worldwide adoption of ecologically, socially and economically sound systems based on principles of organic agriculture.

[68] Available at http://www.ciesnet.com/pfiles/programmes/gscp/GSCP-draft-reference code-Version-1.pdf

To further add to the uncertainty or looseness surrounding the meaning of an international standard, some *nationally*-based standardization organizations have presented themselves as international standard-setters — for example, private sector organizations, such as ASTM International, the American Society for Testing and Materials. Under the WTO TBT rules, these entities would be unlikely to qualify as international standards bodies, as they do not present an opportunity for all WTO members to participate in the approval of standards. In such cases, they would most likely be viewed as domestic standardization bodies, to which the WTO TBT Code would apply.

In summary, one may assume that for purposes of TBT, a standard would not qualify as "international" unless it is the product of "an international body or system," but there is no minimum number of WTO Members whose "relevant bodies" must *actually* participate in a body or system for its standards to qualify as "international." "Relevant bodies" is couched quite broadly, reflecting the differing structures of different international standardization bodies and systems, some of which are made up of purely non-governmental participating entities from different countries, others of governmental participants or representatives, and still others are mixed.

So far there is only one WTO case that has considered the issue of what is an international standard. In the *EC-Sardines*[69] case, the EC challenged whether it should be required to use a standard as a basis for a mandatory regulation under TBT on grounds that the standard was not adopted by consensus in the relevant international body (in this case the Codex Alimentarius). The AB rejected this claim, indicating that a standard still qualifies as an international standard under TBT, even if not all the participants in the international body or system agree to the standard.[70]

TBT — Voluntary Standards

In the TBT-international standards section above, we considered the scenario, in which mandatory government regulations are based on voluntary standards (thus making them mandatory) and the key issue of whether the underlying standards would be considered to constitute international standards or not. We now turn to the question of how voluntary standards, which are not linked to mandatory government measures, are to be seen from a WTO rules perspective.

The main WTO discipline that applies to voluntary standards created by non-governmental bodies is in the TBT Agreement. Article 4.1 of TBT requires that WTO Members "take such reasonable measures as may be available to them" to ensure compliance of non-governmental standardization bodies with the TBT Code of Good Practice. Since this Code is an essential reference point for understanding the interaction of WTO law with voluntary standards, we reproduce it in full:

[69] AB Report, *European Communities — Trade Description of Sardines,* WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359.

[70] The TBT Committee, the diplomatic body at the WTO charged with administering and reviewing the TBT regime has proclaimed the "The Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Article 2, 5 and Annex 3 of the Agreement." While seeking "coherence" and avoidance of duplication in standards setting, this is not an authoritative interpretation of the agreement. "Decisions and Recommendations Adopted by the Committee since 1 January 1995", WTO Committee on Technical Barriers to Trade, G/TBT/1/Rev. 8, 23 May 2002.

Text Box 3: Annex 3 — Code of Good Practice for the Preparation, Adoption and Application of Standards

General Provisions

A. For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.

B. This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as "standardizing bodies" and individually as "the standardizing body").

C. Standardizing bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardization activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

Substantive Provisions

D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.

E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.

G. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardizing bodies within the territory of a Member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.

H. The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.

I. Wherever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.

The language "such reasonable measures as may be available" recognizes that there may be significant limits in domestic legal systems, to the extent that the creation and publication of voluntary standards can be controlled by governments. Especially in the area of social criteria, constitutional guarantees of freedom of expression and freedom of association and political belief may well limit the ability of governments to interfere with standard-setting by purely private bodies; the emission of voluntary social standards is in fact very akin to political and social activism and advocacy.

The one kind of standardization body to which it appears that the TBT Code does *not* apply is international standardization bodies.

The TBT Code applies to any non-governmental or governmental domestic, local, or regional standardizing body. Non-governmental body is defined simply as "a body other than a central government body or a local government body." A standardizing body is presumably any entity that engages in standardizing. There is no definition of "standardizing" in TBT but, as already noted, there is a definition of a standard: as a "Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method." It follows from this that to know whether a body is a standardization body, we need to know whether it is involved in the approval of the kind of document described in this definition. The notion of "*recognized* body" implies that standards are norms that are recognized — ie. accepted and used in their own activities — by actors other than the standard-setting body itself, whether firms, consumers or governments. Thus, where a single market actor, such as Walmart, establishes social criteria for its *own* purchases, these would not likely be viewed as "standards" within the meaning of TBT nor Walmart as a "standardization body." Nevertheless, given the purchasing power of such actors, there would obviously be major impacts on the marketplace.

The TBT Agreement is clear that any domestic or regional standardization body is covered by the Code of Good Practice. This explicitly includes both governmental and non-governmental bodies. As already noted, regional bodies refers to any body open to participation by the relevant bodies of some but not all WTO Members, and the expression "relevant" is broad enough to encompass regional initiatives composed of entities that are non-governmental, or governmental, or a mixture of both. The one kind of standardization body to which it appears that the TBT Code does *not* apply is international standardization bodies. One reason that this may be the case is that it is obvious, or fairly obvious, that a WTO Member may be able to assert some degree of regulatory control over domestic bodies, whether governmental or private. Since standards of regional bodies would typically be approved by all of the bodies in the regional body, each domestic body participating in the regional body might be held accountable for its actions in such approval by its own domestic government. In the case of international bodies, it is possible that standards could be created by some process not entailing approval by, or consensus of, all domestic participating bodies. Thus, a WTO Member state, in order to assure that an international body's standardization activities follow the Code would have to have jurisdiction not only over its own domestic body participating in international body, but in some sense over the actions of the international body itself — which would ill fit with territorial notions of jurisdiction in international law.

