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Reforming the WTO to Better Promote Social Justice

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I. Introduction

Social justice should be a goal of global lawmaking. Although the concept of 'social justice'[2] infuses the law and policy of the International Labour Organization (ILO),[3] social justice is not explicitly pursued in the law and policy of the World Trade Organization (WTO). In my view, global social justice is too important to leave exclusively to the ILO.

The establishment of the WTO in 1994 resulted from the vision and hard work of governments, businesses, and scholars over the preceding century. Like any international organisation, the WTO comprises a community of actors; inside the WTO, the key actors are governments. More so than most multilateral agencies, including agencies of the United Nations (UN), the WTO is also a legal order enjoying a law-based dispute system.[4] Another key feature of this legal order is that decisions are normally made by consensus.[5]

In recent years, the legislative and judicial functions of the WTO have not been successfully performed. A key obstacle is the United States (US). Since 2017, the US has refused to allow appointments to the WTO's appellate tribunal. The shutdown of the WTO Appellate Body is especially troubling because its adjudicators have constructively clarified the jurisprudence regarding policy space for national environmental and social regulation.[6] Besides judicial deadlock, WTO's multilateral legislative agenda has also been blocked. At the WTO's last Ministerial Conference (MC11) held in 2017, WTO member governments were unable to fulfill or launch new trade negotiations to achieve better rules for the world economy. The persistent deadlock that has stymied most WTO legislative initiatives stems from the difficulty of obtaining consensus. Commenting on this predicament, Ernst-Ulrich

[1] This chapter is current as of 14 April 2022.

[2] See CW Jenks, *Social Justice in the Law of Nations* (Oxford, Oxford University Press, 1970).

[3] The Preamble to the ILO's Constitution of 1919 begins with the social justice clause: 'Whereas universal and lasting peace can be established only if it is based upon social justice …' Part XIII of the Treaty of Peace (Versailles, 28 June 1919) [Treaty of Versailles]; 'Peace and Social Justice' (1919) 2 *British Medical Journal* 18–19.

[4] Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) (Marrakesh, 15 April 1994).

[5] Art IX:1 of the WTO Agreement.

[6] J Langille, 'The Trade-Labor Relationship in the Light of the WTO Appellate Body's Embrace of Pluralism' (2020) 159 *International Labour Review* 569, 588.

Petersmann observes: 'The more UN and WTO reforms are blocked by authoritarian veto practices and political opportunism …, the more sustainable development and democratic civil society struggles for human rights, social justice and protection of the environment risk will remain "unsuccessful"'.[7]

The question of how (or whether) to seek social justice in international economic law goes back to the origin of the conceptualisation of the trading system in the early twentieth century. Since the mid-1970s, I have focused on these matters both as a US government official and as a scholar.[8] Over the past three decades, the individual from whom I learned most about the ILO is Francis Maupain in his role of ILO Legal Adviser and Former Legal Adviser. In a comprehensive 2013 book on the ILO and its relationship with other international economic law, Maupain suggests a 'widening' of the 'Horizon of Social Justice' including at the WTO.[9]

Nine years later, suggestions for widening the WTO's horizons are mainstream.[10] Today, few would gainsay that the WTO has some normative role to play in the global governance of the 'World of Work'. The question is what the WTO's role should be.

When the trading system was established after the Second World War, the multilateral conference convened to write rules was the UN Conference on Trade and Employment (UNCTE) held in 1946–1948.[11] The International Trade Organization (ITO) Charter, produced by the UNCTE, included a chapter on 'Employment and Economic Activity'. This wave of rulemaking for the global economy soon foundered and, because of defection by the US, that progressive ITO Charter failed to come into force. Consequently, the employment dimension of the multilateral trading system has remained inchoate since 1947.

The theme of this volume is 'possible global futures'. A scholar writing on global futures could undertake prediction or prescription. Back in 2005, I authored a predictive essay on what the WTO would be 15 years hence in 2020.[12] Yet, when 2020 arrived, my predictions proved way off the mark as the WTO had degenerated into deeper failure than even my dystopic scenario. Today, pessimism about the WTO is endemic.[13]

This chapter proceeds in four parts: Part I provides a brief summary of the legal history of the emergence of a social dimension in the trading system. Part II explains why the WTO should not seek to condition trade on labour rights. Part III makes several specific suggestions for what the WTO should do to promote a stronger world economy including its labour markets. Part IV concludes in looking ahead to 2023 by looking back at 1923.

