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TRADE INTERESTS AND EXTRATERRITORIAL VALUE CONSIDERATIONS IN NEW-GENERATION FREE TRADE AGREEMENTS: THE PSYCHOLOGY OF REDIRECTION

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"Unde dai si unde crapă" ("Where you give and where you crack.") Romanian proverb[1]

I. INTRODUCTION

The historical development of trade has been molded around the goals of how best to trade and how to deal with non-trade issues related to or resulting from trade.[2] Bilateral Investment Treaties ("BITs"), since the Germany-Pakistan BIT of 1959,[3] guarantee the free movement of capital[4] and set out property protection standards, otherwise regulated under human rights laws.[5] The Marrakesh Agreement[6] and the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement made the protection of intellectual property rights a condition of membership in the world trade club.[7]

Building off those critical agreements, the past few decades have seen the emergence of new species of non-trade standards gaining ground in international trade.[8] Most new generation free trade agreements ("FTAs") contain provisions that are allegedly not related to trade, even though all of them are extremely relevant to trade.[9] Examples of some of the most

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[1] Mihai Adrian Hotca, *Unde Dai Si Unde Crapă (Efectul Fluturelui), MIHAI ADRIAN HOTCA, LAWYER PERSONAL BLOG* (Apr. 4, 2019), http://htcp.eu/unde-dai-si-unde-crapa-efectul-fluturelui/.

[2] Luke Eric Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law Within Investor-State Arbitration,* RIGHTS & DEMOCRACY 9 (2009).

[3] *See* Germany-Pakistan Bilateral Investment Treaty of 1959.

[4] Such as the freedom of investment, national treatment of foreign capital and the right to repatriate the proceeds.

[5] Peterson, *supra* note 2, at 12-13.

[6] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [*hereinafter* Marrakesh Agreement or WTO Agreement], https://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm (last visited Feb. 11, 2020) (This agreement established the World Trade Organization).

[7] *Overview: The TRIPS Agreement*, WTO, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Feb. 11, 2020).

[8] *See e.g.* Arthur E. Appleton, *Telecommunications Trade: Reach Out and Touch Someone Symposium on Linkage as Phenomenon: An Interdisciplinary Approach,* 19 THE U. OF PA. J. OF INT'L L. 209 (1998); *see also* José E. Alvarez, *Symposium: The Boundaries of the WTO,* 96 THE AM. J. OF INT'L L. 1 (2002).

[9] Blayne Haggart, *Modern Free Trade Agreements Are Not About Free Trade*, CIGI (Apr. 11, 2017), https://www.cigionline.org/articles/modern-free-trade-agreements-are-not-about-free-trade.

notable provisions are those imposing environmental and labor standards.[10] A common feature of such provisions is that they are fueled by regulatory competition concerns and rather than protecting foreign investors, burden domestic firms.[11] Contrary to BITs, which oblige the host country to protect foreign investments, these provisions require domestic producers to protect their workers and the environment,[12] and to respect certain 'minimum' standards on their own territory.[13] In other words, while most states establish standards to protect the smooth flow of goods or services irrespective of regulatory discrepancies and foreign monetary interests, value standards are extraterritorial.[14] These standards require states to observe certain requirements that normally have no impact on the product itself and to enforce them against domestic producers.[15]

It is noteworthy that the clash between trade and ostensibly non-trade values has a long history and appears to be an inevitable element in all trade regimes. The General Agreement on Tariffs and Trade ("GATT") '47's predecessor, the Havana Charter, referred to labor standards in the context of world trade in Article 7(1).[16] The debate about trade and its environmental effects earned formal recognition in 1971 when the GATT Council of Representatives set up the Group on Environmental Measures and International Trade which, since 1995, has subsisted as the World Trade Organization ("WTO") Committee on Trade and Environment.[17] The first recital of the Marrakesh Agreement's preamble recognized that trade cooperation efforts shall allow, ". . . for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[18] The genesis of the European Union ("EU") principle of equal treatment between men and women demonstrates the subject's two-faced nature.[19] The principle was inserted into the European Economic Community ("EEC") Treaty due to France's fear that its enterprises would suffer a competitive disadvantage, if other Member States allowed women to be paid less.[20] In the World Trade

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[10] James Harrison et al., *Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters,* 57 J. OF COMMON MKT. STUD. 260, 261 (2019).

[11] *Id.*

[12] Gary Burtless, *Worker's Rights: Labor Standards and Global Trade*, BROOKINGS (Sept. 1, 2001), https://www.brookings.edu/articles/workers-rights-labor-standards-and-global-trade/.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See* U.N. Conference on Trade and Employment, *Havana Charter for an International Trade Organization, including Annexes*, U.N. Doc. E/ Conf. 2/78 (1948).

[17] *Marrakesh Declaration of 15 April 1994*, WTO, https://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm (last visited Feb. 11, 2020) (The Committee set up by the Ministerial Decision on Trade and Environment was adopted in Marrakesh on April 15, 1994).

[18] *Decision on Trade and Environment*, WTO, https://www.wto.org/english/docs_e/legal_e/56-dtenv_e.htm (last visited Feb. 11, 2020).

[19] The Treaty of Rome of 1957, art. 119 EC Treaty art. 141 (as in effect 1997) (now TFEU art. 157).

[20] European Commission, *Questions and Answers: What the EU has done for women? 50 years of EU action*, EC EUROPA (Mar. 7, 2013), http://europa.eu/rapid/press-release_MEMO-14-156_en.htm ("The Treaty of Rome in 1957 already included the principle of equal pay for equal work. (Article 119 EEC, then 141 EC, now Article 157 TFEU). The background to this provision was mainly economic: Member States and in particular France wanted to eliminate distortion of competition between businesses established in different Member States. As

Organization, labor standards, among other non-trade issues, have been a concern since its inception.[21] An attempt to bring labor standards under the auspices of the WTO, even though in alignment with the organization's "commitment to the observance of internationally recognized core labor standards", was rejected in 1996.[22]

The tension between trade and non-trade values came to the fore in the context of new generation FTAs, which proudly included minimum standards on environmental protection[23] and labor rights.[24] Not surprisingly, these values have become one of the major issues of world trade.[25] While normative values at first glance may not appear to be of trade-relevance, and there is no global endeavor to create a global regime for these universal values, states realize compliance with such standards has enormous cost implications.[26] There has been a perception that higher local standards put domestic producers at a competitive disadvantage and stimulate the relocation of production plants to low-standards countries, which are at same time also low-wage countries.[27] Although this may not seem to be different from a traditional regulatory competition or race to the bottom problem, these value standards have a special status; states are disinclined to lower their standards and may easily vesture their economic considerations with normative claims[28] which may corroborate the designation of the low-standard country's comparative advantage as "unfair".[29]

The notion of linking trade and ostensibly non-trade values leads us back to an old question of social theory, do value-standards shape commercial policy or do commercial interests determine which values are protected? At first glance, commercial policies appear to be purely value-driven and suggest that trade is not only about economic interests. However, a closer look reveals that commercial policies are profoundly influenced by such economic

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some EU countries (for example France) had adopted national provisions on equal pay for men and women much earlier, these countries were afraid that a cheap female workforce in other countries (for example from Germany) could put national businesses and the economy at a competitive disadvantage owing to lower labor costs.").

[21] World Trade Organization, Singapore Ministerial Declaration of 13 December 1996, WTO Doc. WT/MIN(96)/DEC, 36 ILM 218, 220 (1996).

[22] *Id.* ("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.").

[23] *See* European Parliament, Resolution of 25 November 2010 on Human Rights and Social and Environmental Standards in International Trade Agreements (2009/2219(INI)), CE 99/31 OFF. J. OF THE EU 15(a) (Mar. 4, 2012), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010IP0434.

[24] *See* Phillip Alston, *'Core Labour Standards' and the Transformation of the International Labour Rights Regime*, 15 EUR. J. OF INT'L L. 457, 498, 500, 505 (2004).

[25] Kimberly Ann Elliott, *Labor Standards and the Free Trade Area of the Americas*, 2, 5, 7, 20 (Int'l Inst. of Econ., Working Paper No. 03-7, 2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=444900.

[26] *Id.*

[27] Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT,* 191 MINN. J. OF INT'L L 62, 64, 70, 91 (2001).

[28] *See* Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J. INT'L ECON. L. 43, 50 (2000).

[29] *See* José Manuel Salazar-Xirinachs & Jorge Mario Martínez-Piva, *Trade, Labour Standards and Global Governance: A Perspective from the Americas*, *in* INT'L ECON. GOVERNANCE AND NON-ECON. CONCERNS: NEW CHALLENGES FOR THE INT'L LEGAL ORDER 316, 327-28 (Stefan Griller ed., 2003).

considerations.[30] It is no exaggeration to see this "chicken or egg" dilemma as reflecting a more general question of social theory, does the economy determine culture[31] or may culture exert an independent causal effect on the economy?[32] The antagonism between international trade policy and value standards is none an easier issue.

This paper analyzes the phenomenon of environmental and labor standards in world trade, their place in WTO law, their remarkable emergence in new generation FTAs, and explores whether the insistence of developed countries on their protection has been driven by the moral desire to protect fundamental values or whether value-standards are the products of selfish trade interests.

First, it examines member states' possibility under WTO law to erect extraterritorial value considerations against their trading partners and unilaterally restrict trade with reference to such considerations. As a matter of principle it argues that such extraterritorial value-considerations may be accommodated in Article XX GATT and Article XIV GATS.

Second, it gives a short account of the approach of new generation FTAs, the emerging "folklore", and showcases how non-trade values are becoming an integral part of trade. It argues that FTAs, including their regimes on environmental and labor issues fused into the concept of sustainability, have the perspective for the same carrier path as BITs. Although international investment protection has always remained predominantly bilateral, with a few exceptions, since its appearance in 1959[33] these bilateral strands resulted in a taut fabric that is often treated as a multilateral scheme.

Third, it presents the two traditional explanations on the relationship and interaction between values and economic interests.

Fourth, it concludes that while the debate on core labor rights and environmental protection is fueled by "selfish economic interests", it is undeniable that these are genuine global values. Extraterritorial value considerations emerge under circumstances where regulatory competitive pressure is perceived to be exceptionally high, and the standard is regarded as non-negotiable by the local electorate.[34] Although environmental and labor standards are both trade or value-driven, they are a redirection activity.[35]

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[30] *Id.*, at 315, 318-19, 321, 326-27.

[31] *See* Friedrich Engels, SOCIALISM: UTOPIAN AND SCIENTIFIC, REVUE SOCIALISTE Ch. 3 Para. 40 (1880), https://www.marxists.org/archive/marx/works/download/Engels_Socialism_Utopian_and_Scientific.pdf; *see also* Karl Marx & Friedrich Engels, THE GERMAN IDEOLOGY (First Published in 1932) (Progress Publishers, 1968), https://www.marxists.org/archive/marx/works/download/Marx_The_German_Ideology.pdf; *see also* Karl Marx & Friedrich Engels, THE COMMUNIST MANIFESTO (First Published in 1848) (Progress Publishers, 1969), https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf ("[T]he final causes of all social changes and political revolutions are to be sought, not in men's brains, not in man's insight into internal truth and justice (…) but in the economics of each particular epoch.").

[32] Max Weber, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Unwin Hyman, London & Boston, 1930).

[33] Andrew Paul Newcombe & Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 42 (Kluwer Law International, 2009).

[34] *See* Olivier de Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, BUS. & HUMAN RIGHTS RESOURCE CENTRE (Dec. 1, 2006), https://www.business-humanrights.org/sites/default/files/reports-and-materials/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf.

[35] *Id*.

While developed countries may convincingly argue that lower standards may entail an unfair competitive advantage, which may be substantial in certain industries, the effects are rather insignificant.[36] The emergence of sustainability chapters in FTAs is ascribable to the strange marriage between universal altruistic values and selfish trade interests. It brings about a redirection activity which channels the fears against free trade into the debate on value standards.[37] Environmental and labor standards' overall impact on international trade and national competitiveness is slight, even if it may be substantial in certain industries.[38] This implies that high-standard countries do not gain and low-standard countries do not lose too much with these rules. The debate and the reaction on environmental and labor standards displaces a real but invariable cost-advantage circumstance with a changeable and relatively insignificant one to dampen the political resistance against free trade.