To the extent that groups such as the Roundtable on Sustainable Biofuels are considered to be international standardization bodies, therefore, governments could not be held responsible for ensuring their compliance with the Code of Conduct. Nonetheless, such groups could voluntarily undertake to follow the Code of Conduct, even though WTO Members are not required to hold them to it. This might be advantageous as it would make their standards more attractive to use or adapt by *other* bodies, such as domestic and regional bodies, that *are* required to be held to the Code.[71]

[71] There is an International Social and Environmental Accreditation and Labelling Alliance (ISEAL), consisting of a number of international certification initiatives, which has developed a Code of Good Conduct for setting social and environmental standards, as they view Annex 3 of the TBT Agreement and ISO reference documents as not relevant in their entirety to social and environmental standards. www.isealalliance.org

SPS

Since biofuels are produced from agricultural feedstocks, one might expect that, in addition to the disciplines of the GATT and the TBT Agreement, those of the SPS Agreement, which contains specialized provisions related to food and agriculture regulations, would be applicable to biofuels social conditionalities. However, as detailed in Annex A of SPS, the SPS agreement only applies to measures aimed at dealing with risks that arise *on the territory of the regulating Member,* the importing country. Of course, one reason for the importing country to be concerned with practices in the exporting country might be a notion that food security is a global concern, raising issues of the global commons. But here also there is no scope for SPS, where the definitional section in Annex A refers exclusively to a *territorial* conception of protection of human and animal life and health. The consequences of the non-applicability of the SPS Agreement are significant and simplify somewhat the challenge of WTO justification of social conditionalities. The SPS Agreement imposes requirements that measures be based on scientific risk assessment and scientific principles, and is ill suited to measures that at the same time address ethical and human rights dimensions of the problem while dealing also with interrelated concerns about risks to life and health. As is illustrated by the WTO *EC-Biotech* dispute, where both kinds of concerns are present behind a measure, this can lead to great complexity concerning the relative zones of applicability of SPS and TBT disciplines.

II.C. FORMS OF SOCIAL CONDITIONALITIES RELEVANT TO BIOFUELS

We now examine additional WTO considerations that arise with regard to specific conditionalities.

1. Mandatory Import Prohibitions

The strongest kind of social conditionality would be an outright import prohibition on biofuels whose production does not live up to certain social criteria. At this time, no such prohibitions have been put into place, but for the purposes of illustration, let us assume that a country decides to ban a specific biofuel because of allegedly poor labor conditions in the countries in which it is produced.

A ban that applies only to imports and does not impose the same conditionality domestically, is discriminatory on its face; this kind of measure would normally be found to be an illegal "prohibition or restriction on trade" under Article XI of the GATT. Article III, National Treatment, would not even need to be applied because there is no issue of even-handedness between the treatment of domestic and imported products, given that the ban doesn't apply domestically *at all*. This is a relatively easy case; such a ban would have to be justified under an exception, such as the public morals clause in Article XX, if it were to be maintained consistently with WTO rules.

On the other hand, if a ban is based on social criteria applicable to both domestic and imported products, then the fundamental issue will be the National Treatment standard in Article III:4 of the GATT, i.e. assessing the evenhandedness of the ban as between imported and domestic products. The issue under Article III.4 may well arise with respect to "like products."

What would be some of the considerations in assessing whether a ban on imports of biofuels that do not satisfy certain social criteria is even-handed between domestic and imported products? Where the ban is facially neutral, i.e. the same criteria apply to both domestic and imported products, the question may be one of determining whether a bias towards domestic products is somehow detectable in the structure and design of the criteria or the way in which they are formulated or implemented.[72] In this respect, criteria derived from international agreements or standards accepted by a wide range of countries at different levels of development, and through transparent processes allowing wide participation of different countries and/or stakeholder interests, would be more likely to be seen as even-handed. Therefore, a ban premised on criteria derived from the application of "core labor standards," might be more likely seen as even-handed, than one premised on criteria developed to ascertain whether biofuels had replaced food crops in their country of origin.

While exporters express concern about the wide range of different standards or criteria that seem to be proliferating, a range of options would however give exporters the opportunity to select the code or set of standards that is most suitable to them, provided that the underlying social concerns are met.

Similarly, with respect to determinations of whether the criteria are met, the existence of due process, the provision of formal reasons as to why a given product does or does not meet the criteria, and the use of independent monitoring entities may enhance the impression of even-handedness. Use of the same third-party certification program for domestic biofuels production and for imports could be influential in this context. Finally, building an element of flexibility into the deployment of social criteria will also counter suspicions about protectionist bias: this would mean giving the foreign producer some range of choice as to which code of conduct or social standards they wish to adhere, provided they are comparable to the criteria of the importing country. While exporters express concern about the wide range of different standards or criteria that seem to

[72] AB in the *Chile-Alcohol* case stressed the importance of examining the "design, architecture and structure" of the scheme in assessing whether there is protectionism. Paras. 61ff.

be proliferating, a range of options would however give exporters the opportunity to select the code or set of standards that is most suitable to them, provided that the underlying social concerns are met.

2. Qualifying for Targets and Promotion Policies

Short of imposing an import ban, a country could consider limiting access to government incentives for biofuels whose production fails to meet certain social criteria (or only allowing these to count towards meeting a target). Such measures have not yet been implemented but they are being considered. While the final outlines of EU legislation are not yet clear (see Text Box 4), it is relatively safe to speculate that the final EU scheme will use environmental conditionality as a requirement to qualify for incentives. Social conditionality may also be included.