[7] EU Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (Oxford, Oxford University Press, 2022) *vi*.

[8] My scholarship has long noted the fundamental distinction between using national trade access (carrots or sticks) to raise foreign labour standards up to ILO standards versus using trade access to raise foreign costs in order to protect domestic producers and workers from having to compete with lower-income countries.

[9] F Maupain, *The Future of the International Labour Organization in the Global Economy* (Oxford, Hart Publishing, 2013) 256.

[10] A Trebilcock, 'Governance Challenges and Opportunities for the International Labour Organization in the Wake of the Covid-19 Pandemic' (2021) 18 *International Organizations Law Review* 370, 394.

[11] JM Jensen, 'Negotiating a World Trade and Employment Charter: The United States, the ILO and the Collapse of the ITO Ideal' in JM Jensen and N Lichtenstein (eds), *The ILO from Geneva to the Pacific Rim* (London, Palgrave Macmillan, 2016) 83–109.

[12] S Charnovitz, 'The World Trade Organization in 2020' (2005) 1 *Journal of International Law & International Relations* 167–89.

[13] S Olson, 'Is it time to expect less from the WTO?' 31 January 2022. Available at: www.hinrichfoundation.com/research/article/wto/post-wto-world/; J Zumbrun, 'Economic Blacklist of Russia Marks New Blow for Globalization', *Wall Street Journal* (10 March 2022).

II. A Century of Trade and Labour Linkages

Although governments for centuries have used treaties to regulate mutual trade policies, the successful establishment of a rule-based multilateral trading system did not occur until the General Agreement on Tariffs and Trade (GATT) was written in 1947. The hatching of the GATT was accomplished by a group of like-minded countries (led by the US) who wanted to get moving on mutual trade liberalisation without having to wait for all the governments participating in the multilateral UNCTE negotiations.

The path to the UNCTE began at the Paris Peace Conference. In 1919, the US government proposed a Declaration for Equality of Trade Conditions proclaiming that import duties 'as to the rest of the world be equal and without discrimination, difference, or preference, direct or indirect'.[14] The British government supported a 'most-favoured-nation clause' and called for a joint commitment 'not to discriminate' against trade by 'indirect means' such as 'Customs or administrative regulations of procedure ….'[15]

Those idealistic beginnings of global trade lawmaking were soon dropped by peace negotiators. For international trade, the results of the Paris negotiations were: (1) the general commitment in the Treaty of Versailles of 'equitable treatment for the commerce of all Members of the League';[16] and (2) an understanding that the League of Nations would put international economic law on its early agenda. The first early success ensued in 1923 when the League sponsored the negotiation of the International Convention for the Simplification of Customs Formalities. That Convention became the first twentieth-century multilateral trade treaty.

In parallel with the UNCTE discussion of basic trade rules that 28 years later became GATT's foundational trusses, the peace negotiators of 1919 also considered several proposals for labour-related trade rules. For example, the Labour Commission of France's Chamber of Deputies recommended that negotiators 'draw up measures to be taken against States' through 'commerce duties or prohibitions … levied' against products 'in inverse proportion' to the 'standard of protective labour legislation enjoyed' by the workers in one country 'as compared with the standard of protection' afforded under international conventions.[17] The US government proposed a treaty provision that 'no article or commodity may be carried or delivered in international commerce if prison labour contributed to its manufacture'. Yet this US proposal was voted down by peacemakers.[18]

Still, the peace negotiators made unanticipated progress in promoting international worker rights. The most significant achievement was the multilateral agreement establishing the ILO. Furthermore, the League of Nations Covenant proclaimed that League member governments 'will 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 for which their commercial and industrial relations extend …'[19] The project of promoting humane

[14] DH Miller, *The Drafting of the Covenant* (New York, GP Putnam's Sons, 1928) 16.
[15] ibid 18–19.
[16] Art 23(e) of the Treaty of Versailles.
[17] Resolution of the Labour Commission of the French Chamber of Deputies, *Official Bulletin* (Geneva, ILO, 1919–20) 234, 238, 240.
[18] *Official Bulletin* (Geneva, ILO, 1919–1920) 218–19, 225–28.
[19] Art 23(a) of the Treaty of Versailles.

