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relation to international trade law

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Summary

The supervising organs of the International Labour Organization (ILO) have for decades criticized the Myanmar government for making use of forced labour. In 1996, during the 83rd session of the International Labour Conference, twenty-five worker delegates filed a complaint against Myanmar for violating its obligations under the Forced Labour Convention, and soon after the Governing Body of the ILO appointed a Commission of Inquiry. The Commission directed heavy critique against Myanmar for making use of forced labour, and formulated a number of recommendations for the government to implement.

After a series of attempts to persuade the Myanmar government to comply with the recommendations of the Commission, a resolution calling on all ILO members to review their contacts with Myanmar so as not to aid the government in their violations of the Forced labour Convention, was adopted in the year 2000.

As a result of this resolution, several governments imposed trade sanctions on Myanmar. These actions can be seen as possible violations of the international trade rules of the World Trade Organization (WTO). However, there are certain exceptions to these rules relating to e.g. 'public morals'. The Dispute Settlement Mechanism of the WTO has never decided whether human rights arguments can be used to justify exceptions from trade obligations, but an investigation into the jurisprudence of the WTO dispute organs and the history of the exception clauses of international trade law points in this direction. If a specific trade measure is taken as a consequence of ILO authorization it could be considered acceptable under the exception clauses of the major trade agreements. However, if a trade measure taken under the ILO resolution for some reason should fail to meet the requirements of the exceptions clauses, and therefore amount to a violation of an international trade agreement, a conflict of norms would arise. Since the ILO resolution is the later and more specific norm, it should take precedence over the general WTO rules according to the general law principles of *lex posterior* and *lex specialis*.

The implications of the Myanmar experience are difficult to foresee, but hopefully the future potential conflicts and synergies between international human rights law and international trade law can be solved through the display of mutual respect and understanding of the major international actors of these areas of international law.

Abbreviations

AB	Appellate Body
ASEAN	Association of Southeast Asian Nations
BFDA	Burmese Freedom and Democracy Act
CSR	Corporate Social Responsibility
DP	Dispute Panel
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding ¹
EC	European Community
EU	European Union
FDI	Foreign Direct Investments
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HLT	High Level Team
ICFTU	International Confederation of Free Trade Unions
ICJ	International Court of Justice
ILC	International Labour Conference
ILO	International Labour Organization
ITO	International Trade Organization
MMPA	Marine Mammal Protection Act
NGO	Non Governmental Organization
NLD	National League for Democracy
SPDC	State Peace and Development Council
TRIPS	Trade-Related Intellectual Property Agreement
TVA	Towns and Villages Acts
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UK	United Kingdom
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
vHLT	very High-Level Team
WTO	World Trade Organization

¹ Understanding of Rules and Procedures Governing the Settlement of Disputes (1994), available via the WTO homepage, <www.wto.org/english/docs_e/legal_e/28-dsu_e.htm>.

1 Introduction

1.1 General Background

The International Labour Organization (ILO) was created in 1919 to establish and implement international standards on the conditions of labour. The organization was from the beginning a unique creation, with its tripartite structure that allowed representatives from workers' and employers' organizations to participate alongside governments in both the creation and the supervising of labour standards. However, much like the later established human rights institutions of the United Nations and most other institutions of international law, the supervising procedures of the ILO in practise mainly consisted of name-and-shame procedures, without any real possibilities of punishing governments not upholding their commitments under international labour law.

By contrast, the World Trade Organization (WTO) has since its creation in 1994 been equipped with a powerful Dispute Settlement Mechanism, empowered to grant offended members the right to suspend concessions or obligations due to the offending members, thereby effectively enforcing the principles of international trade law. This competence, coupled with the automatic and effective system for adjudication, sparked the interest of labour rights proponents for an insertion of a so-called 'social clause' into the WTO. This would bind the WTO members to uphold the basic human rights of workers through the effective dispute settlement system of the organization. Despite the interest for this construction of several governments, not to mention unions and Non Governmental Organizations (NGOs), the opponents of this idea managed to master the debate at the first Ministerial Meeting, creating the 'Singapore Declaration', through which the members of the WTO announced their commitment to labour rights, but named the ILO the competent organization to deal with the issue. The intent of this statement was to leave questions of labour standards out of the organization.