Text Box 4: EU Legislation

The European Commission has proposed draft legislation to bring biofuels policy into a common framework. The legislation has been debated in the European Parliament with respect both to the overall mandate and to sustainability criteria. The Commission did not include social criteria in its draft legislation because of WTO implications but called for monitoring by the Commission of the food security implications of biofuel development. However, there is support for inclusion of social criteria as a precondition for a biofuel to qualify for treatment as a renewable fuel. The discussion on social conditionality in the European Parliament has been wide-ranging.

One proposal would specify certification of adherence to some or all of the treaties of the International Labour Organisation listed in EC legislation applying generalised tariff preferences (GSP).[73] A variation on this proposal would require that a country commit to maintain ratification of the treaties and implementing legislation, and to accept regular monitoring and review of its record of implementation. However, countries could alternatively show that their own social and environmental standards are equivalent to those of the treaties for their biofuels to qualify for incentives.

Another proposal would require submission of information by suppliers on the producer's right to use the land and consultation with local populations and interest groups. An alternative to this would require the Commission to report on land conflict and displacement of peoples within exporting countries. The definition of "high conservation value land," would include land "fundamental to meeting basic needs of local communities (e.g. subsistence, health) and areas critical to local communities' traditional cultural identity."

Debate has also focused on how environmental and social criteria will be developed and implemented. The Commission draft authorized the authority to decide that certain certification schemes provide accurate information, but others have proposed that the Commission also independently promote and further develop such schemes as well as to assess their effectiveness.

[73] OJ L 169, 30.6.2005, p. 1, Annex III to Regulation (EC) No 980/2005.

Under WTO law, social criteria that *must* be met in order for biofuels to qualify as contributing to meeting a *mandatory* target would, quite clearly, qualify as domestic "rules, regulations or requirements" within the meaning of Article III:4 of the GATT (National Treatment) and the MFN obligation in Article I of the GATT would be applicable as well. The case of subsidies including fiscal incentives and other promotion policies for biofuels requires a somewhat more complex analysis. It is conceivable that social conditionality in this context does not constitute mandatory government action, since private economic actors, if they so wish, are free, not to meet the conditions as long as they are willing to forgo the subsidy or benefit. In that case, the applicable disciplines would exclusively be those of the WTO Agreement on Subsidies and Countervailing Duties and the subsidies and related provisions of the WTO Agreement on Agriculture. Nevertheless, building on a line of jurisprudence beginning with cases such as *Canada-Foreign Investment Review Act* and Japan-Semiconductors in the GATT era, in the *U.S.-Foreign Sales Corporation* case, the AB made it clear, that for purposes of the National Treatment obligation in the GATT, government action that affects the behavior of private economic actors through incentives or disincentives to certain conduct, may constitute a "rule, regulation or requirement." *The complexity is that the consistency of the social conditionality with the GATT non-discrimination norm will be evaluated under WTO law separately from the issue of whether the subsidy itself is legal under the SCM Agreement and/or the subsidy provisions of the Agreement on Agriculture.* Neither the SCM Agreement nor the Agreement on Agriculture includes exceptions provisions that could be used to justify an otherwise unacceptable subsidy. However, for a subsidy to be impugned under the SCM Agreement, not only is it necessary to show there is a financial contribution by government (this could include tax revenue forgone that is otherwise due, for instance), but that the recipient gained a benefit, i.e. was put in a better position than in an unsubsidized competitive market. It might be argued that under the SCM Agreement, a subsidy is less likely to confer a benefit on the recipient, where the subsidy is accompanied by additional burdens such as purchasing only biofuels that meet certain criteria. As a matter of strategy, however, dissatisfaction with social conditionalities might make some WTO Members more likely than otherwise to challenge subsidies to biofuels under the SCM Agreement or the Agreement on Agriculture.

It is unclear as to whether Article XX of the GATT could provide a defense to subsidies measures with social conditionalities, for example on public morals grounds. The 2006 World Trade Report of the WTO Secretariat, in its legal analysis, suggests: "While Article XX in principle would apply to subsidies, the more specific rules of the SCM Agreement in any case are explicitly geared to remedying trade distortions from subsidization."(p. 201) It is difficult to interpret this statement. It could indicate that, since the SCM Agreement is simply *a lex specialis* to the GATT provisions on subsidies, Article XX can be used as a defense against any claim of violation of the more specialized rules in the SCM Agreement. Such an interpretation would also take account of the absurd result of not applying Article XX: WTO Members would have more policy space to enact much more obviously and severely trade-distorting measures such as import bans and quotas than what are generally understood to be less-distortive measures, namely domestic subsidies.

3. Mandatory Reporting

Some countries already have implemented and others are envisaging reporting requirements on social conditions in biofuels production. Such reporting requirements can vary widely — i.e. an importing government agency, an importer/producer or an exporting country government may be tasked. Some countries may only allow imports to count towards a mandate or to benefit from certain incentives if accompanied by such reporting. Some may go a step further and require that such reports demonstrate that certain social criteria are being met. We present a number of examples of reporting requirements before we turn to the question of WTO compliance.

Text Box 5: Reporting Requirements

Reports on aspects of biofuel production are mandated by law in several countries. Most require reporting by both businesses and government agencies. **The US Energy Security and Independence Act (EISA)** requires that the U.S. Environmental Protection Administrator report to Congress on effects of the EISA, including its environmental impacts outside the United States.[74] It also requires the Department of Energy, in consultation with USDA and EPA, to contract with the National Academy of Sciences to assess the impact of the renewable fuel standard on the industries involved in the production of feed grains, livestock, food, forest products, and energy, although not per se on the impact on food prices and the rural economy. The EISA also mandates other reporting by business, but not on social or environmental conditions.