II. CAN EXTRATERRITORIAL VALUE CONSIDERATIONS BE USED UNILATERALLY TO DEROGATE FROM WTO LAW?

Although the WTO neither regulates, nor enforces labor standards, its antecedent, the Havana Charter did provide for the maintenance of fair labor standards by establishing in Article 7(1) that "all countries have a common interest in the achievement and maintenance of fair labor standards."[39] While GATT '47 has provisions similar to the Havana Charter, references to labor standards and workers' rights were excluded.[40] Nonetheless, WTO law arguably provides member states the power to unilaterally restrict trade with reference to extraterritorial value considerations such as core labor standards and environmental protections.

Under WTO law, states may restrict trade with reference both to the product's characteristics (product-based restrictions) and the process used to produce the goods (process-based restrictions).[41] Although the relevant cases emerged in the context of animal life protection,[42] they can be extrapolated to other values. This case-law opens the door to the extra-territorial assertion of local values and the enforcement of these values upon exporting states.[43]

WTO law under GATT '47 encompassed extraterritorial value considerations from the beginning. Article XX of GATT '47, in a narrow scope, allowed states to enforce expectations against their trading partners to comply with certain standards on their own territory and to derogate from their obligations if these extraterritorial expectations were not

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[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *See* U.N. Conference on Trade and Employment, *supra* note 16.

[40] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [*hereinafter* GATT '47] (The preamble of GATT '47 merely refers to "raising standards of living, ensuring full employment and a large and steadily growing volume of real income").

[41] Robert Howse & Donald Regan, *The Product/Process Distinction-An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy,* 11 EURO. J. OF INT'L L. 249, 279 (2000) (arguing that process-based measures may not only be justified under Article XX GATT but may also be in conformity with other GATT provisions, such as National Treatment embedded in Article III.).

[42] Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

[43] *See* Renee Chartres & Bryan Mercurio, *A Call for an Agreement on Trade-Related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards*, 37 N.C. J. OF INT'L L. AND COM. REG. 665, 708-21 (2012) (discussing how core labor standards could be accommodated in Article XX GATT).

met.[44] Article XX(e) authorized states to ignore the provisions of the GATT in order to adopt measures "relating to the products of prison labor".[45] However, this is considered a specific and narrow exception because for decades there was no endeavor to extrapolate this approach to other values.[46]

Tuna/Dolphin was the first controversy to address this issue.[47] According to the panel's report, never been adopted by the GATT Council, the United States' importation ban on tuna from countries that did not ensure dolphin safety during tuna-fishing was not justified under Article XX of GATT for jurisdictional reasons.[48] The Panel held that:

> *5.31 (...) A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction. This suggests that Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction.*
> *5.32 (...) The Panel considered that if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The considerations that led the Panel to reject an extrajurisdictional application of Article XX(b) therefore apply also to Article XX(g).*[49]

While the panel seemed clear in following the principle of territoriality, a few years later the case-law was reversed in *Shrimp/Turtle* where the fact pattern was very similar to *Tuna/Dolphin's* in that the harvest of shrimp resulted in the incidental killing of turtles and the United States banned the importation of shrimp products from countries whose standards did not protect turtles. [50] The Appellate Body held that Member States may restrict trade on account of the production product itself instead of the product's characteristics.[51] The Appellate Body overturned the panel's territorial approach and confirmed that extraterritorial considerations are not *a priori* excluded from the scope of Article XX of GATT.[52]

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[44] *See* GATT '47, *supra* note 40, at art. XX.

[45] *Id.* at art. XX(e); *see also* Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 126 INT'L LAB. REV. 565, 569-70 (1987) ("Competition resulting from goods made by prison labour was one of the earliest issues of unfair trade. At least eight countries have restricted such international trade. The first legislation came in 1890 when the United States banned imports of all foreign goods, wares, articles and merchandise manufactured by 'convict' labour. In 1930 the law was broadened to forbid imports made by 'forced labour' or 'indentured labour under penal sanctions.'").

[46] *See* Charnovitz, *supra* note 45, at 570-71.

[47] Panel Report, *United States Restrictions on Imports of Tuna*, WTO Doc. DS21/R-39S/155 (adopted Sep. 3, 1991).

[48] *Id.*

[49] *Id.* at ¶ 5.31-5.32.

[50] *See* Panel Report, *supra* note 42, at ¶ 1.

[51] *Id.* at ¶ 2.

[52] *Id.* at ¶ 3.

> *121. (...) The Panel, in effect, constructed an a priori test that purports to define a category of measures which, ratione materiae, fall outside the justifying protection of Article XX's chapeau. In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. 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. (...) 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.*[53]

In terms of the holding, it is difficult to draw far-reaching conclusions. The Appellate Body seems to have avoided ruling on whether purely extraterritorial considerations could be accommodated in Article XX of GATT by establishing a remote territorial link between turtles located in foreign waters and the US. Since turtles are highly migratory, the United States may reasonably claim territorial jurisdiction over fishing practices in foreign waters due to the possible detrimental effect on its own waters.[54] For the Appellate Body, this circumstance established a sufficient nexus to avoid the question of jurisdictional limitation:

> *133. Finally, we observe that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas. (...) The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat -- the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case*

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[53] *Id.* at ¶ 164 ("it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.").

[54] BARBARA COOREMAN, GLOBAL ENVIRONMENTAL PROTECTION THROUGH TRADE: A SYSTEMATIC APPROACH TO EXTRATERRITORIALITY (Elgar Publishing, Inc., ed., 2017).

> *before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).* [55]

The issue of extraterritorial considerations could have been revisited in *Seal products*,[56] which arguably centered on a process-based restriction. The EU, with a few exceptions, prohibited seal products on the European market.[57] The Commission justified the measure with reference to moral considerations[58] that emerged from the "the animal welfare aspects of the killing and skinning of seals and about trade occurring in products possibly derived from seals that have been killed and skinned with avoidable pain, distress and other forms of suffering."[59] The European measures aimed to "protect seals from acts that *cause them avoidable pain, distress, fear and other forms of suffering* during the killing and skinning process," and "[a]ddress the concerns of the general public with regard to the killing and skinning of seals."[60] The measures clearly invoked the relevance of Article XX of GATT's jurisdictional aspects because the measures codified EU citizens' and consumers' concerns regarding the effect of hunting activity on seal welfare that occurred outside the EU. However, the parties did not address this issue within their submissions and the Appellate Body refused to confront it:

> Accordingly, while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation, (…) [the AB] decided in this case not to examine this question further.[61]

Without ignoring the complexity of the case-law, it appears that an Article XX of GATT and, by analogy, an Article XIV of GATS analysis may accommodate extraterritorial value considerations. The *obiter dicta* in *Shrimp/Turtle*, as well as the Appellate Body's consideration of the unraised jurisdictional arguments in *Seal products*, suggest that this provision is not fully devoid of extraterritorial considerations.

The Appellate Body's cautiousness may suggest that this is a highly delicate issue. On the one hand, states' regulatory autonomy needs to be recognized so as to preserve the legitimacy of the global trading system. A scheme indifferent to local values, such as one that does not allow the EU to eliminate demand for products that entail the inhuman treatment of seals, may easily loose its legitimacy. On the other hand, the omission of Article XX's territorial limits would open the way for states to enforce their domestic policies on their contracting

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[55] Panel Report, *supra* note 42, at ¶ 133.

[56] Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.50, WTO Doc. WT/DS400/AB/R (adopted Nov. 23, 2013).

[57] *Id.* at ¶ 7.51.

[58] GATT '47, *supra* note 40, at art. 20(a) [hereinafter GATT XX(a)].

[59] Appellate Body Report, *supra* note 56, at ¶ 7.395 (*citing* European Commission, *Proposal For A Regulation of the European Parliament and the Council Concerning Trade in Seal Products*, COM 2008, 469 final (Jul. 23, 2008), at 2).

[60] Appellate Body Report, *supra* note 56, at ¶ 7.394 (*citing Impact Statement On The Potential Of A Ban Of Products Derived From Seal Species*, COM 2008, 496 final (Jul. 23, 2008), at 23) (emphasis added).

[61] Appellate Body Report, *supra* note 56, at ¶ 5.173.

partners and open the door to protectionism veiled by moral considerations. This goes against the basic idea of the global trading system.[62]

Article XX(e) of GATT allows states to restrict trade in relation to "the products of prison labor."[63] While this provision refers to a specific labor standard, there is a teleological and historical argument warranting its application to labor standards in general. When GATT '47 was drafted, coerced labor was the only universally prohibited labor law violation.[64] Thus, Article XX's purpose and the parties' intentions arguably demand the accommodation of recently-evolved labor standard considerations. Article 19.6 of the Trans-Pacific Partnership ("TPP"),[65] which obliges the parties to restrict the importation of products that are the result of "forced or compulsory labour, including forced or compulsory child labour," underpins this interpretation.[66] This process-based restriction extends prison labor to the various forms of forced or compulsory labour and child labor, which is assumed to be compulsory given that the worker is an infant.[67]

While Article XX(e) does not permit an extension for textual reasons, public morals referred to in Article XX(a) are sufficiently vague to accommodate.[68] This construction is in line with Article 31 of the 1969 Vienna Convention on the Law of Treaties, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[69] Given that the purport of Article XX(a) cannot be established on the basis of the "ordinary meaning" of the words, as the elusive term of "public morals" is undefinable, context, object and purpose must be considered. This may reasonably lead to the conclusion that the drafters of GATT envisaged carving out an exception for core labor standards or even human rights in general.

The approach of allowing states to erect extraterritorial expectations, and especially the accommodation of labor standards in Article XX of GATT, attracted a good deal of criticism given the potential immense repercussions of this doctrine's excessive use:

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[62] *Id.* at ¶ 7.610.

[63] GATT '47, *supra* note 40, at art. 20(e) [*hereinafter* GATT XX(e)].

[64] Chartres & Mercurio, *supra* note 43, at 696 ("Considering that the GATT was drafted in 1947 when coerced labor was the only widely prohibited international human rights norm, it is not a stretch to interpret the inclusion of Article XX(e) as an indication of the original drafters' awareness of the need to create an exception for the prevailing human rights norms of the period when assessing compliance with the GATT. Such an interpretation provides credence to the view that the GATT should be read in such a way that it is compatible with contemporary human rights norms.").

[65] After the US withdrew from the TPP, the remaining members concluded the agreement. Technically, this was implemented through the conclusion of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), which, in turn, incorporated the TPP by reference (Article 1 CPTPP), with the exception of some provisions, whose entry into force was suspended (Article 2 CPTPP). *See* Trans-Pacific Partnership Agreement, art. 19.6, Feb. 4, 2016, https://ustr.gov/sites/default/files/TPP-Final-Text-Labour.pdf [*hereinafter* TPP] (last visited Feb. 13, 2020); *see* also Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 1-2, Mar. 2018, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/#CPTPP [*hereinafter* CPTPP] (last visited Feb. 13, 2020).

[66] TPP, *supra* note 65, at art. 19.6 ("[E]ach Party shall also discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour.").

[67] *See id.*, at art. 19.6 n.10.

[68] *See* GATT XX(e), *supra* note 63; *see also* GATT XX(a), *supra* note 58.

[69] Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

> [I]f we were to allow member countries an automatic right to exclude products on (…) grounds [of process and production methods], especially moral grounds, that would be opening a real Pandora's Box. Moreover, the weaker states would be at a disadvantage because they could not realistically invoke trade sanctions or use them to advantage the way the powerful nations could, so that the white man's burden would be de facto combined with the GATT sanctions version of gunboat diplomacy.[70]

Although the imminent dangers of allowing extraterritorial considerations into Article XX of GATT are obvious, the legitimacy of the notion cannot be denied because Article XX(e) of GATT expressly refers to an extraterritorial consideration, such as prison labor.[71] Hence, the question is rather the breadth and depth of the exception.

The first question would be, whether territorial and extraterritorial considerations should be treated alike. An affirmative answer would certainly stifle the trading system. Most likely, if states were permitted to project all their moral considerations on their trading partners that would imply that they could embargo any foreign product for virtually any conceivable reason. For instance, a state could ban the importation of goods produced on Saturday or Sunday, because it may consider working on Saturday or Sunday as immoral. This demonstrates that the circle of extraterritorial considerations should be significantly narrower.