The ILO used the momentum gained by the interest in labour-trade and human rights issues to create the 'ILO Declaration on the Fundamental Principles and Rights at Work' in 1998, stating that all ILO members were obliged to uphold the core labour rights conventions.

Alongside this development, the ILO supervising system was ever increasingly occupied with Myanmar's flagrant violations of the Forced Labour Convention², a core labour rights convention. As labour rights proponents had been disappointed by the reluctance of the WTO to deal with labour issues, there was an amounting pressure on the ILO to force

² ILO Convention concerning Forced or Compulsory Labour, No. 29, 1930.

Myanmar to comply with its obligations. Article 33 of the ILO Constitution was a provision creating a possibility to enforce labour rights by authorizing members to punish the violating member, through for example trade restrictions, reminiscent of the WTO Dispute Settlement Mechanism.

As this procedure by its nature inflicted on the territory of international trade law, it gave rise to the questions I will attempt to answer in this thesis.

1.2 Subject and Aim

My firm conviction is that human rights and labour rights proponents should make every effort to learn more about other areas of international law. Obvious as this may seem, there are still many gaps in the understanding of how different areas of international law and policy affect human rights, and there is much to gain by trying to investigate the possible synergies and conflicts. Given the popular support for the concept of providing protection for human rights and labour rights, the human rights regime might well be positively affected by links with other areas of international law. The inevitable interaction between human rights law and other areas of internal law creates opportunities and possibilities that can only be explored if they are brought to surface and analyzed.

The aim of this thesis is to analyze the latest development in the enforcement of core labour rights and its relation to international trade law. The subject of the analysis will be the sanctions imposed on Myanmar, based on the ILO critique of the country's violations of the Forced Labour Convention. The main legal question to be answered in this thesis is:

Are the sanctions imposed on Myanmar legal under international trade law?

The steps the ILO has taken towards Myanmar will be examined. This will provide a background for answering the preliminary questions of whether the ILO has the competence to authorize trade sanctions and if this step was justified in the present case. Furthermore, the rationale behind the trade measures taken by the member states will be highlighted through this investigation.

As the Myanmar process represents an innovation of the working methods of the ILO as well a novelty in the relation between trade and labour, it gives birth to another question:

How will the Myanmar experience affect the future relation between labour rights and international trade law?

A discussion concerning this issue will be conducted in the final parts of the thesis, against the backdrop of the findings regarding the actions taken by the ILO and its members, and international trade law.

1.3 Disposition

The second chapter of this thesis will deal with the steps taken by the ILO organs, as well as the trade measures imposed by member states, to persuade the Myanmar government to honour its obligations under the Forced Labour Convention. The reasons for, and consequences of, this line of action by the ILO will be analyzed in the concluding part of the chapter. This background will then form the basis for the third chapter, in which the legality of these trade measures will be examined under international trade law. The general principles of WTO law and the exceptions to these principles will be outlined, to investigate if trade measures on human rights grounds are legal under international trade law. The fourth chapter will deal with the possible conflict of norms if the trade measures imposed on the basis of the ILO authorization are violating WTO law. Finally, in the fifth chapter, I will state the conclusions regarding the legality of the trade measures examined, and discuss the Myanmar process' effect on the future relation between labour rights and international trade law.

1.4 Delimitations

My main focus regarding the Myanmar process will be on the procedural elements pertaining to the ILO constitution, rather than on the substantive legal issues of forced labour. The reason for this is twofold. Firstly, the legal issues concerning forced labour are in this case not controversial, Myanmar has been criticized for over forty years for its reluctance to abide by the Forced Labour Convention. Secondly, my purpose with this thesis is to examine the recent changes in the enforcement of labour rights and consequently the procedure as such, with its unique punitive element, is of great importance to my conclusions.

The general question regarding the effectiveness and potential dangers of economic sanctions will not be examined in detail, as this issue is very complex and thus cannot be dealt with at length in this thesis.

1.5 Method and Materials

My research regarding the ILO's dealings with Myanmar will mostly be based on primary sources, which are mainly the actual resolutions and reports produced by the various ILO organs. This material will be analysed through the lenses of academic literature of the area.