In contrast, **The Renewable Transport Fuel Obligation (RTFO)** a UK initiative which came into effect in April, 2008, requires that 5% of all UK fuel come from a renewable source by 2010. Tradeable certificates are issued to suppliers according to the quantity of renewable fuel on which duty has been paid. Suppliers report on both the net greenhouse gas saving and sustainability of the biofuels they supply. Sustainability criteria include social principles. Social standards schemes applying social criteria and considered acceptable include SA 8000, The Sustainable Agriculture Network and the Roundtable on Sustainable Palm Oil. Although these also cover other issues, they require that biofuel production cannot adversely affect workers rights and relationships, or adversely affect existing land rights and relationships.[75]

At its initiation, the RTFO reporting on sustainability is voluntary and suppliers can designate "don't know" to the source of the fuel. However, when fully implemented, certificates will not be issued to suppliers whose biofuels have not been certified to meet appropriate sustainability standards. Reports must then include verification of compliance with working conditions respecting freedom of association, non-discrimination, lack of sexual harassment, and lack of child labor.[76]

The Netherlands has also explored tradeable certifications for biofuels based on sustainability reporting. This would also phase in specific supplier declarations, including for sustainability, that would be part of the supplier balance sheet, reviewable by government and reported to government on an annual basis. Social considerations would include social and economic harm to local communities, and the welfare of workers. A protocol would be developed for specific monitoring and reporting on competition of biofuel and food production. Implementation of this project has been postponed, but the Dutch Government has progressed toward a reporting obligation and a greenhouse gas balance tool.[77] German legislation also contemplates use of mandatory sustainability criteria, but none have as yet been agreed for social criteria.

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[74] Section 204.a (3) of the Energy Independence and Security Act (EISA), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h6enr.txt.pdf

[75] Ibid.

[76] RSPO Principles and Criteria for Sustainable Palm Oil Production, 2007, Roundtable on Sustainable Palm Oil (RSPO), at http://www.rspo.org/resource_centre/RSPO Principles & Criteria Document.pdf

[77] The state of regulation in the Netherlands is as reported in the European Union's Final Report on Criteria and Certification for Sustainability Systems for Biomass Production, January 2008. http://ec.europa.eu/energy/res/sectors/doc/bioenergy/sustainability_criteria_and_certification_systems.pdf

Whether they are imposed as conditions for importation, or through domestic regulatory or criminal sanctions, and where they *affect* the conditions of competition of imported products in the domestic marketplace, reporting requirements must be consistent with the non-discrimination norm in the GATT (both National Treatment and MFN Treatment). Obvious concerns here would be if reporting requirements were imposed on foreign producers but not domestic producers, or on foreign producers from some WTO Members but not others. But, perhaps less obviously, reporting requirements imposed on domestic consumers or distributors of imported products, could also violate the non-discrimination norm, if those requirements are designed in such a way as to impose a greater burden on domestic consumers or distributors when they are purchasing imported biofuels as opposed to domestic like products.

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In addition, Article X of the GATT, the transparency provision, requires that "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings" that affect, inter alia, "distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use ..." of imported products.

The TBT Agreement also contains disciplines that are relevant to reporting requirements. Where these reporting requirements are related to assessment *by central government bodies* of conformity with mandatory "technical regulations" *or* with (voluntary standards), Article 5.2 requires that WTO Members ensure that information requirements are limited to what is necessary to assess conformity ..." It is unclear whether this provision implies that governments may only impose reporting requirements in order to assess conformity with mandatory regulations or with voluntary standards.

4. Multilateral Agreements

Multilateral agreements are written agreements between two or more states. Often, they are considered in principle open to participation or negotiation by all concerned states in the international community, even if in practice, they may be of interest only to a subset of states (for instance, agreements concerning the status of Antarctica). But, this criterion of open participation is not consistently reflected in all uses of the expression "multilateral agreement" in international legal and diplomatic practice. A still more restrictive — and more controversial — notion of *a truly* or *pure* multilateral agreement is erga omnes partes, meaning that the agreement reflects a global good, such as the protection of human rights or endangered species, and the obligations are owed by each state not just to each other state, but to the entire community that has signed the agreement. One legal scholar, Joost Pauwelyn, has famously and controversially argued along these lines, even claiming that the WTO agreements are not in this sense "full" multilateral agreements because the obligations are owed to individual WTO Members, not to "nullify or impair" their benefits under the agreements, rather than to the WTO community as a whole; in other words the WTO treaties are merely a framework for exchange of essentially bilateral mutually interested concessions.[78]

[78] Pauwelyn, "A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?", European Journal of International Law 14:5.

Because of the degree of uncertainty and controversy concerning the more restrictive definitions of a multilateral agreement, it is probably most prudent to consider as "multilateral" any agreement between two or more states that is not explicitly confined to one particular region, or to a *closed, explicitly restricted* list of member states. In today's globalizing world, the range and number of multilateral agreements — in this broad sense — is enormous. Many different expressions are used, among them "treaty," "protocol," "convention," "understanding," "code," "guidelines." What — if any — legal significance can be attached to these different terms, especially in relation to WTO law?

In the biofuels context, several initiatives to which governments are party are seeking to establish sustainability criteria. These include the **Global Bioenergy Partnership** and the **International Energy Agency's Task 40**.