The cluster of value considerations may be delimited in two ways. First, extraterritorial value considerations, acceptable in the context of Article XX of GATT, may be identified with jus cogens.[72] Apart from the fact that this would conceive the extraterritorial reach of these considerations very narrowly, it would not be reconcilable with the *obiter dicta* in *Shrimp/Turtle*; the protection of turtle life is obviously not part of international jus cogens, which traditionally covers norms like prohibition of aggressive war, crimes against humanity, war crimes, piracy, genocide, apartheid, slavery and torture.[73] Due to the human rights roots,[74] it is tempting to argue that core labor standards are part of jus cogens. However, only two core labor rights, forced and child labor, may be considered peremptory international norms if they are equated with slave or slave-type work.[75] Alternatively, collective bargaining, trade unions and discrimination in general may be devoid of this capacity.

Second, the extraterritorial application of Article XX may be limited to value considerations that are universally recognized, such as human rights, core labor standards, environmental protection, child protection and protection of cultural heritage.[76] This cluster

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[70] Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126, 133 (2002).

[71] *See id.*; *see also* GATT XX(e), *supra* note 63.

[72] *See* Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT'L & COMP. L. 609, 612 (1977).

[73] *See id.* at 610-11; *see also* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes,* 59 L. & CONTEMP. PROBS. 63, 68 (1996).

[74] *See generally* Bal, *supra* note 27 (provides a detailed argument that human rights considerations may be accommodated in Article XX of GATT).

[75] *See* Federico Lenzerini, *International Trade and Child Labour Standards*, *in* ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 308 (Francesco. Francioni ed., 2001); *see also* Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. OF INT'L L. 361, 365-66 (1995) (Asserting that "slavery, forced or compulsory labor, and the employment of underage children are transgressions of customary international law.").

[76] *See* Bal, *supra* note 74, at 105.

contains values that are generally accepted by the international community, but might not be universally binding on all its members.[77]

Collective bargaining, trade unions and discrimination at the workplace may be regarded as genuine and globally recognized universal values, given their human rights roots.[78] Article 4 of Universal Declaration of Human Rights prohibits slavery.[79] Article 7 provides for equality before the law and Article 23(2) provides for the right to equal pay for equal work.[80] Article 20 embeds the right of peaceful assembly and association.[81] Article 23 sets out a list of workers' rights, "right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment," "right to just and favorable remuneration" as well as the right to form and to join trade unions.[82] Article 24 provides that "[e]veryone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay."[83] Article 25 provides for the protection of motherhood and childhood.[84]

Article 8 of the International Covenant on Civil and Political Rights prohibits slavery, as well as forced and compulsory labor.[85] Article 22(1) provides for the freedom of association and, within this, specifically refers to the right to form and join trade unions.[86] Article 6 of the International Covenant on Economic, Social and Cultural Rights provides for the right to work, including the right to the opportunity to gain living by work, to freely choose or accept one's work.[87] Article 7 embeds the right to just and favorable work conditions, including minimum wage and equal pay, safe and healthy working conditions and equal treatment at workplace, as well as rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.[88] Article 10 provides for paid leave or leave with adequate social security benefits for mothers during a reasonable period before and after childbirth, as well as prohibits the economic and social exploitation of children and their employment in work harmful to their morals or health and requires states to set age limits for child labor.[89] Article 8 provides the right to establish and join trade unions, as well as the right to strike.[90]

The past few decades have seen a similar internationalization of environmental protection. It has long been established that "as a matter of international law (…) states have an obligation to prevent damage to both the environment of other states and areas beyond the

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[77] *See id.* at 105-08.

[78] *See id.* at 105 (The concept of extraterritoriality is overridden "with regard to human rights, such as slavery, forced labor and racial discrimination. As such, the state's sovereignty and independence to direct the outcome of its own domestic concerns has eroded.").

[79] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948).

[80] *Id.* at art. 7, 23.

[81] *Id.* at art. 20.

[82] *Id.* at art. 23.

[83] *Id.* at art. 24.

[84] *Id.* at art. 25.

[85] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 8 (Dec. 16, 1976).

[86] *Id.* at art. 22.

[87] G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 6 (Dec. 16, 1976).

[88] *Id.* at art. 7.

[89] *Id.* at art. 10.

[90] *Id*. at art. 8.

limits of national jurisdiction."[91] This concept culminated in the Paris Agreement which was adopted within the United Nations Framework Convention on Climate Change.[92] The Paris Agreement ossified a global environmental standard and has been ratified by 187 parties.[93] Environmental protection is, contrary to labor standards, not a purely extraterritorial consideration because pollution knows no borders, resulting in at least a remote territorial link between environmental contamination in a country and the state of the environment in another.[94] Hence, as in *Shrimp/Turtle*, a state may reasonably claim jurisdiction on the basis of the objective territoriality doctrine.

Proceeding from these considerations, there is a solid doctrinal basis for the argument that the competitive advantages attained by national measures encroaching on universal values of the international community may be legitimately treated as "unfair" and, as such, falling outside the trade benefits promised under WTO law.[95] "Given the above, any comparative advantage gained by noncompliance with these standards is not an advantage that should be shielded by liberalized trade. This is not a controversial statement; in fact, the vast majority of countries agree with such an edict."[96]

These are trade benefits not promised to member states, hence, their impairment does not go counter to WTO law.[97] Even if WTO law does not positively require its members to respect core labor standards or to protect the environment, it may sanction them by allowing states to erect extraterritorial considerations if they are based on universally recognized values.

III. ENVIRONMENTAL AND LABOR STANDARDS IN NEW GENERATION FTAS: THE EMERGING "FOLKLORE"

The linkage between trade, local standards and regulatory competition goes back well before the current system of world trade.[98] Efforts to link trade and labor in an international instrument also precedes the modern world trade system.[99] Yet, environmental and labor

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[91] Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 THE AM. J. OF INT'L L. 268, 280 (1997).

[92] U.N. Secretary-General, *Paris Agreement: Entry Into Force*, U.N. Doc. CN735.2016TREATIES-XXVII.7.d (Dec. 12, 2015).

[93] Paris Agreement – Status of Ratification, Nov. 4, 2016, https://unfccc.int/process/the-paris-agreement/status-of-ratification.

[94] *See* Bal, *supra* note 74, at 105.

[95] *See* Chartres & Mercurio, *supra* note 43, at 685.

[96] *Id*. at 692.

[97] *Id*. at 693.

[98] J. M. Servais, *The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?*, 128 INT'L LABOUR REV. 423, 424 (1989) ("The concern to establish links between international trade and labour standards is probably as old as the standards themselves. Jacques Necker, the banker and finance minister under Louis XVI, wrote in 1788 that if a country were to abolish the weekly day of rest, it would undoubtedly gain an advantage, provided it was the only one to do so; if others acted likewise the situation would be as before.").

[99] Charnovitz, *supra* note 45, at 575 ("In 1943 Phillip Murray, President of the Congress of Industrial Organizations (CIO), proposed an 'international fair labour standards Act or Treaty' that would prohibit the movement of goods produced in violation of labour standards covering the right to organize, hours of work, minimum wages, and child labour.").

standards only emerged in FTAs in the early '90s.[100] The first major agreement to contain such provisions that make free trade conditional on the acceptance of environmental and labor standards was the North American Free Trade Agreement ("NAFTA").[101] NAFTA addressed these issues in two side-agreements.[102] In 1993, President Clinton asserted that ". . . [NAFTA] is the first agreement that ever really got any teeth in environmental standards, any teeth in what another country had to do with its own workers and its own labor standards (…). There's never been anything like this before."[103]

> The creation of the NAFTA Side Agreements was first and foremost a response to the unavoidable impact that free trade would have on the environment and labor welfare. The principal U.S. political constituencies--both for and against NAFTA--had each focused their arguments on the existing threat of losing jobs to Mexico; one side maintained that NAFTA would stanch this loss, while the other felt it would exacerbate it. It was also generally recognized that the problem was not the lack of labor and environmental laws in Mexico, but the failure of enforcement and that this resulted from the lack of institutional resources for the necessary inspection and enforcement. Mexico's top-heavy political culture characterized by power of the executive branch, its lack of an independent judiciary, and endemic corruption were understood as the problem. The NAFTA Side Agreements were tailored precisely to target these deficiencies. Their central innovation was to set forth as the legal standard of the Side Agreements, not substantive labor and environmental laws, but a consultation and disputes process that inquires whether a party has persistently failed to effectively enforce its own environmental or labor laws.[104]

Before NAFTA, environmental and labor rights considerations in trade agreements were rare and limited to exception clauses similar to Article XX of GATT.[105] Although NAFTA

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[100] David A. Gantz et al., *Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements*, 42 THE U. OF MIAMI INTER-AM. L. REV. 297, 308 (2011).

[101] *Id*.

[102] *See* BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 107 (Hart Pub. 2005).

[103] STAFF OF SEN. ELIZABETH WARREN, BROKEN PROMISES: DECADES OF FAILURE TO ENFORCE LABOR STANDARDS IN FREE TRADE AGREEMENTS, https://www.warren.senate.gov/files/documents/BrokenPromises.pdf.

[104] Jack I. Garvey, *AFTA After NAFTA: Regional Trade Blocs and the Propagation of Environmental and Labor Standards*, 15 BERKELEY J. OF INT'L L. 245, 255 (1997).

[105] *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ENVIRONMENT AND REGIONAL TRADE AGREEMENTS (2007); *see also* Chang-fa Lo, *Environmental Protection through FTAs: Paradigm Shifting from Multilateral to Multi-Bilateral Approach*, 4 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 293, 313 (2009); *see also* Michael S. Barr et al., *Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement*, 14 HOUS. J. OF INT'L L. 1, 27 (1991) ("With slight variations, existing worker rights clauses essentially attempt to condition benefits for exports to the United States (usually duty-free access to United States markets) on their respect for internationally recognized worker rights. This conditioning of export benefits attempts to achieve the dual aim of protecting United States workers and industries from unfair competition and promoting human rights and political stability in developing countries") (overview of pre-NAFTA FTA's labor provisions).

offered a new paradigm for handling these concerns, and later proved to be the precursor of major developments in international free trade law, the use of environmental and labor chapters remained rare and sporadic for a period of time.[106] The major turning point was the WTO's conclusive rejection of incorporating labor rights in 1999.[107] A move which has since reinforced efforts to incorporate them into FTAs.[108] Unsurprisingly, most developed countries, particularly Canada, the EU and the US, have been enthusiastic protagonists for incorporating these rights while developing countries have been skeptical about their incorporation.[109]

Over the years a wide array of patterns have been used to reflect commitments to environmental and labor standards.[110] Some agreements only mention them in the preamble, while others have comprehensive provisions in the main text and include them in the FTA's general dispute settlement mechanism.[111] In-between stand arrangements that consider these issues a subject for cooperation, as well as agreements with comprehensive environmental and labor chapters backed by no effective dispute settlement mechanism.[112] Some FTAs address these issues in side agreements like NAFTA, the pioneer of free-trade-related environmental and labor standards, did.[113]

There has been an emergence of various boilerplate clauses that address environmental and labor issues which have become the "folklore" of FTAs, and have the possibility of becoming the standard.[114] This development parallels the history of BITs.[115] With a few exceptions, international investment protection has always remained predominantly bilateral since its appearance in 1959.[116] These bilateral strands resulted in a taut fabric that is

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[106] ENVIRONMENTAL AND REGIONAL TRADE AGREEMENTS, *supra* note 105, at 40.

[107] *See* Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: an Analysis of Their Current Relationship*, 36 COLUM. J. OF TRANSNAT'L L. 659 (1998) (Tracing "the reasons and background behind the World Trade Organization's (WTO) decision to free itself from the question whether or not to link trade sanctions to labor standards." Demonstrating that "[t]he WTO acknowledged the authority of the International Labor Organization (ILO) regarding labor standards, leaving the protection of these standards in the hands of an organization without enforcement means").

[108] Kevin Kolben, *The new Politics of Linkage: India's Opposition to the Workers' Rights Clause*, 13 IND. J. OF GLOBAL LEGAL STUDIES 225, 231 (2006) ("A turning point in attempts to incorporate a workers' rights clause into the WTO was the inability at the 1999 WTO Ministerial meeting in Seattle to make any progress on the issue, primarily due to the opposition of India and other developing countries. Since this failure in Seattle, the United States has increasingly negotiated labor rights provisions into bilateral trade agreements with its trading partners. Congress incorporated language into the U.S. Bipartisan Trade Promotion Authority Act of 2002, directing the president to negotiate labor rights provisions directly into bilateral trade agreements").