The investigation of the legality of human rights based trade sanctions under WTO law will be conducted through classical legal method, whereby I will try to identify the content of the present trade law agreements, *de lege lata*. The international legal framework embodied in the Vienna Convention on the Law of Treaties will form the background against which the rules of the trade agreements will be analysed. The jurisprudence of the WTO organs will be the primary source, but academic literature on the topic will also be used. In the chapter regarding the conflict of norms, the investigation will rest on the general principles of international law on this topic, together with academic works on the topic.

As for the discussion of the possible consequences of the Myanmar situation, I will use the legal background clarified by the *de lege lata* investigation as a background to elaborate on the possible future consequences. The academic debate on this topic will clarify the outlines of the discussion.

2 The Myanmar Case

2.1 Introduction

In this chapter I will examine the unique process whereby the ILO, for the first time in its 80-year old existence, resorted to the usage of punitive measures by passing a resolution under article 33 of its Constitution. Myanmar, a country run by a harsh military regime using forced labour³, was the subject of these measures.

I will in a chronological order describe the steps that the ILO has taken to persuade the government of Myanmar to uphold its human rights obligations during the later years. This process will be analyzed from the internal legal perspective of the ILO's constitution. The debate regarding the usage of punitive measures, which is still ongoing within the ILO, will also be outlined.

2.2 Background

In 1996, during the 83rd session of the International Labour Conference, twenty-five worker delegates filed a complaint under article 26 against Myanmar for violating its obligations under the Forced Labour Convention of 1930. The complaint recalled that 'Myanmar's gross violations of the Convention [No. 29] have been criticized by the ILO's supervisory bodies for 30 years'.⁴

The historic background to the problems of forced labour in Myanmar was the following. Myanmar formed a part of the British Empire until it became independent in 1948 and adopted a national constitution. The constitution contained a prohibition of forced labour.⁵ The following years Myanmar was troubled by numerous insurgencies by different political and ethnical groups. The military assumed power in a coup in 1962. Twelve years later, a new constitution was adopted and the country embarked on a socialist path. This was interrupted by another coup in 1988, establishing yet another

³ See e.g. homepage of JURIST, available on <jurist.law.pitt.edu/world/myanmar.htm>, the Burma campaign UK, <www.burmacampaign.org.uk/aboutburma/economy.html>, last visited 26 May 2006.

⁴ Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention 1930 (No. 29), Geneva, 2 July 1998 (hereinafter, Report of the Commission of Inquiry), Part I, para. 1(1), available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>, last visited 26 May 2006.

⁵ See Francis Maupain, *Reflections on the Myanmar Experience*, in Philip Alston's (Ed.), *Labour Rights as Human Rights*, 2005, Oxford University Press, New York, p. 97.

military regime. In 1990 there was hope of a democratic transformation in the country as a free election was held and the opposition party, the National League for Democracy (NLD), won a landslide victory. However, the military regime refused to recognize the result of the election and hardened the grip on power in the country. The situation in Myanmar quickly worsened and the country found itself in political isolation.⁶

Many parts of the Myanmar legislation are remnants of British colonial rule. This legislation includes the penal code, which explicitly prohibits unlawful compulsion of forced labour in section 374. However, the Towns and Villages Acts (TVA), another piece of British legislation, form exceptions to this general prohibition. The TVA deal with the public administration of villages, and provide the Village Heads with authority to foster labour for numerous tasks such as messenger duties, food supply etc. The types of forced labour covered under the TVA are thus not unlawful under the penal code.⁷

Myanmar ratified the ILO Forced Labour Convention (No. 29) during a period of civilian rule in 1955. This convention, which is one of the eight 'core' human rights conventions of the ILO⁸, defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.⁹ Even though Myanmar ratified the Forced Labour Convention, the TVA remained intact.¹⁰ From the 1960s and onwards the ILO Committee of Experts on the Application of Conventions and Recommendations repeatedly stated that the TVA were inconsistent with Myanmar's obligations under the convention. The Myanmar governments' main response was that these pieces of colonial legislation were obsolete and thus did not pose a problem.¹¹ There was no real development in the communication between the ILO organs and the Myanmar authorities. Instead, the rapid political changes, as mentioned above, during the end of the 1980s and the beginning of the 1990s further worsened the human rights situation in the country.

2.3 The Commission of Inquiry

It was against this background that 25 labour delegates of the 83rd session of the International Labour Conference filed their complaint against Myanmar.