The former, composed of the countries that constitute the "G8" plus Brazil, Mexico, China, India, and South Africa, has identified an initial set of key sustainability criteria including environmental, economic, social and energy security. The International Energy Agency is part of the Organization for Economic Cooperation and Development; its workplan for 2007-2009 includes facilitating implementation of sound certification on an international level, including with UNCTAD, the WTO and the FAO. It will also map and develop quality assurance procedures.

It is not contemplated that measures adopted by the parties to these initiatives will be either mandatory or binding, and the instruments that are envisioned as results of these processes are not likely to address trade measures. Let us assume, however, that a multilateral agreement were to bind countries party to mandatory measures, i.e. labeling biofuels on the social conditions under which they were produced. Such a scenario could arise under the United Nations Convention on Biodiversity.

At its Ninth Meeting of the Parties in June, 2008, parties to the Convention[79] "[u]rge[d] Parties and invite[d] other Governments, in consultation with relevant organizations and stakeholders, including, indigenous and local communities, to: (a) Promote the sustainable production and use of biofuels with a view to promote benefits and minimize risks to the conservation and sustainable use of biodiversity… and (c) Develop and apply sound policy frameworks for the sustainable production and use of biofuels, acknowledging different national conditions, and taking into account their full life cycle as compared to other fuel types, that contribute to the conservation and sustainable use of biodiversity, making use of relevant tools and guidance under the Convention as appropriate, including, inter alia: The application of the precautionary approach in accordance with the preamble of the Convention on Biological Diversity and The Akwé: Kon[80] voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding development on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (decision VII/16 F)."

The decision also called upon parties to "continue to investigate and monitor the positive and negative impacts of the production and use of biofuels on biodiversity and related socio-economic aspects, including those related to indigenous and local communities."

We now proceed to consider some possible specific relationships between various kinds of multilateral agreement in relation to biofuels social conditionalities and the WTO agreements:

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[79] COP 9 Decision IX/2, Bonn, 19 - 30 May 2008, http://www.cbd.int/decisions/?dec=IX/2

[80] The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities were developed pursuant to task 9 of the program of work on Article 8(j) and related provisions adopted by the Conference of the Parties of the Convention on Biological Diversity at its fifth meeting, in May 2000.

1) Multilateral agreements may themselves contain trade provisions to enforce social conditionalities against non-complying or even non-participating states. Where the trade provisions relate only to signatories of the agreement, general international law rules on treaties might be interpreted as altering WTO obligations among those particular states, such that no Article XX justification is required. This so-called inter se agreement, however, could not permit a lesser standard of obligation towards third states who are Members of the WTO but not parties to that particular agreement. In the unlikely case that the same set of countries are members of a multilateral agreement and the WTO, the agreement reached later in time might be seen as the prevailing one. Alternatively, as was the case with respect to the Kimberley Accord[81] on conflict diamonds, a WTO waiver might be sought to ensure that signatories can implement the contemplated trade sanctions to enforce conditionalities, including against non-signatories. Finally, each individual state party taking the sanctions contemplated under the multilateral agreement might justify its actions as "necessary" for public morals under Article XX of the GATT. With respect to the TBT Agreement, an argument could be made that the substantive criteria in the multilateral agreement constitute "international standards," and that by acting in accordance with such standards, the sanctioning Member should be presumed not to be creating unnecessary obstacles to trade.

2) The agreement might not contain any trade measures, thus leaving the use of trade measures to enforce the criteria in the agreement at the discretion of individual WTO Members. In such an instance, the trade measure would be examined by a WTO panel, as was the case with various agreements on sustainable development and biodiversity in the *Shrimp/Turtle* case. Multilateral agreements might be offered as proof that the social criteria in question are not protectionist or biased towards the regulatory approach or interests of the sanctioning WTO Member in particular, and also that the conditions of different countries have been taken into account, including developing countries. The substantive criteria in the agreement might well also qualify as "international standards" for purposes of compliance with TBT.

3) The agreement might explicitly reject the use of trade measures to enforce social criteria and/or contain a different method of dealing with disputes/enforcement. The existence of such an agreement, even if not signed by all WTO Members, would make it more difficult for a Member to argue, even if that particular Member was not a signatory to the agreement, that trade measures were a "necessary" means of addressing the social concerns at issue.

5. Government Procurement

Procurement initiatives relevant to biofuels already exist at federal, state and local levels; generally these do not include social provisions, but might in the future. Most are aimed at economic development and provision of fuels that meet the desired efficiency and quality standards for fuels.

[81] At the urging of various international NGO's the UN General Assembly passed a resolution, 55/56 (1 December 2000). The resolution supported the creation of an international certification scheme to end the link between the illicit trade in conflict diamonds and human rights violations associated with armed conflict in various African countries. This resolution helped support the launch of the Kimberley Process Certification Scheme (KPCS) in 2003. The Kimberley process aims to make all internationally traded diamonds "conflict free" i.e. not trafficked from conflict zones. "The Kimberley Process Certification Scheme (KPCS) imposes extensive requirements on its members to enable them to certify shipments of rough diamonds as 'conflict-free'. As of September 2007, the KP had 48 members, representing 74 countries, including the EU, which was counted as a single member.

Text Box 6: Procurement Measures

European cities and member states are active in green procurement, including biofuels. A Green Public Procurement (GPP) strategy and conference hosted by the European Commission in 2006 recommended and secured commitments from governments to "adapt policies and actions to meet sustainability challenges."[82] The social aspects of GPP, however, were recognized to be somewhat unclear.