[109] Lo, *supra* note 105, at 315; *see also* OECD, *supra* note 105, at 58; *see also* Kolben, *supra* note 108, at 244-56 (For an overview on these arguments (e.g. protectionism, sovereignty issues)).

[110] Cristina Tébar Less & Joy Aeree Kim, *Checklist for Negotiators of Environmental Provisions in Regional Trade Agreements* (OECD Working Papers 2008-02), https://www.oecd-ilibrary.org/docserver/235708858388.pdf?expires=1580162501&id=id&accname=guest&checksum=61B7C3FC2632DC8988B1DA56C9447F6E.

[111] *Id.* at 5, 10, 12-13.

[112] *Id.* at 6.

[113] For a systematic categorization, *see* Hepple, *supra* note 102, at 107-18; *see also* OECD, *supra* note 105, at 24-27; *see also* Less & Kim, *supra* note 110; *see also* Lo, *supra* note 105, at 321-24.

[114] *See* Less & Kim, *supra* note 110.

[115] *See* Hepple, *supra* note 102.

[116] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U. OF CALIFORNIA, DAVIS J. OF INT'L L. & POL'Y 157, 169 (2005).

often treated as a multilateral scheme, even if it is not seamless.[117] New generation FTAs, with their regimes on environmental and labor issues fused into the concept of sustainability, have the possibility of having the same carrier path.[118]

This "folklore" uses a uniform pattern to address these issues and quite a few FTAs have an integrated chapter titled "Trade and Sustainable Development" linking the two subjects through the buzzword "sustainability."[119] These chapters oblige parties to maintain high levels of environmental and labor protection, freeze parties' environmental standards and provide for effective domestic enforcement.[120]

A standard boilerplate provision is the "continuous improvement" clause which provides that parties shall maintain high environmental and labor standards while continuing their stride toward improvement.[121] In addition, FTAs set out clearly formulated core standards with reference to international treaty law which are clear commitments under the FTA and function as the spearhead of the duties emerging from pertinent chapters.[122]

Social clause provisions that provide protection for various workers' rights[123] usually center on the quadriga of core labor standards set out by the International Labor Organization ("ILO"):[124] (1) freedom of association and right to collective bargaining; (2) prohibition of all

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[117] *Id.*

[118] *See* Less & Kim, *supra* note 110, at 7-8.

[119] *See* Economic Partnership Agreement [*hereinafter* JEFTA], EU-Japan, Chapter 16, Jul. 17, 2018 (EC); *see also* Free Trade Agreement, EU-S. Kor., Chapter 13, Oct. 6, 2010 (EC); *see also* Free Trade Agreement, EU-Singapore [*hereinafter* EU-Sing. FTA], Chapter 12, Oct. 19, 2018 (EC).

[120] For an overview on environmental provisions, *see* Lo, *supra* note 105, at 314 ("The basic contents and the core obligations pursued by the United States include the substantive provisions to ensure FTA partners to provide for high levels of environmental protection, not to fail to effectively enforce their environmental laws, and to recognize that it is inappropriate to derogate from these laws to encourage trade or investment. They also include the mechanisms for environmental cooperation that provide a framework for working with its FTA partners to build their capacity and the promotion of public participation"). For an overview on labor provisions, *see* Christian Häberli, Marion Jansen & José-Antonio Monteiro, *Regional Trade Agreements and Domestic Labour Market Regulation*, *in* POLICY PRIORITIES FOR INTERNATIONAL TRADE AND JOBS 301 (Douglas Lippoldt ed., 2012) ("By way of a mid-way conclusion we see three types of (not mutually exclusive) references to domestic labour standards in RTAs: [1] Commitments to strive to improve domestic standards are prevalent in RTAs to which the United States is a partner. [2] Commitments not to lower existing domestic standards are a formulation also favoured by the European Union seeking to avoid a "race to the bottom." [3] Commitments to basically implement existing domestic standards are a kind of bottom line which developing countries have come to accept as a least constraining formulation, albeit within the overarching objective of their economic development. In addition, many RTAs provide for technical assistance to strengthen adherence to ILO and to national standards in developing countries").

[121] JEFTA, *supra* note 119, at art. 16.2(1); *see also* EU-Sing. FTA, *supra* note 119, at art. 12.2(2); *see also* EU-S. Kor. FTA, *supra* note 119, at art. 13.3; *see also* TPP, *supra* note 65, at art. 20.3(3); *see also* Comprehensive Economic and Trade Agreement [*hereinafter* CETA], Can.-EU, art. 23.2, 24.3, Oct. 30, 2016 (Eur. Commission); *see also* Agreement on Environmental Cooperation [*hereinafter* KORUS], Republic of Kor.-U.S., art. 20.1, June 30, 2007, T.I.A.S. No. 12-315; *see also* Trade Promotion Agreement [*hereinafter* TPA], Colom.-U.S., art. 17.1(1), 18.1, Nov. 22, 2006, (USTR).

[122] *See* KORUS, *supra* note 121, at art. 19.2(2), 19.3(1)(a), 20.3(1)(a), 20.3(2); *see also* TPA, *supra* note 121, at art. 17.2(2), 18.3(2).

[123] *See* Clotilde Granger & Jean-Marc Siroën, *Core Labour Standards in Trade Agreements: From Multilateralism to Bilateralism*, 40(5) J. OF WORLD TRADE 813 (2006); *see also* Samira Salem & Faina Rozental, *Labor Standards and Trade: A Review of Recent Empirical Evidence*, 4(2) J. OF INT'L COM. & ECON. 63, 74-77 (2012).

[124] *ILO Declaration on Fundamental Rights at Work and its Follow-Up*, INT'L LAB. ORG., at point 7 (1998) ("[A]ll Members, even if they have not ratified the Conventions in question, have an obligation arising from the

forms of forced and compulsory labor; (3) prohibition of child labor; and (4) elimination of discrimination at the workplace. The quadriga is an essential element of social clauses for new generation FTAs.[125]

Some FTAs go even further than the ILO's fundamental rights base-line.[126] FTAs generally incorporate requirements for fair minimum wage, occupational safety and health, while the 1998 ILO Declaration does not.[127] The JEFTA and KORUS FTAs reaffirm the parties' obligations as members of the ILO at large.[128]

CETA supplements the quadriga with "health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness," acceptable minimum employment standards for wage earners," and "non-discrimination in respect of working conditions, including for migrant workers," placing special emphasis on workers' health and safety.[129] The TPP also provides for "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."[130] This reaffirms the parties' ILO membership obligations.[131]

The EU-Singapore FTA[132] and the EU-South Korea FTA[133] refer to the UN Framework Convention on Climate Change and its Kyoto Protocol for environmental protection. JEFTA opened a new chapter in this regard as the first FTA to incorporate a duty to respect the 2015 Paris Climate Agreement.[134] Similarly, the EU announced its refusal to conclude FTAs with countries that fail to ratify the Paris Climate Change Agreement.[135] Because of this announcement the Paris Climate Change Agreement has the potential of acquiring the same status as labor law's quadriga.

New generation FTAs generally do not contain these self-invented environmental and labor standards because they simply incorporate pre-existing international obligations. For example, the ILO considers the quadriga to be a set of core labor standards forming part of

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very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation"). For an assessment of the 1998 ILO Declaration, *see* Alston, *supra* note 24, at 457; *see also* Brian A Langille, *Core Labour Rights – The True Story (Reply to Alston)*, 16 EUR. J. OF INT'L L. 409 (2005).

[125] EU-Sing. FTA, *supra* note 119, at art. 12.3(3); *see also* JEFTA, *supra* note 119, at art. 16.3(2); *see also* EU-S. Kor. FTA, *supra* note 119, at art. 13.4(3); *see also* CETA, *supra* note 121, at art. 23.3(1); *see also* TPP, *supra* note 65, at art. 19.3(1); *see also* KORUS, *supra* note 121, at art. 19.2; *see also* TPA, *supra* note 121, at art. 17.2.

[126] CETA, *supra* note 121, at art. 23.3(2); *see also* TPP, *supra* note 65, at art. 19.3(2).

[127] *See* Chartres & Mercurio, *supra* note 43, at 682-85.

[128] *See* JEFTA, *supra* note 119, at art. 16.3(2); *see also* KORUS, *supra* note 121, at art. 19.1.

[129] *See* CETA, *supra* note 121.

[130] *See* TPP, *supra* note 65, at art. 19.3(2).

[131] *See id.* at 19.2(1).

[132] *See* EU-Sing. FTA, *supra* note 119.

[133] *See* EU-S. Kor. FTA, *supra* note 119, at art. 13.5(3).

[134] *See* JEFTA, *supra* note 119, at art. 16.4(4).

[135] Jon Stone, *EU to Refuse to Sign Trade Deals with Countries that Don't Ratify Paris Climate Change Accord*, INDEPENDENT (Feb. 12, 208), https://www.independent.co.uk/news/world/europe/eu-trade-deal-paris-climate-change-accord-agreement-cecilia-malmstr-m-a8206806.html.

human rights law.[136] All 187 ILO members are required to universally protect and respect these core labor standards.[137] This raises the question, why do the parties commit themselves to standards they have already assumed? The reason is that while these standards are pre-existent, their implementation and enforcement is often highly ineffective.[138] The inclusion of these substantive standards brings them into the ambit of a more effective dispute settlement mechanism and makes them part of the mutually agreed upon commitments emerging from the FTA.[139] This implies that a state violating the incorporated standards risks significant trade benefits.[140]

FTAs do not often fully incorporate the parties' various international obligations regarding environmental and labor standards, and instead uniformly provide for the "effective implementation" of the rules the parties are subject to under international law[141] or of the obligations under the treaties listed in the FTA.[142] It can be inferred that the parties may refer to the violation of non-incorporated international treaty obligations, even though no party is obligated to uphold these standards and any party may actually denounce these standards with no consequences. Hence, the "effective implementation" clause should reinforce the parties' international treaty obligations without incorporating those obligations into the FTA.

The foundation of the environmental and labor chapters' is the "no waiver or derogation" boilerplate clause which prohibits the waiver of or derogation from domestic environmental and labor law to encourage trade.[143] In addition, the "inappropriate encouragement" clause specifically prohibits the trade-motivated attenuation of environmental and labor standards, classifying this as illegitimate regulatory competition.[144] The "effective enforcement" boilerplate clause provides that parties shall not fail to effectively enforce their environmental and labor laws in a way that impacts trade or investment between them.[145] Some

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[136] *See* HOW THE ILO WORKS, https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm (last visited Feb. 13, 2020).

[137] *See* ALPHABETICAL LIST OF ILO MEMBER COUNTRIES, https://www.ilo.org/public/english/standards/relm/country.htm (last visited Feb. 13, 2020).

[138] *See* THE BENEFITS OF INTERNATIONAL LABOUR STANDARDS, https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm (last visited Jan. 30, 2020).

[139] *See* Jordi Agustí-Panareda et al., *Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System*, INT'L LABOUR OFFICE (March 2014), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/genericdocument/wcms_237940.pdf.

[140] *See* Granger & Siroen, *supra* note 123, at 830 ("An ILO without trade leverage.").

[141] EU-Sing. FTA, *supra* note 119, at art. 12.2(1), 12.3(3), 12.6(2); *see also* JEFTA, *supra* note 119, at art. 16.4(2); *see also* EU-South Korea FTA, *supra* note 109, at art. 13.4(3), 13.5(2); *see also* CETA, *supra* note 121, at art. 23.3(4), 24.4(2); *see also* TPP, *supra* note 65, at art. 20.4(1).

[142] *See* KORUS, *supra* note 121, at art. 20.2, 20-A; *see also* TPA, *supra* note 121, at art. 18.2.

[143] *See* Susan Ariel Aaronson & Jean Pierre Chauffour, *The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?*, WTO PUBLICATIONS, https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm#fnt1.

[144] *See* JEFTA, *supra* note 119, at art. 16.2(2); *see also* EU-Sing. FTA, *supra* note 119, at art. 12.1(3), 12.12(1); *see also* EU-South Korea FTA, *supra* note 119, at art. 13.7(1)-(2); *see also* CETA, *supra* note 121, at art. 23.4(1)-(2), 24.5(1)-(2); *see also* TPP, *supra* note 65, at art. 19.4, 20.3(6); *see also* KORUS, *supra* note 121, at art. 20.3(2); *see also* TPA, *supra* note 121, at art. 18.3(2).