⁶ See Francis Maupain, *Reflections on the Myanmar Experience*, p. 98.

⁷ Report of the Commission of Inquiry, Part IV, para. 237.

⁸ See the ILO homepage, available on www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE, last visited 22 March 2006.

⁹ ILO Convention No. 29, article 2.

¹⁰ See Francis Maupain, *Reflections on the Myanmar Experience*, p. 98.

¹¹ *Ibid.*

According to the complainants, there was widespread practice of forced labour in Myanmar. This forced labour, both for public and private purposes, affected hundreds of thousands of men, women and children in various parts of the country. The military government was also accused of committing physical and sexual abuse on forced labourers including beatings and rapes. According to the complainants, these actions amounted to blatant violations of Myanmar's obligations under the Forced Labour Convention.¹²

The Governing Body of the ILO appointed a Commission of Inquiry in 1997 to examine this complaint, as provided for in article 26(2) of the ILO Constitution.¹³ The Myanmar government refused the Commission entry into the country as this 'would interfere in the internal affairs of [the] country'.¹⁴ Not gaining access to the country, the Commission completed their task by holding hearings with witnesses in Geneva¹⁵ and by visiting the neighbouring countries, where they interviewed up to 250 persons to gather information about the situation on forced labour in Myanmar.¹⁶ The Commission's report was published in 1998. The Commission decided that it, despite the absence of co-operation by Myanmar, had sufficient material to make an assessment as to the substance of the case.¹⁷

The Commission's conclusions on substance were clearly formulated:

There is abundant evidence before the Commission showing the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military for portering, the construction, maintenance and servicing of military camps, other work in support of the military, work on agriculture, logging and other production projects undertaken by the authorities or the military, sometimes for the profit of private individuals, the construction and maintenance of roads, railways and bridges, other infrastructure work and a range of other tasks, none of which comes under any of the exceptions listed in Article 2(2) of the Convention.¹⁸

The Commission concluded that the TVA were incompatible with the Forced Labour Convention. However, even though the requisition of forced labour often followed the general pattern described in the TVA, these laws were never actually invoked in practise. Instead, the military acted with unfettered competence and they did not even respect the limits of the TVA.¹⁹ Forced labour was also widely performed by women, children and elderly person and often in combination with 'threats to the life and security and extrajudicial punishment of those unwilling, slow or unable to comply

¹² Report of the Commission of Inquiry, Part III, para. 101.

¹³ *Ibid.*, Part I, para. 1.

¹⁴ *Ibid.*, Part II, para. 70.

¹⁵ *Ibid.*, Part II, para. 55.

¹⁶ *Ibid.*, Part II, para. 80.

¹⁷ *Ibid.*, Part V, para. 523.

¹⁸ *Ibid.*, Part V, para. 528.

¹⁹ *Ibid.*, Part V, para. 529.

with a demand for forced labour; such punishment or reprisals range from money demands to physical abuse, beatings, torture, rape and murder.’²⁰

Myanmar’s obligation to suppress the use of forced labour was thus violated both through the TVA and in actual practice ‘in a widespread and systematic manner, with total disregard for the human dignity, safety and health and basic needs of the people of Myanmar’.²¹ The Commission also criticized the total lack of enforcement of the penal code section 374, which prohibits forced labour. This piece of legislation was not even applied in cases not covered by the exceptions in the TVA. Finally, the Commission stated that the prohibition of forced labour was a peremptory norm of international law, and that anyone who violated this principle was responsible of an international crime, and, if the violation was widespread or systematic, a crime against humanity.²²

The Commission recommended that the Myanmar government revised the TVA and other legislative text, to make them compatible with the country’s obligations under the convention. Even more importantly, the authorities, and in particular the military, should refrain from imposing forced labour in practise. Furthermore, the penal code’s section 374 was to be strictly enforced. The final words of the Commission underlined the extreme gravity of the human rights violations in Myanmar:

This report reveals a saga of untold misery and suffering, oppression and exploitation of large sections of the population inhabiting Myanmar by the Government, military and other public officers. It is a story of gross denial of human rights to which the people of Myanmar have been subjected particularly since 1988 and from which they find no escape except fleeing from the country.²³

The recommendations were very strong in their frank description of the human rights violations in Myanmar. It is important to note that the complaints procedure used in this case, under article 26 of the ILO constitution, results in a binding legal determination on a question of a breach of an ILO Convention.²⁴ The recommendations of the Commission of Inquiry were not in their self binding rulings, but Myanmar had, according to article 29 of the ILO Constitution, either to accept the recommendations or to pursue the matter in the International Court of Justice (ICJ). Similar to all other countries faced with the recommendations of a Commission of Inquiry, Myanmar did not make use of the ICJ procedure to try to alter the outcome of the procedure.