Many European cities and municipalities implement environmental purchasing criteria for biofuels. In Sweden, a joint procurement tender between the City of Göteborg, with 80 administrative units and companies, the Göteborg Region Association of Local Authorities, several surrounding municipalities and the Church of Sweden in Goteborg[83] includes low ethanol-blended petrol E5, and ethanol E85. Social criteria are not explicitly part of purchasing requirements, but a supplier must provide relevant information if sustainability criteria apply to a product in his assortment.

Other procurement policies more explicitly recognize social and economic dimensions of sustainable purchasing. Some encourage small suppliers by dividing a tender into smaller parts.[84] Others encourage governments to use procurement to implement corporate responsibility goals including social and economic benefits.[85] A few explicitly include ethical procurement criteria among criteria for sustainable sourcing.[86] Other governments include private-sector socially certified goods in their programs.[87]

The most explicit social dimension of biofuels procurement is a Brazilian law dating from 2005 mandating that a growing percentage of biodiesel be purchased from small producers. Biodiesel producers who want to qualify for tax breaks must purchase 10% to 50% of their raw materials from small growers, depending on the region. The law, administered by the Ministry of Agrarian Development and called the "social fuel stamp" requires biodiesel producers, including Petrobras, a semi-state-owned company, to purchase at auction a specified percentage of fuel from qualified small-family farm producers.[88]

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[82] See the Europa website for a full description of this initiative. http://ec.europa.eu/environment/gpp/

[83] Joint Procurement of Fuels in Sweden, LEAP Toolkit, Case Study 43, at 'ICLEI-Local Governments for Sustainability', iclei-europe.org

[84] Procura, Sustainable Procurement Campaign, Key Criteria for Electricity, at http://www.procuraplus.org/fileadmin/template/projects/procuraplus/New_website/Detailed_Product_Information/Electricity_-_Procura__Key_Criteria.pdf

[85] Transport for London, Policy for the Mayor's Green Procurement goals at http://www.tfl.gov.uk/assets/downloads/businessandpartners/policy-for-the-mayors-green-procurement-code.pdf

[86] City of Calgary, Alberta, Canada. http://www.vibrantcalgary.com/media/Living Wage and The City February 2008.pdf

[87] These include Fair Trade certified goods such as bananas in school canteens in the city of Rome, Fair Trade Coffee, chocolate (cocoa), tea, and orange juice in Vienna, Austria for use in cnnection with Austria's 2006 EC Presidency, and Fair Trade Towns Initiatives in the UK, Belgium, Ireland and Italy. Buyeranalytics, at buyeranalytics.com, "Ethical Sourcing: the Cornerstone of Sustainable Procurement. http://www.buyeranalytics.com/purchasingblogs/2008/1/26/the-cornerstone-of-sustainable-procurement-ethical-sourcing.html

[88] USDA, GAIN Report BR7012, August 17, 2007, available at http://www.fas.usda.gov/gainfiles/200709/146292286.pdf

Text Box 6: Procurement Measures *(continued)*

U.S. purchasing requirements for biofuel are primarily environmental, but social criteria play a minor role. Executive Order (EO 13423), January 2007, mandates that Federal agencies conduct their environmental, transportation, and energy-related activities in an "environmentally, economically and fiscally sound, integrated, continuously improving, efficient, and sustainable manner." At least half of statutorily required renewable energy must come from new renewable sources. Agency acquisitions of goods and services must be based on use of sustainable environmental practices, including acquisition of biobased, environmentally preferable, energy-efficient, water-efficient, and recycled-content products. "Sustainable" means to "create and maintain conditions, under which humans and nature can exist in productive harmony, that permit fulfilling the social, economic, and other requirements of present and future generations of Americans."[89]

The WTO Government Procurement Agreement (GPA) is a plurilateral agreement to which only a small subset of WTO Members are parties[90]; the EC and the U.S. are both signatories. Essentially no developing countries (and this includes major players such as Brazil) are parties to this Agreement, which greatly limits its significance in the context of biofuels conditionalities. Moreover, in the case of those countries that are bound, only those central and local government agencies are required to comply with the GPA, which have been specified by its party. Carve-outs for energy- and military related procurements are common.

A provision of the GPA stipulates that "any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfill the contract in question."[91] It could be argued that social criteria are extrinsic or irrelevant to the capability to fulfill the contract. However, it could be argued that by imposing social conditionalities within a commercial contract, they become *part and parcel* of the firm's capability to fulfill the contract. Moreover, as McCrudden[92] points out, Article XIII:4(b), which establishes the grounds on which a procuring authority can award a contract, specifies that the contract must be awarded to the "tenderer who has been determined to be fully capable of undertaking the contract"[93] and who makes the lowest bid or the most advantageous bid "in terms of the specific evaluation criteria set forth in the notices or tender documentation." Thus, the only stipulation is that evaluation criteria be specific and transparent (i.e. evident from the information supplied by the procuring authority prior to the bidding process); there is no limitation to criteria of an economic nature or even to technical specifications as defined elsewhere in the GPA.

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[89] Available from the White House website at http://www.whitehouse.gov/news/releases/2007/01/20070124-2.html

[90] Available from http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm

[91] Article VIII, clause B, p. 14; available from http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm November 12, 2008. Uruguay Round Agreement, Agreement on Government Procurement (Article {I - XII).

[92] Christopher McCrudden, Buying Social Justice (New York, NY: Oxford University Press, 2007).

[93] p. 20, Article XIII, 4 (b); available from http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm November 12, 2008. Uruguay Round Agreement, Agreement on Government Procurement (Article {I - XII).