conditions of labour in commercial relations had always been, and was destined to continue to be, a conditioning factor in the development of the world trading system.[20]

Although the problems of high tariffs and trade discrimination were discussed within the League of Nations, no lasting legal solutions were achieved. Still, one elemental connection came in the recommendations of the 1927 World Economic Conference for future agreements on trade. Among the issues discussed were: simplification and stability of customs tariffs, subsidies, anti-dumping, state enterprises, and collective action to expand international trade. With regard to the labour market, the 1927 Conference recommended that governments should 'lead producers' to give individuals the 'healthiest and the most worthy employment' and to use 'methods of renumeration giving the worker a fair share of the increase of output'.[21] To the extent that the 1927 Conference was prolegomena for a rule-based global economy, the Conference's dual focus on both trade rules and labour outcomes became a constitutive moment. Attention to the goals of 'worthy employment' and a worker's 'fair share' reappeared in future waves of reform.

As the ILO gained its footing to promote the mondialisation of labour law, the topic of international trade occasionally arose in debate. For example, in 1926, ILO Director Albert Thomas contrasted the 'ineffectiveness of protection by means of tariffs' with the 'efficacity of a simultaneous raising of labour standards'.[22] Returning to this theme in a 1927 speech, Thomas averred that 'neither free trade nor protection affords a final solution' to social problems whose solution can only emerge through 'organised co-operation between nations'.[23]

Due to space constraints, this chapter will not cover the developments over the next several decades where the labour and trade regimes intersected. That history includes: inter-war planning for a more organised world economy, the Declaration of Philadelphia, the negotiations at the UNCTE, the early cooperation between ILO and the infant ITO, the initial discussions in ILO on a social clause, and US actions during the GATT Tokyo Round[24] to add a fair-labour-standards clause to GATT. I participated in those GATT reform efforts and recall how the US hobbled itself with bureaucratic infighting.

III. Avoid a Labour Trap for WTO Progress

Establishing the WTO in 1994 (by consensus) was an important achievement and looks even more impressive nearly three decades later. One of the many improvements made in global trade law was overcoming barriers to cross-border labour services. Note that ceasing protectionism for trade of goods and services does not mean that governments are committing to allow unfettered transborder movements of capital/money, labour, technology or data.

[20] S Charnovitz, 'The Influence of International Labour Standards on the World Trading System' (1987) 126 *International Labour Review* 565.

[21] Report of the World Economic Conference (1927) 134 *Annals of the American Academy of Political and Social Science* 174, 188.

[22] ILO, Report of the Director, 1926, 496.

[23] A Thomas, *International Social Policy* (Geneva, ILO, 1948) 110–11.

[24] G Edgren, 'Fair labour standards and trade liberalisation' (1979) 118 *International Labour Review* 523, 530–33.

Seemingly, the most direct way of achieving higher labour standards in internationally traded goods and services would be to write a social clause into WTO rules as a condition for world trade. In line with US law at the time,[25] in 1986, I recommended that GATT establish a system of 'international fair labour standards' with compliance to be reviewed by a multilateral organisation 'rather than leave such decisions to the politics of each importing country'.[26] I warned that: 'As the LDCs [less-developed countries] grow more competitive over a wider range of goods, U.S. protectionism is likely to increase unless foreign competition is perceived as fair and unless the potentially injured workers have confidence in their opportunities for retraining and reemployment.'[27] Several years later, as GATT transmogrified into WTO, I recommended that WTO 'develop a set of minimum international labour standards that all Members would undertake to follow in producing for international commerce'.[28] I proposed five standards covering 'forced labour; child labour; freedom of association; toxic substances; and derogations from national law in export processing zones'.[29]

But in 1997, after 20 years of activism on labour-related trade issues, I changed my mind. I gave this explanation:

> The WTO, for three primary reasons, is never going to be a good forum for pursuing the goal of higher labour standards. First, the WTO is a specialised organisation on trade where trade ministers serve as representatives. Second, the WTO is not, and does not purport to be, a champion of worker rights. Third, decision-making in the WTO normally requires a consensus.[30]

Instead, I proposed that if trade controls are needed as part of the regulation of the production of internationally trade goods, then such rulemaking on 'odious' products should be undertaken by ILO.[31]

My views matured as a result of what I saw in WTO and ILO,[32] and what I learned from other scholars. For example, in discussing the 'dilemma' for 'trade theory' with respect to the 'international market in labour policy', Brian Langille observed that the 'resolution of our dilemma must be based in multilateral negotiation, agreement, and enforcement which aims at securing the gains from trade while permitting political negotiation of the proper scope of the market in labour'.[33] I appreciated Langille's concern that: 'The problem with the ILO process is that it lacks direct connection to the trade issue',[34] but I saw no legal bar to making that connection.