[145] *See id.*

FTAs define the expectations of effective enforcement in terms of access to remedies and procedural guarantees.[146]

EU and US FTAs differ as to enforcement patterns, the former preferring soft enforcement and promotional activities, while the latter using hard enforcement.[147] EU FTAs pull out environmental and labor provisions from the FTA's general dispute settlement mechanism and subject these chapters to special regimes where consultations, cooperative activities, and mediation by a panel of experts providing non-mandatory reports and recommendations is available, while arbitration-like dispute settlement is not.[148] The FTAs concluded by the US[149] subject environmental and labor chapters to the general dispute settlement mechanism, similar to the CPTPP.[150]

The above obligations, including the "no waiver or derogation" and the "effective enforcement" clauses, are conditional on the effects of inter-party commerce, that is, lowering standards and non-enforcement affecting domestic trade or trade with non-party countries may not come under the scope of this provision.[151] In other words, environmental and labor standards are protected by the FTA only when they have an adverse impact on the FTA's imaginary trade equation. FTAs often pronounce regulatory competition in environment and labor as conferring an unfair competitive advantage on domestic producers.[152] This is similar to the thought that "any comparative advantage gained by non-compliance with these standards is not an advantage that should be shielded or trumped by liberalized trade."[153]

So far the "effect on trade" requirement has been interpreted in a single case,[154] the CAFTA-Guatemala Labor Panel's recent report adopted on June 14, 2017.[155] According to the Dominican Republic-Central America-United States FTA ("CAFTA-DR"), the parties are obliged to enforce their labor laws if non-enforcement affects cross-border trade:

> *Article 16.2: Enforcement of Labor Laws*
> *1. (a) A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.*[156]

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[146] *See* CETA, *supra* note 121, at art. 23.5, 24.6; *see also* TPP, *supra* note 65, at art. 19.8, 20.7; *see also* KORUS, *supra* note 121, at art. 19.4, 20.4; *see also* TPA, *supra* note 121, at art. 17.4, 18.4.

[147] Billy Melo Araujo, *Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality*, 67 INT'L AND COMP. L. Q. 233, 240-41 (2018).

[148] *See* JEFTA, *supra* note 119, at art. 16.12-19; *see also* EU-S. Kor. FTA, *supra* note 119, at art. 13.11-16; *see also* EU-Sing. FTA, *supra* note 119, at art. 12.15-17; *see also* CETA, *supra* note 121, at art. 22.3-4, 23.7-11, 24.12-16.

[149] *See* Lo, *supra* note 105, at 309 (2009); *see also* KORUS, *supra* note 121, at art. 19.5-7, 20.6-9; *see also* TPA, *supra* note 121, at art. 17.7, 18.12.

[150] *See* TPP, *supra* note 65, at art. 19.15, 20.19-23.

[151] *See* EU-S. Kor. FTA, *supra* note 119, at art. 13.2(1).

[152] *See* Eu-Sing. FTA, *supra* note 119, at art. 12.3(5); *see also* JEFTA, *supra* note 119, at art. 16.3(6).

[153] *See* Chartres & Mercurio, *supra* note 43, at 692.

[154] *See* Araujo, *supra* note 147, at 243.

[155] Panel Report, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the* CAFTA - DR (adopted 14 June 2017) [Article 16.2.1(a) Guatemala Panel Report], p. 1

[156] Central America-Dominican Republic-United States Free Trade Agreement, DR-CAFTA, 43 ILM 514 (2004).

The phrase "in a manner affecting trade between the Parties" could have been interpreted as a jurisdictional provision qualifying the application of the FTA to cases affecting inter-state commerce. It could have been reasonably argued that matters having purely domestic effects or impacting solely on commerce with countries not party to the CAFTA-DR should not come under its purview. However, the Panel took another line of interpretation and treated it as a substantive issue by linking the application of the labor standard obligations to the purpose for which they were inserted.[157] It held that claims related to non-enforcement are enforceable under the CAFTA-DR if a party's action or inaction confers a competitive advantage on its producers:

> *190. In sum, we find that a failure to effectively enforce a Party's labor laws through a sustained or recurring course of action or inaction is "in a manner affecting trade between the Parties" if it confers some competitive advantage on an employer or employers engaged in trade between the Parties. (…)*
>
> *191. We turn now to the question of what must be shown by a complaining Party to establish that such a failure to effectively enforce confers a competitive advantage on a participant or participants in trade between the Parties and thus is in a manner affecting trade.*
>
> *196. (…) [O]ur enquiry into whether a failure to enforce labor laws is such as to confer a competitive advantage in trade between the CAFTA-DR Parties focused principally on (1) whether the enterprise or enterprises in question export to CAFTA-DR Parties in competitive markets or compete with imports from CAFTA-DR Parties; (2) identifying the effects of a failure to enforce; and (3) whether these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises.*
>
> *505. In sum, the facts as we have found them fail to establish a breach of Article 16.2.1(a), because whichever way they are viewed, one of the prongs of an Article 16.2.1(a) claim has not been met. When Guatemala's law enforcement failures are looked at collectively, they show (on an arguendo basis) a sustained or recurring course of action or inaction, but not conduct in a manner affecting trade. When the one law enforcement failure that we found to be in a manner affecting trade is looked at by itself, there is no sustained or recurring course of action or inaction. Under these circumstances, given the cumulative nature of the elements of Article 16.2.1(a), we are unable to find that provision to have been breached based on the factual matrix before us.*[158]

IV. WHY DID EXTRATERRITORIAL VALUES CONSIDERATIONS BECOME AN INTEGRAL PART OF INTERNATIONAL ECONOMIC RELATIONS? POTENTIAL NARRATIVES

[157] *See* Panel Report, *supra* note 155.

[158] *See id.*

There are two traditional narratives that may explain the emergence of non-trade values in international economic relations, projecting the idealist Max-Weberian and the materialist Marxist notion of social phenomena.[159] While the former would suggest that trade is not only about trade,[160] the second is based on the cynical proposition that these values have a genuine trade character and references to their non-trade aspects are simply meant to veil the selfish economic interests they foster.[161]

Max Weber convincingly demonstrates, through the emergence of Protestantism and capitalism, how mental changes)i.e. religious and cultural) impact the structure of economic production.[162] Protestantism's puritan standards created "hard work" to be a moral value and the money earned as a measure of this, even though greed was rejected.[163] Hence, the mental change entailed by Protestantism had a profound impact on the structure of the economy and resulted in the emergence of capitalism.[164] On the other hand, the theory of Marx rests on the contrary tenet that 'it is the economy that determines all the other spheres of social life'.[165] The economy is the base while culture, politics, religion are only a super-structure; these are, in the last instance, the products of the economy's structure.[166]

A. The Theory of Universal Values

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[159] *See* Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 892-93 (2003) ("One of the challenges facing proponents of a link between trade and labor is to explain why a state should concern itself with labor conditions in other states. It is sometimes suggested that low standards in one country impose a cost on other countries because the low labor standards make it impossible to compete while maintaining higher standards. States then must either reduce their own standards or accept a loss of economic welfare. (…) The more persuasive justification for the use of trade sanctions against countries with poor labor practices is based on the claim that some set of labor rights are human rights that exist independently of national boundaries.").

[160] *See* Chartres & Mercurio, *supra* note 43, at 692 ("With such a high ratification rate and widespread endorsement within the broader international human rights system, the CLS do not simply constitute rights that belong to workers, but rather constitute rights that belong to individuals as human beings. Thus, child labor is prohibited not because the labor is cheaper than adult labor, but rather because the growth and development of children should not be undermined through labor; the operative principle is that children should be shielded from the burdens of labor, and concerns regarding the rate of pay a child receives are irrelevant by comparison. Similarly, forced labor is prohibited not because it creates an economic distortion, but rather because it denies workers their freedom. While prohibition of discrimination reaches beyond wage costs to protect workers' equal right to work and the right to equal treatment as part of the human right to be treated equally, freedom of association serves broader political and social goals than merely permitting unionization.").

[161] *See* Bhagwati, *supra* note 70, at 130.

[162] Max Weber, DIE PROTESTANTISCHE ETHIK UND DER GEIST DES KAPITALISMUS (Springer 2016) (the book was first published in 1904/1905 and republished, after amendments, in 1920).

[163] *Id.* at 26.

[164] *Id.* at 26.

[165] *Id.* at 27.

[166] Karl Marx, PREFACE TO THE *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY*, (1859) (Progress Publishers, 1977) ("In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely [the] relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure, and to which correspond definite forms of social consciousness.").

The first and probably most tempting explanation of developed countries' insisting on environmental and labor standards, is that they are considered universal values and their protection is a question of principle.[167] Core labor standards are rooted in fundamental human rights while environmental protection, recently based upon extraterritorial effects and historical significance in the age of global warming, is a universal concern for mankind.[168]

The emanation of the idealist theory may be found in numerous EU instruments. In the context of the Transatlantic Trade and Investment Partnership ("TTIP") negotiations, the European Commission ambitiously advocated that ". . . trade is not just about our economic interests, but also about values. That's why we are proposing a very ambitious approach to sustainable development in the EU-US trade talks."[169] This approach is in line with what the European Parliament expects from the Commission when negotiating FTAs:

> *15. Taking into account the objectives cited above, calls on the Commission to include systematically in all free trade agreements negotiated with non-EU countries a series of social and environmental standards that include:*
>
> *(a) a list of minimum standards that must be respected by all the EU's trading partners; from a social viewpoint, these standards must correspond to the ILO's eight Core Labour Standards as listed in the ILO Declaration on Fundamental Rights and Principles (1998); in addition to these eight Core Standards, there are the four ILO Priority Conventions for the industrialized countries; with regard to the environment and respect for human rights, the minimum standard must correspond to the list of conventions on the environment and the principles of good governance as set out in the European regulation on the scheme of generalized tariff preferences;*
>
> *(b) a list of other conventions that should be implemented gradually and flexibly, taking account of developments in the economic, social and environmental situation of the partner concerned; from a social viewpoint, the ultimate objective must be geared to full implementation of the ILO's Decent Work Agenda.*[170]

While it is very tempting to assimilate the view that the above values are protected simply because they qualify as a categorical imperative in democratic societies, it should not be disregarded that the non-observance or violation of these values and rights is not attributable to trade liberalization. This is not something trading partners may want to regulate to obviate the repercussions FTAs may bring about, neither are these rules and values postulated by economic intercourse, such as investment protection is postulated by the influx of capital.

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[167] *See* Salazar-Xirinachs & Martínez-Piva, *supra* note 29, at 330-32.

[168] *See* JAMES A. GROSS & LANCE COMPA, HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES 2 (James A. Gross & Lance Compa eds., 1st ed. 2009); *see also* GLOBAL ENVIRONMENTAL CHANGE: UNDERSTANDING THE HUMAN DIMENSIONS 44 (Paul C. Stern, Oran R. Young & Daniel Druckman eds., 1992).

[169] European Commission Press Release IP/15/5993, EU to Pursue the Most Ambitious Sustainable Development, Labour and Environment Provision in TTIP (Nov. 6, 2015).

[170] EUR. PARL. DOC., *supra* note 23, at 36-37.

Furthermore, one may find no official explanation on why these values and rights deserve this privileged status and others do not.

Notably, while new generation FTAs do deal with environmental protection and labor rights, they fail to address more pressing human rights issues, such as political liberties and fundamental civil rights.[171] It should not be disregarded that, although the values listed in these international agreements are certainly of utmost importance, in the hierarchy of human and civil rights they are clearly surpassed by more fundamental liberties such as human dignity, prohibition of torture, cruel or degrading treatment, punishment, and a right to fair trial.[172] It is difficult to argue that the inclusion of the right to form trade unions and to conclude collective agreements is warranted by their immense moral significance when the right to a fair trial and the right not to be tortured are not even mentioned.[173] This suggests that something else must be involved besides purely value-based considerations.

B. The Theory of Economic Interests

The second, perhaps more cynical, explanation as to why the values mentioned above are included is that they are motivated by economic interests. Cost-savings entailed by lower labor and environmental standards confer a competitive advantage on foreign producers.[174] High standard states may perceive this as a Hamletian dilemma.[175] They may stick to their higher standards, forcing their producers to fail or move to a low standard country to remain competitive.[176] This implies cut-backs, higher unemployment rates, political unrest. Or they may forcibly lower their standards to preserve their firms' competitiveness.[177]

Regulation, not only in the context of international economic relations, is often described by the Baptist-bootlegger coalition metaphor.[178] This expressive metaphor demonstrates how selfish economic interests may stimulate measures that, at first glance, may appear to be genuinely value driven:

> Bootleggers (…) support Sunday closing laws that shut down all the local bars and liquor stores [because they increase the demand for illegal spirits].