6. Trade Preferences

Trade preferences are another type of government incentive. A country could, for example, opt to provide enhanced trade preferences for biofuels, which meet certain sustainability criteria. Although neither the current EU or U.S. Generalized System of Preferences (GSP) schemes have specific application to biofuel or agricultural production systems, they could conceivably apply to biofuels or feedstocks exported by a beneficiary country. They could also aim to provide greater preferences for feedstocks/biofuels which meet certain criteria along the lines of the GSP+ scheme. These include the EU's GSP+ scheme,[94] which was redrawn in 2005 to meet WTO AB criteria in the *EC-Tariff Preferences* Case (see text box 7), and also the GSP scheme of the United States. The current EU scheme replaces three former incentive schemes (drugs, social and environment arrangements) with a single scheme that would cover approximately 7,200 products, which can enter the EU duty-free from countries with vulnerable economies that accept the main international conventions on social issues, human rights, environmental protection and governance. Additional preferences are provided to those countries who meet the conditionality.

In order to qualify, countries must demonstrate that GSP-covered imports represent less than one percent of total EU imports under the GSP and that their economies are poorly diversified and vulnerable. Preferences are initially granted to those countries that have ratified and effectively implemented[95] 16 core conventions on human and labor rights, as well as seven (out of 11) conventions related to good governance and the protection of the environment, including all the major multilateral environmental agreements. For full eligibility, recipient countries need to have ratified 27 international conventions by December 31, 2008.

The U.S. GSP scheme, like a number of other legislative provisions in U.S. trade law,[96] extends trade preferences conditional on demonstration that several kinds of conditions are met, including since 1984, that beneficiary countries meet the core standards of the ILO. The same ILO standards are addressed within the text of U.S. Free Trade Agreements (FTAs). Proponents of this approach to international labor rights implementation argue that GSP has been effective in securing adherence to labor rights, particularly since failure to take steps to afford these rights jeopardizes a country's GSP status for some or all of their products.[97]

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[94] Council Regulation No 980/2005 of 27 June 2005.

[95] This requires submission of "comprehensive information" concerning ratification of the conventions, the legislation and measures to implement the conventions. http://ec.europa.eu/trade/issues/global/gsp/pr211205_en.htm

[96] Section 301 of the Trade Act of 1974; the Caribbean Basin Economic Recovery Act (CBERA) in 1983; the Andean Trade Preference Act (ATPA) in 1992; the Overseas Private Investment Corporation (OPIC); the Multilateral Investment Guarantee Agency (MIGA); and the North American Free Trade Act (NAFTA) in 1994.

[97] "In Global Trade, Labor Standards Have a Long History," by Robert Rogowsky and Eric Chyn, Wednesday, July 18, 2007, Filed under: World Watch, Government & Politics, from "The American, an Online Magazine, at http://www.american.com

Text Box 7: *EC-Tariff Preferences* (GSP) Case[98]

In the *EC-Tariff Preferences* (GSP) case, the WTO AB addressed the circumstances where a developed country WTO Member could impose conditions on the receipt of preferences by a developing country under a GSP scheme. In this case, India had originally challenged a relatively new aspect of the EU scheme, namely a provision that gave an enhanced preference to those developing countries able to certify that core labor standards, a range of environmental standards and drug enforcement measures were being effectively implemented in their domestic law and regulations. In the end, India dropped the claims about the labor and environmental preferences, limiting its argument to drug preferences. The Panel ruled that under Art. I:1 of the GATT (MFN), and also under the Enabling Clause, which provides an exception from Art. I:1 for GSP, developed countries must, with a few narrow exceptions, treat *all* developing countries the same in respect of GSP preferences (except for least-developed, which may be offered a larger margin of preference). The AB modified this holding, noting that some conditionalities could be consistent with the Enabling Clause, where they are positively related to the development needs of the recipient countries. The AB emphasized that multilateral agreements would be relevant reference points in determining whether a conditionality was positively related to development needs. In any case, the criteria must be of an objective nature and enforced through a transparent process.

It is likely therefore, that the more closely linked social criteria for biofuels are to well-established and widely-subscribed norms reflected in multilateral agreements, the more likely they will be considered consistent with WTO rules on GSP. One example would be core labor rights, which have been agreed between virtually the entire membership of the International Labor Organization. Although the right to food is well established in the Covenant on Economic, Social and Cultural Rights, determining whether a given set of policies and practices of a particular country with respect to biofuels is consistent with the right to food in a transparent and objective way would require devising a set of indicators and applying these in an equal and coherent manner to all GSP-recipients.

[98] Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries,* WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report, WT/DS/246/AB/R, DSR 2004:III, 1009.

III. CONCLUSIONS AND RECOMMENDATIONS

An examination of social conditionalities applied to biofuels trade from a WTO rules perspective is — as demonstrated — a complex undertaking. Just as the larger policy questions about the desirability of linking social standards to trade measures are unresolved, there are also a considerable number of legal uncertainties, the most important of them being:

- How are non-product-related process and production methods to be viewed under a WTO lens?
- What types of agreements can be considered formal multilateral agreements and what is their status vis-à-vis WTO agreements?
- What constitutes an international standardizing body or international standard for the purposes of the TBT Agreement?
- To what extent does the TBT Code of Conduct commit WTO members to oversee private sector standards?

Given these uncertainties on the one hand, and the proliferation of biofuels sustainability schemes on the other hand, we offer a number of recommendations:

Recommendation 1: As in other areas (organic foods, for instance), a multiplicity of standards can create confusion and add costs to production. Where developing country producers do not benefit from a sophisticated state of the art domestic standards system, including conformity assessment institutions, compliance with standards, especially a multiplicity of them, can be a drag on competitiveness. Certainly, producers and other users of such systems are entitled to know in advance what costs would be added by adherence to as-yet untried social performance standards, but there is often little information and no transparency. If such programs are used, efforts should be increased to report on their costs, their availability and suitability in different countries and under different circumstances, and on whether producers would be rewarded in terms other than market access for complying.