Myanmar’s response to the Commission’s findings was deeply negative. The government described the information the Commission had received as coming from ‘anti-government circles’ and being ‘politically motivated,

²⁰ *Ibid.*, Part V, para. 530.

²¹ *Ibid.*, Part V, para. 536.

²² *Ibid.*, Part V, para. 538.

²³ *Ibid.*, Part V, para. 543.

²⁴ See Francis Maupain, *Reflections on the Myanmar Experience*, p. 99.

highly biased, lacked objectivity'.²⁵ However, implying that the findings of the Commission were erroneous, the government stated that it did not see any difficulties in implementing the recommendations of the Commission.²⁶

May 14 1999 the Myanmar government issued Order No. 1-99, in an attempt to silence the critique from the ILO and the international community. This order proscribed that the persons authorized to use forced labour according to the TVA should refrain from doing so 'until and unless any further directive is issued'.²⁷ This prohibition was however coupled with certain exceptions, in part corresponding to the exceptions found in articles 2 and 10 of the Forced Labour Convention. The issuance of Order No. 1-99 did not persuade the ILO organs that the Myanmar government had taken the Commission's recommendations seriously. In a report on these developments to the Governing Body, the International Labour Office made it abundantly clear that Myanmar had yet to implement the recommendations of the Commission of Inquiry. Firstly, the exceptions in article 10 of the Forced Labour Convention, which Order 1-99 referred to, were only to be applied during a transitional period from the adoption of the Convention in 1930, and they were thus no longer applicable.²⁸ Secondly, Order No. 1-99 reserved the option of issuing a further directive to reinstate the powers to make use of forced labour.²⁹ Thirdly, despite the recommendations of the Commission, no action had been brought against anyone for violating section 374 of the penal code. Lastly, the report contained evidence from numerous sources, such as the International Labour Confederation of Free Trade Unions (ICFTU), the United Nations High Commissioner for Refugees (UNHCR) and Amnesty International, that forced labour was still practiced on a large scale across the country.³⁰ Once again the Myanmar Government responded defiantly to the ILO organs, and stated that the facts of the Director-General's report were 'manifestly false accusations concocted with evil intent to bring about the destruction of Myanmar'.³¹

²⁵ See letter dated the 23 September 1998, appended to ILO document GB.273/5, available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb273/gb-5.htm>, last visited 26 May 2006.

²⁶ See letter dated the 23 September 1998, appended to ILO document GB.237/5.

²⁷ Order 1-99 is appended to the Report of the Director-General to the members of the Governing Body on Measures taken by the Government of Myanmar following the recommendations of the Commission of Inquiry established to examine its observance of the Forced Labour Convention, 1930 (No. 29), Geneva 21 May 1999, GB 274, available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb274/dg-myanm.htm>, last visited 26 May 2006.

²⁸ The Report of the Director-General to the members of the Governing Body on Measures taken by the Government of Myanmar following the recommendations of the Commission of Inquiry established to examine its observance of the Forced Labour Convention, 1930 (No. 29), para. 52.

²⁹ *Ibid.*, para. 49.

³⁰ *Ibid.*, paras. 14-44.