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[171] Meredith Kolsky Lewis, *Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means?*, 12 LOY. U. CHI. INT'L L. REV. 1, 8-9 (2014).

[172] *Id.* at 8.

[173] EUR. PARL. DOC., *supra* note 23, at 31.

[174] Robert E. Hudec, *Differences in National Environmental Standards: The Level-Playing Field Dimension*, 5 MINN. J. OF GLOBAL TRADE 1 (1996).

[175] ENGOQUIZZITIVE, *Words Derived from Popular Literature*, Blog Post, (Dec. 5, 2010), https://engquizzitive.wordpress.com/2010/12/05/words-derived-from-popular-literature/.

[176] *See* Robert M. Stern, *Labor Standards and Trade Agreements* 4-5 (The U. of Mich. Gerald R. Ford Sch. of Pub. Pol'y, Working Paper No. 459, 2003), http://fordschool.umich.edu/rsie/workingpapers/Papers476-500/r496.pdf; *see also* Mihir Chatterjee, *Re-Negotiating Trade and Labor Standards in a Post Hong Kong Scenario*, 2 ASIAN J. OF WTO & INT'L HEALTH L. AND POL'Y 473, 479 (2007).

[177] *See* Eddy Lee, *Globalization and Labour Standards: A Review of Issues*, 136 INT'L LAB. REV. 173, 181 (1997).

[178] Cato Institute Press, *Bootleggers and Baptists: How Economic Forces and Moral Persuasion Interact to Shape Regulatory Politics*, CATO INSTITUTE (Oct. 9, 2014), https://www.cato.org/events/bootleggers-baptists-how-economic-forces-moral-persuasion-interact-shape-regulatory-politics.

> Baptists support the same laws and lobby vigorously for them [because they believe drinking on Sunday is immoral].[179]

The prohibition of selling alcohol on Sunday is thereby supported by two influential but seemingly adversarial social groups; the Baptists and the Bootleggers.[180] While such a political coalition is highly counter-intuitive, it is logical and reasonable given that both stakeholders strive for and achieve the maintenance of the prohibition. The strikingly different features of the two groups warrants the assumption that they both make a common effort for the joint attainment of their commonly shared objective. Baptists and bootleggers often form this coalition unintentionally, generally going unnoticed, and lobby for the same measure. While the bootleggers' motives may be fueled by their economic interest, Baptists provide politically useful labels for the movement, which increases the general marketability of Sunday prohibition to the local electorate.[181]

It is noteworthy that in this scenario the value to be protected is genuine and it is certainly not faked nor forged. This is not simply a case of scaremongering against foreign products or providers. What really makes it interesting is that without the involvement of selfish economic interests the value-based considerations may enfeeble. The significance of the Baptist-Bootlegger coalition metaphor in context of environmental and labor standards is that it explains the selection criteria of non-trade values that make their way into new generation FTAs. It may be the case that the Baptists want to have numerous value-based measures added into the law, but the legislators, for one reason or another, are more likely to pay attention to those that are backed by intensive lobbying generated by strong economic interests.

The emergence and development of environmental and labor standards is submitted to be no exception to the above phenomenon:

> Human endeavours are complex, and driven by different motivations. Labour standards are no exception. They are promoted for a number of reasons, philanthropic [sic], ethical and economic . . . . The two motivations may have a different agenda, and one of the main preoccupations for the trading system are unholy alliances of economic protectionism disguised by human right motivations.[182]

> [I]t is important to understand that the demand for Linkage via a Social clause in the WTO (and corresponding preconditions on environmental standards for WTO protected market access) is a reflection of the growing tendency to impose an essentially trade unrelated agenda on this institution and on to other trade treaties. It is the result of an alliance between two key groups:

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[179] *See* Bruce Yandle, *Bootleggers and Baptists – The Education of a Regulatory Economist*, 7 REG. 12, 13 (1983).

[180] *See id.*

[181] *See* Russell Roberts, *Pigs Don't Fly: The Economic Way of Thinking about Politics*, LIB. OF ECON. & LIBERTY (Dec. 3, 2007), https://www.econlib.org/library/Columns/y2007/Robertspolitics.html.

[182] Thomas Cottier & Alexandra Caplazi, *Labour Standards and World Trade Law: Interfacing Legitimate Concerns*, INST. OF EUROPEAN & INT'L ECON. L., UNIV. OF BERNE 4, 5 (Oct. 2011), https://www.researchgate.net/publication/242465994.

> (i) Politically powerful lobbying groups that are "protectionist" and want to blunt the international competition from developing countries by raising production costs there and arresting investment flows to them; and
>
> (ii) The morally-driven human rights and other groups that simply wish to see higher standards abroad and have nothing to do with protectionist agendas.[183]

The landscape of the political process may be more complicated, with the Baptist and the Bootlegger camps consisting of different stakeholders.

> Western labor unions and the interests they represent, that is, employees in import competing industries in Western industrialized countries, are the strongest supporters of improvements in labor standards in the developing world. Labor representatives from developing countries--to the extent that they can organize in the first place--agree in principle but are often less outspoken because they also fear for the loss of jobs.
>
> Environmental interests will be promoted by small and medium-sized import competing industries in the West, and otherwise mainly by NGOs composed of concerned Western citizens. Again, environmental interests are only beginning to be organized in NGOs in developing countries, and the impact of these mostly young and inexperienced organizations – as well as their support by the local population – is still limited.[184]

Interestingly, the use of labor standards in this context is far from new and has been part of EU law from the very first day of its unification.[185] The principle of equal pay between men and women has been a long, entrenched principle engrained in EU law from the outset.[186] One may find this surprising given that the treaty establishing the EEC was purely an economic instrument advancing economic integration, while the principle of equal pay remained a genuine human rights provision.[187] The scenario is even stranger if one takes into account that Member States were not required to protect human rights in general, but were nonetheless keen on securing that women earn equal pay.[188] France's insistence on the inclusion of this provision

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[183] Jagdish N. Bhagwati et al., *Third World Intellectuals and NGOs Statement Against Linkage (TWIN-SAL)*, (Nov. 1999), https://doi.org/10.7916/D8KD24KG (a group of academics and NGOs released the "TWIN-SAL" statement expressing adversity to the interconnection of the WTO and labour or environmental issues).

[184] Frank Emmert, *Labor, Environmental Standards, and World Trade Law*, 10 U.C. DAVIS J. OF INT'L L. & POL'Y 75, 101-02 (2003).

[185] *See, e.g.,* TFEU, *supra* note 19, at art. 153(1) (showing multiple interests in regulating labor standards starting in 1957 with the signing of the Treaty of Rome).

[186] *See id.* at art. 157; *see also* European Commission, *50 years of EU gender equality law*, EC EUROPA (Oct. 25, 2007), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_07_426; *see also* Council Directive 75/117, 1975 O.J. (L 45) (EC) (promulgating one of the first laws pertaining then-EEC Member States regarding the principle of equal pay for men and women).

[187] *See* European Commission, *supra* note 20.

[188] *See id.*

resulted from its clear economic interests.[189] While the principle of equal pay between men and women was a rooted principle in French law, it did not enjoy the same level of protection and scrutiny in other Member States.[190] So, France feared that this regulatory plight may confer a competitive advantage on other Member State producers against its domestic French producers as they all competed in the same common market without national borders.[191] As it appeared that lowering the French standards was not an option, France successfully enforced this trade-relevant, non-trade value on other Member States:

> The Treaty of Rome in 1957 already included the principle of equal pay for equal work. (Article 119 EEC, then 141 EC, now Article 157 TFEU). The background to this provision was mainly economic: Member States and in particular France wanted to eliminate distortion of competition between businesses established in different Member States. As some EU countries (for example France) had adopted national provisions on equal pay for men and women much earlier, these countries were afraid that a cheap female workforce in other countries (for example from Germany) could put national businesses and the economy at a competitive disadvantage owing to lower labour costs.[192]

V. A THEORY OF REDIRECTION AND UNHOLY MARRIAGE BETWEEN PROTECTIONISM AND UNIVERSAL VALUES

The antagonism between trade interests and genuine values as motives explaining the appearance of extraterritorial value considerations seemingly ignores the complexities of social processes.[193] Theories that have tried to attribute this phenomenon exclusively to one or the other give only a simplified explanation to this complicated issue.[194] The appearance of environmental and labor standards has been unquestionably fueled by clear and outspoken economic interests,[195] so the claim that their inclusion is not about trade is not convincing. It is equally unconvincing to argue that it is only about the selfish economic interests. Environmental protection and labor rights are undeniably universal values and the reason they were picked up by FTAs from the pool of regulatory competition issues influencing local

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[189] *See id.*

[190] *See id.*

[191] *See* Hepple, *supra* note 102, at 200.

[192] *See* MEMO/14/156, *supra* note 187.

[193] *See* Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?*, 117 J. OF BUS. ETHICS 493, 501 (2013).

[194] *Compare The Benefits of International Labour Standards,* INT'L LAB. ORG., https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm (last visited Feb. 11, 2020) (emphasizing the economic benefits of labor standards), *and* Koen Rademaekers et. al, *The number of Jobs dependent on the Environment and Resource Efficiency improvements*, ECORYS, Apr. 3, 2012, at 9, https://ec.europa.eu/environment/enveco/jobs/pdf/jobs.pdf (emphasizing the economic benefits of environmental protection), *with Labour Law*, EUR. COMM'N, https://ec.europa.eu/social/main.jsp?catId=157&langId=en (last visited Feb. 11, 2020), *and Environment Policy*, EUR. COMM'N, https://ec.europa.eu/info/policies/environment_en (last visited Feb. 11, 2020).

[195] *See id.*

producers' competitiveness, such as taxation, public utility prices and use of infrastructure, was that the economic interests and the genuine value considerations overlapped.[196]

In the Baptist-Bootlegger metaphor, the Bootlegger's lobbying would probably not be successful without the moral label supplied by the Baptist, and the Baptist's efforts would probably be feeble if they were not backed by the Bootlegger's economic interests.[197] The appearance and prevalence of extraterritorial value considerations is ascribable to the unholy marriage of trade interests and genuine values.[198]

Nonetheless, the bark of extraterritorial value considerations is worse than its bite, making it a redirection activity that, in FTAs, appeases resistance in developed countries at a negligible price for developing countries.[199] Only a very small portion of the cost advantages of developing countries is attributable to the alleged disrespect of core environmental and labor standards embraced by FTAs.[200] Empirical studies confirm that the environmental regulation's impact on local producers' competitiveness has been minuscule.[201] Although adverse effects "on trade, employment, plant location, and productivity" may be statistically significant, "particularly in pollution- and energy-intensive sectors," "the scale of these impacts is small compared with other determinants of trade and investment location choices such as transport costs, proximity to demand, quality of local workers, availability of raw materials, sunk capital costs, and agglomeration."[202] "The effects tend to be concentrated on a subset of sectors for which environmental and energy regulatory costs are significant, usually a small group of basic industrial sectors characterized by very energy-intensive production processes, limited ability to fully pass through pollution abatement costs to consumers, and a lack of innovation and investment capacity to advance new production processes."[203] Accordingly, while the environmental regulation's impact on a firms' competitiveness is heterogeneous, the overall impact is very small.[204]

> Some 20 years ago, in their review of the literature on the competitiveness impacts of environmental regulation in the United States, Jaffe et al. (1995) concluded that "there is relatively little evidence to support the hypothesis that environmental regulations have had a large adverse effect on competitiveness." Since then, through hundreds of studies that have used ever larger datasets with increasingly fine levels of disaggregation,

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[196] *See id.*

[197] *See* Yandle, *supra* note 179, at 13-14.

[198] *See id.*

[199] *See* Araujo, *supra* note 147, at 234 ("[A]s far as labour protection standards in EU and US FTAs are concerned, there is a significant disconnect between the rhetoric and practice. Whilst both players have been keen advocates of trade-labour linkages, and have included substantive labour-related obligations in their FTAs, they have also failed or proved themselves reluctant to implement and enforce such provisions in practice, raising the question of whether these provisions amount to little more than a veneer.").