[25] US Public Law 93–617, Section 121(a)(4).

[26] S Charnovitz, 'Fair Labor Standards and International Trade (1986) 20 *Journal of World* 61, 76 (February).

[27] ibid 78.

[28] S Charnovitz, 'The World Trade Organization and Social Issues' (1994) 28 *Journal of World Trade* 17 (October).

[29] ibid 31–32.

[30] S Charnovitz, 'Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate' (1997) 11 *Temple International & Comparative Law Journal* 131, 160 (internal references omitted).

[31] ibid 162–63 (internal references omitted).

[32] 'International Trade and Labour Standards: The ILO Director-General Speaks Out' (1996) 135 *International Labour Review* 230.

[33] BA Langille, 'General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade's Destiny)' in J Bhagwati and RE Hudec (eds), *Fair Trade and Harmonization. Legal Analysis* (Cambridge, MIT Press, 1996) 231–66, 247, 260. In retrospect, my participation in the July 1993 authors' workshop for the Fair Trade and Harmonization project sparked my reconsideration of earlier views on the trade-labour linkage.

[34] ibid 260.

Revisiting these issues now, I would add the additional point that any policy assignment to the WTO for worker rights will distract and impede the WTO from accomplishing its primary task which is to promote 'a world where trade flows freely' undergirded by WTO actions for 'a fair, equitable and more open rule-based system ….'[35] Keeping global supply chains open against state-centric protectionism is a job that cannot be accomplished without a well-functioning WTO. For prudential reasons, WTO should stay in its governance lane and rarely, if ever, call for trade restrictions. Rather, the WTO should catalyse open trade to promote both sustainable development and strategic interdependence among polities that share the planet.

Even though other international regimes – for example on climate and on pandemics – suffer normative gaps, the WTO should not try to fill those gaps. Recasting the WTO into a global handyman is a trap that will further hinder its prospects for success. To be sure, a theoretical possibility always exists that by adding in more topics for bargaining, an international organisation can optimise its solution space.[36] Yet no analysis has come to my attention showing how the likelihood of successful WTO trade liberalisation negotiations can be enhanced with worker rights piled onto the negotiating table.

The efforts in 1996 to add worker rights to the WTO's negotiating agenda did not achieve what advocates had hoped for. Instead, at the WTO's 1st Ministerial Conference (Singapore, MC1), WTO member governments declared: 'We renew our commitment to the observance of internationally recognised 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.'[37] Looking ahead, the WTO should continue to stay out of the ILO's way, particularly given how unsuccessful the WTO has been since 1996 in accomplishing its own mission of 'progressive liberalisation'.[38]

Above, this chapter posits the possibility of a trade control authored by ILO. How would such a trade control be administered? Because there are no centrally administered trade controls in the world economy, all trade controls are decentralised to national governments.

A key distinction exists regarding whether a trade control is specifically *required* by an international treaty or whether a trade control is *countenanced* to uphold an international norm. One of the earliest examples of a required control came in the Phosphorus Match Convention of 1906 which directs governments to forbid the manufacture and importation of white phosphorus matches.[39] An example of a countenanced trade control is the Wellington Convention on Driftnets stating that parties 'may take measures' to prohibit the importation of fish caught using a driftnet.[40]

[35] WTO, Singapore Declaration, 1996, para 6.

[36] See RD Tollison and TD Willett, 'An Economic Theory of Mutually Advantageous Issue Linkages in International Negotiations' (1979) 33 *International Organization* 425.

[37] WTO, Singapore Declaration, para 4. See 'Trade and Labour Standards'. Available at: www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm.

[38] See Art XIX of the General Agreement on Trade in Services (GATS).

[39] Art 1 of the International Convention on the Prohibition of the Use of White Phosphorus in the Manufacture of Matches (Berne, 26 September 1906). The Convention sought to prohibit a manufacturing process for matches that was toxic to workers.