Recommendation 2: While WTO rules require that WTO Members base their mandatory regulations on international standards, there are serious issues of legitimacy where standards do not reflect a broad international agreement, at least among the most significant stakeholders. Adequate participation of developing country stakeholders, and other stakeholders with limited resources and capacities, in the process of development of international standards may require technical assistance to improve their representation in these international processes. Strengthening of their domestic standards systems may also be required to translate international standards into the specific national context. Where broad consensus is hard to achieve, standards should be formulated in such a way as to allow some flexibility in their adaptation to local conditions, and should be keyed as closely as possible to international instruments that do reflect wide agreement, for example the ILO Declaration on Core Labour Standards.

Recommendation 3: Voluntary standards, even where they are not transformed into mandatory government regulations, have considerable ability to shape the marketplace. In the case of domestic standards of this kind, or regional ones, WTO Members are required to ensure to the extent possible that they comply with the Code of Good Practice in the TBT Agreement. But these disciplines do not apply to voluntary international standards. With respect to such standards, there are trade offs between the flexibility and possibility for experimentation and improvement created by multiple competing standards initiatives, certifications, etc. and the risks of imposing inordinate costs on exporters who must comply with different standards for different markets, as well as the dangers of consumer confusion. There is no single obvious solution to this trade off between the virtues of experimentation/competition/flexibility and those of coherence/uniformity/certainty. We simply note that managing this trade off will be a central challenge, both for achieving social goals as well as realizing the dynamic potential of global biofuels markets.

Recommendation 4: As there is no case law in the current WTO jurisprudence that deals explicitly with social conditionalities, clarifying the parameters of WTO law in this area through the dispute settlement process would likely take several years at a minimum as disputes wind their way through various stages in the process. Given the rapidity with which various initiatives for social standards for biofuels are being developed, and the possibility that they will soon begin to shape global markets, there is reason for concern about this time lag. While it would be very difficult, through a negotiated understanding, to anticipate all the WTO issues that could arise through all possible approaches to social conditionalities for biofuels, greater clarity and direction could arguably be achieved by identifying a "core" group of measures that might be subject to a WTO waiver or "green list." This might be a joint initiative of the WTO, the ILO, and development related institutions such as UNCTAD or the World Bank.

To address food security concerns linked to biofuels, it strikes us as more effective to reduce the development pressure responsible for the conflict in the first place. This would mean reducing the mandates and blending targets, and moving production into biofuel feedstocks that do not compete with food or onto land which does not compete with land for food production.

Recommendation 5: Before extending social standards to biofuels, there should be a policy justification for singling out that commodity. Many social issues raised in the context of biofuels production, i.e. unfavorable labor conditions and displacement of indigenous people, are not unique to the biofuels sector. This reality puts into serious question the wisdom of applying such social standards only to biofuels and their feedstocks. Although commodity- and sector-specific trade and labor policies are commonplace, creating trade and labor linkages for specific sectors or commodities is not necessarily justified.[99] One possible justification is that biofuel production has expanded largely as a result of government intervention. If there were no government action to support biofuels, then biofuels could be treated the same as other commodities with regard to the social dimension. But once governments intervene in the market to help specific producers, then citizens and taxpayers can reasonably ask what conditions of production are being wrought by government intervention. The agricultural sector as a whole, however, is defined by government intervention in many countries, which makes it more difficult to argue that biofuels require greater scrutiny with regard to their social impacts than other types of agricultural production. Yet, would it be appropriate to link social standards to all agricultural trade separately from manufacturing, since respect for labor laws goes beyond the agricultural sector? Moreover, an exclusive social standard for biofuels could act at cross-purposes with environmental goals by raising the costs of biofuels relative to substitutable petrochemical products. In other words, why should the biofuels industry be burdened with social criteria if the oil industry is not?

Recommendation 6: One of the notable ironies raised here is that the social standards or conditionality addressed in the programs and policies whose WTO consistency is examined above do not for the most part address the most evident social effect of biofuel production, as opposed to agricultural production more generally: namely, the role that biofuel production has played in increasing the price of food. While estimates vary, most would agree that biofuel production is responsible for about 25% of recent food price increases. Seen in this light, the mitigating effects that better labor standards might provide to poor populations producing biofuels could be completely undone if those same populations were impoverished by higher food prices.

[99] International commodity agreements were common in the mid-20th century. Sectoral policy also exists in the WTO, most notably, in the Agreement on Agriculture. Like the trade regime, the international labor regime has also used sectoral policy. The ILO has individualized treaties on agriculture, maritime, bakeries, sheeted glass works, and coal mines. One should also recall that the first treaty to impose an import ban to protect workers was focused on a single commodity, white phosphorus matches.

Resolving the food/fuel conflict by placing conditionalities on biofuels trade could arguably be justified if the goal is to safeguard food security in the country of export. However, biofuels' impact on food security is mainly felt through its impact on food prices. To address food security concerns linked to biofuels, it strikes us as more effective to reduce the development pressure responsible for the conflict in the first place. This would mean reducing the mandates and blending targets, and moving production into biofuel feedstocks that do not compete with food or onto land which does not compete with land for food production. It is incumbent on legislators to consider the effect of their biofuels mandates on food prices, and there is in fact emerging recognition that a broad diversity of biofuels and other renewables would be preferable to continuation of current support of the use of food crops for this purpose.