[200] *See* Antoine Dechezleprêtre & Misato Sato, *The Impacts of Environmental Regulations on Competitiveness*, 11 REV. OF ENVTL. ECON. AND POL'Y 183, 189-90 (2017).

[201] *See id.* at 201.

[202] *Id.*

[203] *Id.*

[204] *See id.*

> employing up-to-date econometric techniques, and covering a wider set of countries, this conclusion has only become more robust.[205]

Likewise, in case of core labor standards the cost implications are, in fact, highly insignificant.[206] "There is almost no evidence that the reduction in relative earnings of unskilled workers in developed countries that is reasonably attributed to increased trade with developing countries relates to non-compliance with core labour standards rather than simply lower wages,"[207] and empirical evidence suggests that the "feared wage effect would be small, and perhaps nonexistent."[208]

The fact that developed countries' producers gain little, while those of developing countries lose equally little, brings into question the significance of the whole issue, let alone that the environmental and labor provisions are highly ineffective. While there is empirical evidence suggesting that environmental and labor standards are improved if they are made the pre-condition of the FTA's conclusion,[209] there is otherwise no empirical evidence confirming the FTAs' significant positive impact.[210]

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[205] *Id.* at 200-01.

[206] *See* ORG. FOR ECON. CO-OPERATION AND DEV., TRADE, EMP. AND LAB. STANDARDS: A STUDY OF CORE WORKERS' RTS. AND INT'L TRADE 88, 123-24 (1996).

[207] Michael J. Trebilcock, *International Trade and International Labor Standards: Choosing Objectives, Instruments, and Institutions*, *in* STEFAN GRILLER, INT'L ECON. GOVERNANCE AND NON-ECONOMIC CONCERNS 289 (Stefan Griller ed. 2003); *see also* Daniel W. Drezner, *Globalization and Policy Convergence*, 3 INT'L STUD. REV. 53, 67 (2001).

[208] Guzman, *supra* note 159, at 892 n.28.

[209] *See* Araujo, *supra* note 147, at 243 ("Assessing the impact of labour provisions in the context of FTAs between parties with power asymmetries is an altogether more complex task. With respect to the US, there is evidence that their FTAs have led to an improvement of labour rights protection in the territory of the signatories. For example, it has been shown that US trade partners tend to increase their labour standards significantly during the FTA negotiation process. This is generally attributed to the fact that the opposition of the US Democratic Party to the signing of trade agreements with countries with low labour standards typically acts as an incentive for the latter to undertake significant domestic reforms. Such 'pre-ratification' or 'pre-implementation' conditionality has proved highly effective in that it enables the US to demand domestic reforms as a precondition for the entry into force of negotiated trade. However, whilst effective, this approach has also been the subject of some criticism, especially as the US has on a number of occasions demanded that its trading partners implement domestic reforms that were not initially provided for in trade agreements. Moreover, although there is evidence that developing countries that have signed a trade agreement with the US have tended to experience improvements in the enforcement of labour laws after the entry into force of such agreements, there are also multiple examples of US FTA partners failing to comply with their labour law commitments. Whilst a number of submissions have been filed in relation to violation of labour provisions in US FTAs, only the aforementioned CAFTA-DR dispute has led to actual arbitration procedure and ruling.").

[210] As for environmental protection, *see* Clive George & Shunta Yamaguchi, *Assessing Implementation of Environmental Provisions in Regional Trade Agreements* (OECD Trade and Environment Working Papers 2018/01), http://dx.doi.org/10.1787/91aacfea-en (In a survey based on 11 respondents from developed countries and 8 respondents from developing countries, as to the question "5. How big a factor RTAs are in achieving observed strengthening of environmental legislation", "[n]one of the developed country respondents indicated any more than a minor effect in their own countries. … Developing country respondents took a slightly more positive view, with one identifying a major effect."). As for labor protection, in the same vein, studies suggest that while the pertinent chapters of FTAs may have a heterogeneous impact, on average they have very little or no success in advancing workers' rights. *See* Harrison et al., *supra* note 10, at 273 ("Overall, we found no evidence that the existence of TSD chapters has led to improvements in labour standards governance in any of our case studies, nor did we find any evidence that the institutionalization of opportunities for learning and socialization between the parties was creating a significant prospect of longer-term change. These findings thus

> When a social clause is included in the trade agreement, this may change the equation. Potentially, firms and their workers in the developed country are in a win-win situation. Their products and services have access to the markets of the developing country, but the developing country is excluded from the developed country's market unless the prescribed social standards are met. In reality, however, this protection is likely to be illusory. First, it is only rarely that observance of human rights standards, ILO core labour standards or 'internationally protected worker rights' add significantly to labour costs (chapter 1, above). Secondly, NAALC and the free trade agreements surveyed in this chapter have had only relatively minor effects on labour standards in developing countries, and have not acted as an effective barrier against products and services produced by workers with low labour standards. US critics of NAFTA can point to the closure of US plants and the shifting of jobs to Mexico. The US–Cambodia textile agreement, while leading to some improvements in working conditions in Cambodia has not halted the continuing decline of the US textile industry. From the viewpoint of firms and workers in the developed countries, the march of trade liberalisation is relentless and social clauses of the kind found in NAALC and other American FTAs are powerless to stop it.[211]

Differences in labor costs do cause competitive advantages and disadvantages.[212] However, core labor standards are only a small slice of the labor costs and the significance of environmental standards is not higher either.[213] Even if minimum wage was a part of the core labor standards, it would reflect local consumer prices and standards of living; the enhancement of labor standards in developing and less developed countries, notwithstanding obvious effects in certain industries, would not change the overall picture.[214] It may be the case that Chinese producers save costs due to lower Chinese labor standards, but the real cost advantage is attributable to China's naturally low wages which are incomparable to United States salaries.[215] If the level of labor protection increased in developing countries, labor costs would remain

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offer the most robust refutation to date of the hypothesis that labour provisions in EU FTAs are actively advancing workers' rights. And in contrast to more optimistic assessments, they also suggest that future normative influence is unlikely to be realized via TSD [Trade and Sustainable Development] chapters in their current form.") (emphasis added).

[211] *See* Hepple, *supra* note 102, at 127 ("It is doubtful, however, whether the notion of social dumping is adequate in itself to form the theoretical basis for a new approach to transnational labour regulation. First, it over-emphasizes the role of labour costs in decisions about relocation. Enterprises are not likely to relocate to another state with lower nominal labour costs if those costs simply reflect lower productivity of workers in that state. This would mean that there is no net difference in unit labour costs. The basic point is that what matters is not the nominal level of wage costs in a firm or industry but the net unit labour costs that is the costs of labour for each unit of production after taking productivity into account. If labour costs do not reflect the relative productivity in a particular state and enterprises relocate to that state, the result would be to increase demand for labour, with the likelihood of rising wage levels. This would, in due course, cancel out the advantages of a relocation which was based purely on low labour costs.").

[212] *See* Asif Salahuddin, *Infusion of Social Clauses into Global Trade Agreements: How Necessary Are They?*, 2 U. OF ASIA PAC. J. OF L. & POL'Y 28, 34-35 (2016).

[213] *See* Salazar-Xirinachs & Martinez-Piva, *supra* note 29, at 329.

[214] *See* T.H. Gindling, *Does Increasing The Minimum Wage Reduce Poverty in Developing Countries?*, IZA WORLD OF LAB. (Nov. 2018), https://wol.iza.org/uploads/articles/459/pdfs/does-increasing-the-minimum-wage-reduce-poverty-in-developing-countries.pdf?v=1.

[215] *See* Peter Navarro, *The Economics of the "China Price,"* 68 CHINA PERSP. 1, 3, 24 (2006).

incomparably lower, and even unionized labor that enjoys safer conditions in the workplace as well as limited daily working hours would be incomparably cheaper than its American or European counterparts.[216]

The above discussion makes the argument for and against environmental and labor standards cyclical. On the one hand, developed countries have the tendency to argue that they are placed at the competitive disadvantage.[217] The argument centers on the idea that developed countries exercising free trade lose jobs to cheap labor found in developing countries "resulting from repressed labor activities."[218] However, while more successful labor activities and higher labor standards certainly result in higher salaries, the enormous differences in labor costs are mainly natural and are caused by different factors.[219] On the other hand, developing countries oppose the extraterritorial extension of environmental and labor standards, because they claim that the standards have no impact so it is futile to insist on them.[220] However, this argument fails: if lower environmental and labor standards entail no significant competitive advantage, the assumption should not entail any significant competitive disadvantage either.[221]

This discussion also reveals the psychology of the debate. While it is true that developed nations have a legitimate argument that if their producers are going to lose in competition they should lose in *fair* competition, the debate on environmental and labor standards seems to be a redirection activity.[222] The argument displaces the real but invariable circumstance with a changeable but relatively insignificant one.[223] Nevertheless, if there is a political need in developed countries for the internationalization of these standards to make free trade agreements sellable, it appears to be a low price for the benefits of free trade.[224]

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[216] *See*, Gindling, *supra* note 214. For a comparison between national minimum wage standards *see NMW – National Minimum Wage*, COUNTRYECONOMY.COM, https://countryeconomy.com/national-minimum-wage (last visited Feb. 2, 2020).

[217] *See* Salahuddin, *supra* note 212, at 29.

[218] *See* Barr et al., *supra* note 105, at 27. *Cf.* Häberli, Jansen & Monteiro, *supra* note 120, at 314 (concluding that empirical evidence does not support "the idea that the weakening of labour market regulations in industrialized countries is driven by trade with low income countries. On the contrary: the only type of RTAs for which we consistently find highly significant negative coefficients are RTAs among high income countries. According to the findings reported below, it is competition among countries of a similar level of income that appears to put the highest pressure on labour market regulation in the rich world.").

[219] *See* Salahuddin, *supra* note 212, at 35 ("Trade and competitive advantage can have the effect of job dislocation and displacement. It is often the case that multinational corporations (MNCs) are in search of regimes with flexible regulations, good infrastructure, economic and political stability, and low wages amongst others. Their finding the presence of above mentioned factors in a country could well cause a move from for e.g. UK to China or Germany to Bangladesh. But then again, sole attribution to low labour standards for such a move would be utterly misleading.").

[220] *See* Garvey, *supra* note 104, at 249.

[221] *See* Salem & Rozental, *supra* note 123, at 64-65.

[222] Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 WASH. & LEE L. REV. 347, 403 (2004).

[223] *Id.*

[224] *Cf.* Garvey, *supra* note 104, at 250 ("In sum, the economic debate is many-sided, and the question of whether trade liberalization negatively or positively impacts environmental regulation and labor welfare as between developed and developing states involves complex economic analysis of multiple variables. Much of the argument pro and con depends on how the empirical data is marshaled – and on speculation. What is clear, however, is that in bringing together into a regional free trade grouping economies of different levels of development, the issues of environmental protection and labor welfare do become manifest, and can no longer be avoided by politicians and policy makers.").

The genesis of NAFTA, the first FTA embedding environmental and labor standards, reveals how extraterritorial value standards redirected the resistance of opposing stakeholders, paving the way for the adoption of the FTA. While the negotiation of NAFTA started similarly to traditional FTAs, treating environmental and labor standards as non-trade matters and, as such, not subjects for free trade negotiations, NAFTA negotiators were prompted to respond to the intensive concerns over environmental and labor issues.[225] The resistance featured a Baptist-Bootlegger coalition: "[t]he [NAFTA] had been fiercely attacked by a strange coalition composed of organized labor, environmentalists, the radical right, the protectionist left, and some very specific powerful business groups, such as big sugar firms, citrus growers, and the flat-glass industry."[226] The motive behind the resistance was based on the unlevelled playing field caused by significantly disparate environmental and labor standards:

> The environmental opponents mainly contended that the lower enforcement levels in Mexico would attract American industry, adding incentives to damage the already deteriorating Mexican environment.' 9 They pushed for reprisals against Mexico, rather than cooperation. Framed in this manner, the environmental issue was closely related to the labor issue. Labor groups also feared that industries were attracted to Mexico by the low wages paid to local workers. The "giant sucking sound," was the phrase used by Ross Perot to describe the catastrophic phenomenon of companies and jobs moving to Mexico as though they were being sucked into a black hole. This metaphor represented the main force binding together this unusual coalition.[227]

Finally, the US government hammered out a solution that was intended to ease the anxiety brought about free trade without changing the FTA's economic equation, namely the side-agreements on environmental protection and labor rights.[228]

> In November 1992, Bill Clinton defeated President Bush in the presidential election. Although NAFTA negotiations were completed before the 1992

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[225] Alejandro Posadas, *NAFTA's Approval: A Story of Congress at Work "From International Relations to National Accountability,"* 2 ILSA J. OF INT'L & COMP. L. 433, 434 (1996).