[40] Art 3(2) of the Convention for the prohibition of fishing with long driftnets in the South Pacific (Wellington, 24 November 1989).

Note that in the field of labour, most of the existing trade controls operate in furtherance of *national* norms rather than international norms. The most well-known trade control – the US import ban of 1930 on certain goods produced with convict labour, forced labour and indentured labour[41] – was not written to implement future ILO conventions regarding forced labour.[42] Indeed, neither ILO Convention No 29 of 1930 nor ILO Convention No 105 of 1957 requires or countenances trade controls.[43]

Although the WTO should not set rules for fundamental labour standards, it could set rules encouraging government interventions to promote readjustment and retraining of workers who could lose their jobs due to trade.[44] In 1995, I called for the WTO to establish a Committee on Trade and Employment. I noted that 'the GATT has arguably dehumanised trade policy, and paid more attention to the needs of multinational corporations than of workers'.[45] My essay sought to build on the GATT's Preamble which states that parties recognise that 'relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand ….' A decade later, I proposed a WTO Decision on Trade and Employment with nine specific action items to achieve greater equity.[46] In the intervening 16 years, the WTO is still not seen as caring about and remediating dislocations caused by trade.

IV. Improve WTO Effectiveness

The most constructive action WTO can take to promote social justice is to lower nationalistic trade barriers so that workers of the world can produce goods and services not only for domestic consumption, but also for export. As a team of economists recently reminded us: 'The fallacy that protectionism is the answer in combating poverty, inequality, and socioeconomic marginalisation is toxic and must be actively countered.'[47] In its 2001 launch of the Doha Development Agenda, the WTO sought to reduce protectionism. In 2015, the UN's Agenda for Sustainable Development (2015) called 'upon all members of the World Trade Organization to redouble their efforts to promptly conclude the negotiations on the Doha Development Agenda'.[48] Unfortunately, Doha apathy in several countries (especially the US)

[41] 19 USC § 1307.

[42] A US import ban on goods produced with convict labour had been in US law since 1890 and thus the 1930 legislation was not new policy. In 1930, the US was not yet a member of the ILO, so was not contemplating a ratification of what would become ILO Convention No 29. Indeed, the US has still not ratified it.

[43] A State ratifying an ILO Convention takes on duties for its own performance, not the performance of its trading partners.

[44] Worker job loss from competition with machines is not within WTO's jurisdiction. Of course, the social effects of automation are within the ILO's jurisdiction.

[45] S Charnovitz, 'Strengthening the International Employment Regime' (1995) 30 *Intereconomics* 221, 223. This essay advocates adjustment assistance to dislocated workers, in contrast to compensating those workers.

[46] S Charnovitz 'The (Neglected) Employment Dimension of the World Trade Organization' in VA Leary and D Warner (eds) *Social Issues, Globalisation and International Institutions* (Leiden, Martinus Nijhoff Publishers, 2006) 125–55, 144–46.

[47] JN Bhagwati, P Krisna and FL Rivera-Batiz, 'Protectionist Myths' in C Erbil and FL Rivera-Batiz (eds) *Encyclopedia of International Economics and Global Trade: International Trade and Commercial Policies* (Singapore, World Scientific Publishers, 2020) 33–56, 52.

[48] UN/A/RES/70/1 (2015), para 65.

led to an abandonment of that modest trade round.[49] Still, the WTO continues patchwork efforts to reduce barriers to trade in both goods and services.

Because WTO legislative decision-making generally requires consensus, the WTO cannot move faster than the most dilatory government. Since 2001, the WTO has produced a few new legal agreements, such as the Trade Facilitation Agreement of 2013, but, on the whole, the WTO's productivity pales next to that of the ILO which, since 2001, has legislated seven new conventions and two protocols. Many multilateral environmental regimes have also been more productive than the WTO over the past 20 years.

With little prospect of restoring lawmaking in the WTO, governments and private actors have turned to workarounds. Because of the difficulty of achieving consensus among 164 WTO member governments, many commentators propose legislating in smaller coalitions. Although the term 'plurilateral' is sometimes used to describe such initiatives, that term is inaccurate with respect to the WTO because, in WTO law, to establish a new plurilateral agreement still requires the consensus of all WTO governments, even though each government retains the option to sign on.[50] So, a better term for deals among a subset of WTO countries would be 'Minilateral' or Codes.