³¹ The memorandum sent by the Myanmar Government dated 21 May 1999 was appended to document GB 276/6 entitled Measures, including action under article 33 of the Constitution of the International Labour Organization, to secure compliance by the Government of Myanmar with the recommendations of the Commission of Inquiry established to examine the observance of the Forced Labour Convention, 1930 (No. 29),

2.4 The Decision to Implement article 33

The ILO at this point found itself in a unique situation. The extreme gravity of the human rights abuses coupled with the open defiance of the Myanmar authorities made it virtually impossible to continue using the co-operative model that the organization had relied on in earlier cases. In previous cases the recommendations of the Commissions of Inquiry had either been, albeit reluctantly, complied with or the problem had been solved automatically when the concerned regime had collapsed.³² In the Myanmar case the regime did not seem to be near a collapse, and the ILO-system thus had to choose between two unpleasant options. Either accept status quo, which the ILO could hardly do without losing relevance in similar future cases, or make use of the punitive measures that were present in article 33 of the ILO Constitution, which reads:

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

This article had never before been used, and the language of the provision left it open to interpretation. The original version of this article had referred to a more specific form of action to be taken, namely ‘measures of an economic character’,³³ but the article was revised in 1946 to a more general language. The purpose of this change does not seem to have been to exclude measures of an economic character, but rather not to limit the article to such measures alone.³⁴ However, there are diverging opinions about the current content of the article.³⁵ The aim of any measure taken under article 33 should correspond with the objectives of the Commission of Inquiry, and they should be appropriate for securing compliance with these objectives.³⁶

In March 2000, the Governing Body decided to put the usage of article 33 on Myanmar on the agenda of the 88th session of the International Labour Conference.³⁷ The discussion in the Governing Body revealed a strong support for using article 33, although there were diverging views. The strongest supporter was the Workers’ group, but also the Employers’ group was in favour. As for the governments, the Western countries were all in favour of strong measures, as they felt that the Myanmar government had

Governing Body, 276th Session Geneva, November 1999. Available via the ILO homepage <www.ilo.org/public/english/standards/relm/gb/docs/gb276/gb-6.htm>, last visited 26 May 2006.

³² See Francis Maupain, *Reflections on the Myanmar Experience*, p. 95.

³³ Versailles Peace Treaty, article 419.

³⁴ GB 276/6, para. 12.

³⁵ See Francis Maupain, *Reflections on the Myanmar Experience*, p. 108.

³⁶ GB 276/6, para. 19.

³⁷ See GB 276/6.

not acted on the Commission of Inquiry's recommendations despite the fact that nearly two years had past since the publication of the Commission's report. The United Kingdom stated that the Myanmar government had ignored the Commission's report and shown contempt for the ILO, and this was supported by the governments of the United States, Austria, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Lithuania, the Netherlands, New Zealand, Norway, Portugal, Sweden and Turkey.³⁸ A number of developing countries, among others South Africa, Namibia, Burkina Faso, Benin, Chile, Guatemala and Gabon, were also in favour of placing an article 33-resolution on the agenda of the International Labour Conference. The main opponents were the countries of the Association of South East Asian Nations³⁹ (ASEAN), who through Malaysia communicated that they were in favour of further dialogue without using punitive measures.⁴⁰ The governments of China and the Russian Federation also supported this position. The government of India was also opposed to the usage of article 33 stating, somewhat surprisingly, that the 'Government was of the view that the ratification of any ILO Convention was a voluntary process and its application should likewise be voluntary'.⁴¹

The decision by the Governing Body to put a resolution under article 33 on the agenda of the ILO made a definite impact on the attitude of the Myanmar government. The government decided to accept a visit of an ILO Technical Cooperation Mission to discuss the implementation of the Commission's recommendations. The Technical Cooperation Mission was able to conduct talks with both government representatives and representatives of the opposition party NLD, amongst other the General Secretary Ms. Aung San Suu Kyi.⁴² Following the visit, the Myanmar Minister of Labour addressed a letter to the Technical Cooperation Mission, stating that the government had taken steps to ensure that there were no instances of forced labour in Myanmar and that it 'would take into consideration appropriate measures, including administrative, executive and legislative measures, to ensure the prevention of such occurrences in the future'.⁴³ Through this letter the Myanmar authorities for the first time

³⁸ Provisional Record 4 of the 88th session of the International Labour Conference, p. 9 available via the ILO homepage www.ilo.org/public/english/standards/relm/ilc/ilc88/pdf/pr-4.pdf, last visited 26 May 2006.

³⁹ ASEAN consists of Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. See the ASEAN homepage, www.aseansec.org/. Brunei Darussalam is not a member of the ILO. See the ILO homepage, www.ilo.org/public/english/standards/relm/country.htm, last visited 26 May 2006.

⁴⁰ Provisional Record 4 of the 88th session of the International Labour Conference, p. 8.