[226] *Id*. at 435.

[227] *Id*. at 436-37.

[228] *See*, MARY TIEMANN, CONG. RESEARCH SER., NAFTA RELATED ENVIRONMENTAL ISSUES AND INITIATIVES 1-2 (2004), https://digital.library.unt.edu/ark:/67531/metacrs6073/m1/1/high_res_d/97-291enr_2004Mar23.pdf ("Environmental issues emerged early in NAFTA negotiations, and linkages between trade and environmental issues were reflected in the outcome of these negotiations more so than in any previous trade talks. While not a new issue, the question of whether a country's stricter environmental measures could be found to pose non-tariff trade barriers received an unprecedented level of attention during the NAFTA debate. Additionally, the question was raised whether a country's weaker environmental protection measures or their ineffective enforcement would create a competitive advantage and provide an added incentive for businesses to relocate production to the least regulated country. A related concern was that expected NAFTA-driven industrialization and population growth in the U.S.-Mexico border region would worsen the severe pollution problems already present. Although trade officials argued that environment was not a customary trade matter and that NAFTA talks were not the best forum for resolving these issues, the level of concern over environmental issues in Congress prompted NAFTA negotiators to respond to them.").

> election, then candidate Clinton had endorsed the accord by promising to pursue supplemental agreements to address the deficiencies in the negotiated text in the areas of the environment, labor, and safeguards. Clinton was apparently trying to appease two major interest groups which supported his campaign: labor and environmentalists.[229]

VI. CONCLUSIONS

While fundamental rights do not, at first glance, appear to be of trade-relevance and there is no multinational endeavor to create a global regime for these universal values,[230] states have realized that compliance with fundamental rights requirements has economic effects and cost implications, and domestic producers are put at a competitive disadvantage when they are required to comply with higher standards. Although this seems to be no different from a traditional regulatory competition problem, fundamental rights have a special status.[231] On the one hand, states, for obvious reasons, are disinclined to lower their standards and to impair their fundamental rights protection for reasons of trade.[232] On the other hand, human rights may easily camouflage the economic considerations behind fundamental rights claims.

Extraterritorial value considerations may be accommodated in the general exceptions of Article XX GATT and Article XIV GATS.[233] Accordingly, member states may embargo foreign products with reference to the production process, instead of the product's characteristics, and this may be extrapolated to environmental protection and core labor standards. It is submitted that this kind of extraterritoriality is acceptable only if the value consideration in question is universally accepted.[234] Core environmental protection and labor standards do meet this requirement.[235] However, there is a fundamental technical problem with their use for this purpose: as a matter of practice, in most cases, it is virtually impossible or highly difficult to ascertain whether the production process of a particular product was observant of the core environmental or labor standards.[236] What, in most cases, can be ascertained is the general labor rights situation in a country, however, the result of such an assessment may be only a general embargo against the goods originating in that country; a result saliently irreconcilable with the basic notions the global trading systems rests on.[237]

New generation FTAs are developing a "folklore" of environmental and labor standards: a common regulatory pattern, which, with the spread of FTAs, has the perspective of becoming a quasi-multilateral arrangement.[238] This parallels the history of bilateral investment treaties: while international investment protection has always remained

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[229] Posadas, *supra* note 225, at 439.

[230] *See* Susan Ariel Aaronson & Jamie M. Zimmerman, *Fair Trade? How Oxfam Presented a Systematic Approach to Poverty, Development, Human Rights & Trade*, 28 HUM. RIGHTS Q. 1025, 1028-30 (2006).

[231] *See* McCrudden & Davie, *supra* note 28, at 49-50.

[232] *Id.*

[233] *See* Marrakesh Agreement, *supra* note 6, at Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167, Annex 1A, 1867 U.N.T.S 187, 33 I.L.M. 1153.

[234] *See* Salazar-Xirinachs & Martínez-Piva, *supra* note 29, at 316.

[235] Eugene Beaulieu & James Gaisford, *Labour and Environmental Standards: The "Lemons Problem" in International Trade Policy* (Univ. of Calgary Dept. of Econ. Discussion Paper Series No. 2000-07, 2001).

[236] *See* Salazar-Xirinachs & Martinez-Piva, *supra* note 29, at 340.

[237] *See* Beaulieu & Gaisford, *supra* note 235.

[238] *See* Less & Kim, *supra* note 110.

predominantly bilateral, these bilateral strands weaved a taut fabric that has the appearance of a lacunose multilateral scheme.[239] This folklore is made up of several elements. The "continuous improvement" clause obliges states to maintain high environmental and labor standards.[240] The spearhead of the substantive provisions are the core standards established by the FTAs.[241] In the field of labor law, these encompass at least the quadriga of labor rights set out by the ILO's 1998 Declaration on Fundamental Principles and Rights at Work: freedom of association and right to collective bargaining, prohibition all forms of forced and compulsory labor, prohibition of child labor and elimination of discrimination at the workplace.[242] However, FTAs quite often extend the ambit of core standards beyond this base-line to include the requirement of a fair minimum wage and occupational safety and health. In the field of environmental protection, the function of core standards has been adopted by the UN Framework Convention on Climate Change and its Kyoto Protocol, and recently the 2015 Paris Climate Agreement.[243]

The added value of reaffirming the rules of international treaty law as the FTA's core standards is that it brings these substantive standards into the ambit of a more effective dispute settlement mechanism, as well as makes the rules part of the mutually agreed upon commitments emerging from the FTA; that is, the violation of the incorporated standards risks these trade benefits.[244] Although the FTAs do not fully reaffirm nor incorporate the parties' various international obligations in relation to the field of environment and labor, they uniformly provide for the "effective implementation" of the rules, to which the parties are subjected under international law.[245] This implies that even though the parties may refer to the violation of non-incorporated international treaty obligations in the field of environment and labor, none of them are obliged to uphold these obligations and any of them may denounce these standards with essentially no strings attached.

The environmental and labor chapters' foundation-stone is the "no waiver or derogation" clause, which prohibits the waiver of or derogation from domestic environmental and labor law in an effort to encourage trade.[246] In addition, the "inappropriate encouragement" clause specifically prohibits the trade-motivated attenuation of environmental and labor standards, pronouncing this to be a form of illegitimate regulatory competition.[247] Further, the "effective enforcement" clause provides that the parties shall effectively enforce their environmental and labor laws.[248]

The above obligations, including the "no waiver or derogation" and the "effective enforcement" clauses, are conditional on effects on inter-party commerce, meaning that

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[239] *See* Hepple, *supra* note 102.
[240] *See* KORUS, *supra* note 121.
[241] *See* Vandevelde, *supra* note 116.
[242] *See* ILO Declaration*, supra* note 124.
[243] *See* JEFTA, *supra* note 119, at art. 16.4(4).
[244] *See supra* text accompanying note 140.
[245] *See supra* text accompanying note 142.
[246] *See supra* text accompanying note 144.
[247] *See supra* text accompanying note 145.
[248] *See supra* text accompanying note 146.

environmental and labor standards are protected by the FTAs only when there is an adverse impact on the FTA's imaginary trade equation.[249]

The increasing insistence on the establishment of extraterritorial value standards has two narratives: on the one hand, developed states may implement them for moral reasons (these values amount to a categorical imperative in the civilized world and "must" be protected); on the other hand, they may champion these value standards to hypocritically serve their own most selfish economic interests at the cost of less developed countries.[250]

It would be flawed to overestimate any of the two above factors. While it is true that only values that have a strong trade-relevance make their way to the negotiation table, at the same time, it is equally true that only those regulatory issues that are backed by a strong value-driven narrative have been singled out.[251] Notably, regulatory competition has various other fields where state measures have the potential to confer a significant competitive advantage on local producers (e.g. taxation, energy prices) and still have not evolved into a linkage problem, possibly because they cannot be wrapped up with one, single universal value.[252] The value issue used by developed countries, be it for selfish economic interests or not, is neither forged, nor exaggerated.[253] The seemingly unholy marriage between the greedy and the moral has an undeniable virtue: due to its interest-driven character, international trade liberalization has the potential of spreading non-trade values and the advantage of FTAs is that they use trade benefits as leverage to protect the environment, as well as workers' fundamental rights.[254]

As a general theory, it may be concluded that value standards have the potential of becoming a key element of comprehensive FTAs, pending that regulatory competitive pressures are perceived to be exceptionally high and the standard is regarded as non-negotiable by the local electorate.[255] The principle of "smaller resistance" means that the extraterritorial demands concerning standards work as a steam valve, which ease the irresolvable tension between ossified local value standards and competitiveness in world trade.[256]

The theory of international trade is largely based upon the notion of comparative advantages.[257] It can be plausibly argued that even though such advantages have to be rewarded, it is legitimate to confine this to "fair" comparative advantages, with the exclusion of "unfair" advantages, such as subsidies.[258] Of course, mere regulatory differences, though they may

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[249] *See supra* text accompanying note 152.

[250] *See supra* Part 4.

[251] *See* Chartres & Mercurio, *supra* note 43, at 692.

[252] *See* Kolben, *supra* note 108.

[253] *See* Lo, *supra* note 105, at 330 ("[A]lthough it is true that countries can cooperate with or without an FTA including environmental provisions, however, (…) the cooperation or the handling of environmental matters under an FTA can be more effective for the facts that there could be incentive under FTA to encourage environment protection and that there could be enforcement mechanism to ensure that environmental provisions are properly implemented.").

[254] *Id.*

[255] *See* Ehrenberg, *supra* note 75, at 364-66.

[256] *See* Burtless, *supra* note 12.

[257] *See* *ECONOMICS* ONLINE, *Comparative Advantage*, http://www.economicsonline.co.uk/Global_economics/Comparative_advantage.html (last visited Feb. 5, 2020).

[258] *See* Ehrenberg, *supra* note 75, at 364-66 ("[V]iolations of these standards by a state, either directly or by its failure to adequately police violations, constitute a state subsidy to the producers of those goods and thereby give the violating state an unfair competitive advantage in its trading relations with other countries.").

confer advantages on domestic producers and inflict disadvantages on foreign producers, cannot be considered unfair.[259]

"The mere fact that some countries apply different standards, even if they are lower, can hardly be used against them. If that position was seriously taken, all sorts of man-made differences could become targets and we would need a world government that would impose identical tax rates, electricity prices, and transportation charges for all enterprises, regardless of global location."[260] Nonetheless, competitive advantages that can be traced back to the ignorance of universally accepted values, such as core standards of environmental protection and labor law, are not virtues that deserve recognition.

It must be noted that, whatever the motives are, the continued reliance on extraterritorial environmental and labor standards seems to be "much ado about nothing".[261] Although the effects are heterogeneous, or varied, the overall impact on trade and competitiveness is slight.[262] In other words, although the non-observance of core environmental and labor standards may be considered unfair comparative advantages, such cases are very rare.[263] While only a minuscule amount of the lower costs to producers from developing countries may be attributed to the impairment of core standards, contrary to the general perception, the enhancement of these standards has no palpable effect on developing countries' cost-advantage at large.[264] All this suggests that the debate on environmental and labor standards is more like a redirection activity: the reaction concerning environmental and labor standards displaces a real, but invariable circumstance such as cost-advantage, with a changeable but relatively insignificant one of core environmental and labor standards, in an effort to dampen the political resistance against free trade.[265]

Nonetheless, the sustainability debate is probably the most constructive defense mechanism against the project fear generated by free trade, a reaction labeled in psychology as sublimation: a defense mechanism which turns unpleasant impulses into socially valuable actions.[266] After all, it is a fair solution to channel the energies of resistance against free trade into a trade-friendly activity which has the effect of fostering universal values.

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[259] *See* Emmert, *supra* note 184, at 87.

[260] *Id.*

[261] *See* Dechezleprêtre & Sato, *supra* note 200.

[262] *Id.*

[263] *See* Guzman, *supra* note 159, at 892 n.28.

[264] *Id.*

[265] *See* Salahuddin, *supra* note 212.

[266] *Sublimation*, DICTIONARY.COM, https://www.dictionary.com/browse/sublimation?s=t.