Although consensus decision-making worked in the GATT between 1947–1964, during the Kennedy Trade Round, GATT governments began pursuing agreements through ad hoc coalitions of governments. This technique worked to produce GATT Codes/Agreements in 1967, but those acts were not widely ratified. The GATT had more success in the Tokyo Round when its non-multilateral Codes/Agreements did come into force for subscribing countries in 1979.

While the WTO Agreement emphasises 'multilateral trade relations',[51] in practice, the WTO has always had a non-multilateral track. In the early years of the WTO, an innovative legal technique arose to formalise bargains among a subset of WTO countries. That occurred in the 1996 Telecommunications Reference Paper, which contains commitments that WTO governments can subscribe to under the WTO General Agreement on Trade in Services (GATS). Some of the Reference Paper commitments go beyond trade: for example, the Reference Paper calls for 'objective, timely, transparent and non-discriminatory' regulation of scarce electromagnetic resources.[52] In December 2021, the WTO re-employed the Reference Paper approach to discipline domestic regulation of services.[53]

The Reference Paper technique for bargaining could be used to formalise joint national commitments on any issue of trade in services, and this method could be put to use beyond services. Under GATT, governments schedule 'concessions'[54] on tariffs. Yet concessions could also be scheduled for Reference-Paper-style regulatory commitments on goods.

The challenge of making use of Minilateral/Code arrangements is that while one can easily imagine how like-minded governments might want to agree among themselves to WTO-plus commitments that add obligations not contained in WTO law, the core WTO

[49] Proposals for deeper economic integration were never seriously considered by the WTO.
[50] Art X:9 of the WTO Agreement.
[51] ibid, art III:2 of the WTO Agreement.
[52] Available at: www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.
[53] WTO, Joint Initiative on Services Domestic Regulation. Available at: docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1129.pdf&Open=True.
[54] Art II of GATT.

non-discrimination rule would prevent a Minilateral arrangement from giving less favourable treatment to countries that chose not to join. What this means is that Minilateral deals cannot reduce substantive WTO law requirements. So, the potential policy space provided by Minilateral agreements is constrained. Nevertheless, if there is a critical mass of like-minded countries, they may still see a benefit in achieving a Minilateral agreement to govern their mutual trade relations.[55]

Besides the possibility of Minilaterals, there are several other ways that social or environmental factors in the market could be made relevant inside the WTO. First, governments could use the World Customs Organization (WCO) to rewrite the harmonised tariff system to differentiate products based on their method of production which could include environmental and labour practices. Second, international standardising bodies could promote new international standards for products that incorporate ecological and human rights concerns.[56] Then, under WTO rules, national technical regulations that are in accord with such standards would be 'rebuttably presumed' under WTO law not to create an unnecessary obstacle to trade.[57] Third, governments could negotiate an 'intergovernmental commodity agreement' including process-related conditions. Pursuant to WTO rules, when a government undertakes obligations under such a sectoral agreement, that action can qualify under GATT's 'General Exceptions'.[58] Many decades ago, a few international commodity agreements contained commitments for 'fair labour standards'.[59] For any of these three approaches – WCO, international standard-setting, and commodity agreements – producer practices could be tracked using blockchain or geotagging technology.

Another modality of improving national trade policy without relying on the WTO is through regional trade agreements. In future negotiations, such agreements can address numerous economic issues regarding goods, services, data, investment, cryptocurrency, technology, and the movement of people. Regional agreements can also promote harmonisation on public health, environmental, and labour policies even when such harmonisation might not be achievable or even needed in multilateral fora.[60]

Although any regional trade agreement inherently conflicts with WTO's non-discrimination norms, WTO rules contain an exception for economic integration agreements that meet specific GATT and GATS requirements.[61] In addition, GATS permits 'Labour Markets Integration Agreements'.[62] Although that policy space has apparently not yet been used, this provision presents a pathway to promote social justice in labour market integration.

[55] To be sure, a political realist can imagine a Minilateral arrangement that discriminates against non-members notwithstanding fundamental WTO rules against trade discrimination. In other words, governments can just ignore WTO rules, as the US regularly does.

[56] Y Naiki, 'Meta-Regulation of Private Standards: The Role of Regional and International Organizations in Comparison with the WTO' (2021) 20 *World Trade Review* 1, 24.

[57] Arts 2.4–2.5 of the WTO Agreement on Technical Barriers to Trade (TBT).

[58] Art XX(h) of GATT.

[59] U Kullman, '"Fair Labour Standards" in International Commodity Agreements' (1980) 14 *Journal of World Trade Law* 527.

[60] See C Scherrer, 'Novel Labour-related Clauses in a Trade Agreement: From NAFTA to USMCA' (2020) 11 *Global Law Journal* 291.

[61] See Art XXIV of GATT; Art V of GATS.

[62] Art V bis of GATS.

The WTO can also promote social justice by revising the WTO rules that have proven dysfunctional in the first 25 years of the WTO. One problem is that WTO rules make illegal any national subsidy that causes adverse effects on other countries even if the subsidy is designed to correct a market failure or supply a public good.[63] To be sure, WTO anti-subsidy rules do not seem to be restraining governments from providing hundreds of billions of dollars in state aid to domestic commercial enterprises and industries. Nevertheless, if governments engage in conduct that WTO law prohibits, this contradiction will undermine respect for world trade law.

Continued respect for the WTO is also far from assured because progress depends on the cooperation of every member government including the problematic governments of Russia, China and the US. One scenario is that the WTO would be replaced by a new organisation using the same legal legerdemain that allowed major economies in 1994 to switch out the WTO for the GATT. The WTO's replacement could be called the Allied Trade Organization (ATO). That ATO could be based on principles entirely opposite from those of the WTO. The new principles might be: (1) omitting the WTO's law-centric focus; (2) rejecting the MFN non-discrimination principle and replacing it with discrimination for favoured nations who share certain volitions or values; (3) excluding unpopular countries (eg Russia) from ATO membership; (4) revising decision-making from consensus to control by major economies; (5) replacing the norms of trade liberalisation and market openness with the norms of protection and nonmarket industrial policy; and (6) reframing the ATO to assist governments achieve joint public law aims (like slowing climate change) rather than to supervise nationalist trade measures.

V. Conclusion

Over the past four decades, my scholarship has been predicated on a duty of optimism. This chapter makes several recommendations for how the WTO and its member governments could promote social justice and greater inclusivity in the trading system. The most important action is to restart and consummate the long-delayed Doha Development round. Such negotiations could include legal reforms in WTO law and new Minilaterals of like-minded governments that supplement the WTO.

In moving forward, policymakers can draw inspiration from the speeches given at the ground-breaking for the building in Geneva that now houses the WTO and that was originally built for the ILO. At that October 1923 celebration, the speakers included many luminaries from the League of Nations and ILO. A building commemoration booklet[64] published by the ILO notes that among the attendees were the delegates of the League Conference on Customs Formalities.

In closing, my chapter recalls the ceremonies address by Léon Jouhaux, who was a key negotiator in 1919 for what later became known as the ILO's constitution.[65] Jouhaux

[63] WTO Agreement on Subsidies and Countervailing Measures (SCM), art 5. Note that government expenditures for the public goods of 'general infrastructure' are exempt from the definition of a subsidy. ibid, art 1.1(iii).

[64] *Laying of the Foundation Stone. Speeches Made at the Ceremony on 21 October 1923* (Geneva, ILO, 1923).

[65] Jouhaux served as a leading worker representative on the ILO Governing Body from 1919 until his death in 1954. He won the Nobel Peace Prize in 1951.

refers to the building under construction as the 'House of Endeavour – endeavour to achieve Justice, Liberty, Right and all the best of which Humanity is capable'.[66] In 2022, the GATT/WTO has endeavoured on world trade in its headquarters for decades longer than the ILO did its endeavouring in that building. Looking to the future, the WTO's quest for 'freer mutually beneficial trade through exchange of market access' should be pursued by seeking the best for humanity through social justice, human freedom, and upholding natural law rights of workers, businesses, and consumers in the global economy.[67]

[66] *Laying of the Foundation Stone* 18–19.

[67] B Langille, 'The Political Economy of Decency' in GP Politakis, Tomi Kohiyama and Thomas Lieby (eds) *ILO 100 Law for Social Justice* (Geneva, ILO, 2019) 503–29, 521. See also WTO Preamble (referencing the 'field of trade and economic endeavour'.

Social Justice and the World of Work

Possible Global Futures

Essays in Honour of Francis Maupain

Edited by
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