⁴¹ *Ibid.*, p. 10.

⁴² See the Report of the ILO technical cooperation mission to Myanmar, Provisional record 8, 88th session of the International Labour Conference, pp. 5-8. Available via the ILO homepage, www.ilo.org/public/english/standards/relm/ilc/ilc88/pdf/pr-8.pdf, last visited 26 May 2006.

⁴³ Letter written by Myanmar Minister of Labour, Major General Tin Ngwe, dated the 27 May 2000 and delivered to the members of the Technical Cooperation Mission. See ILO

admitted that there was a problem of forced labour in the country. The International Labour Conference (ILC) took note of and welcomed the intention of this letter but concluded that ‘the factual situation on which the recommendations of the Governing Body were based has nevertheless remained unchanged’.⁴⁴

The following discussions in the ILC divided the participants into two main groups, similar to those in the Governing Body decision referred to above. The Workers’ and the Employers’ groups were in favour of adopting a resolution on article 33, and there was support from most government delegates, such as the EU countries, central and eastern European states, the US and many of the developing countries. Several Asian governments voted against the resolution, including Malaysia, Indonesia, China, India and Pakistan, as well as the Russian Federation. These countries stated that the ILO should base its work on cooperation and they feared that this decision would become a dangerous precedent. It is interesting to note that the worker delegates of these countries did not share this fear; the delegates of both Malaysia and the Pakistan stated their full commitment to the resolution.⁴⁵ The Conference adopted the resolution (hereinafter the 2000 resolution) regarding article 33, with 257 votes for, 41 against and 31 abstentions.⁴⁶ Part 1 (b) of the 2000 resolution reads:

1. Approves in principle, subject to the conditions stated in paragraph 2 below, the actions recommended by the Governing Body, namely:

(b) to recommend to the Organization’s constituents as a whole – governments, employers and workers – that they: (i) review, in the light of the conclusions of the Commission of Inquiry, the relations that they may have with the member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations; and (ii) report back in due course and at appropriate intervals to the Governing Body;

The content of the resolution’s article 1(b) was open to interpretation, both as to the ‘review’ each country should take of their relations with Myanmar and as to what measures would be ‘appropriate’ to ensure that Myanmar could not use them to perpetuate the system of forced labour. I will

press release quoting the letter the 14 June 2000, available via the ILO homepage, <www.ilo.org/public/english/bureau/inf/pr/2000/27.htm>, last visited 26 May 2006.

⁴⁴ See Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar, 88th session of the International Labour Conference. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#I>, last visited 26 May 2006.

⁴⁵ See Discussion in the Plenary, 88th session of the International Labour Conference, available via the ILO homepage, <www.ilo.org/public/english/standards/relm/ilc/ilc88/com-seld.htm>, last visited 26 May 2006.

⁴⁶ See Vote on the resolution concerning the measures recommended by the Governing Body under article 33 of the Constitution with respect to Myanmar. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/ilc/ilc88/pdf/v-myanm.pdf>, last visited 26 May 2006.

investigate the actions open to member states and their possible legal effects below.

The resolution was to enter into force in November the same year. However, the Governing Body was empowered to freeze the implementation of the resolution at its November session if the intentions of Myanmar's Minister of Labour's letter referred to above were transformed into a legislative, administrative and executive framework 'sufficiently concrete and detailed to demonstrate that the recommendations of the Commission of Inquiry have been fulfilled'.⁴⁷

During the autumn of the year 2000, a second Technical Cooperation Mission was sent to Myanmar. Under the pressure of this mission and the threat of the 2000 resolution, the Myanmar government issued orders in October deleting the exceptions of Order 1-99, and threatening to punish violators of this order.⁴⁸ The Committee of Experts, which convened soon after the adoption of the new orders, encouraged these new steps taken by the Myanmar government.⁴⁹ However, the Committee noted that the orders were still lacking as they were not detailed regarding what types of tasks forced labour could no longer be used for, and how these tasks should be administrated in the absence of forced labour. The Committee also referred to ICFTU documents demonstrating the persistent practise of forced labour in Myanmar up to November 2000.⁵⁰ Furthermore, there were no reported cases of application of the penal code to punish violators of the forced labour prohibition.⁵¹

The Governing Body shared the Committee's critique, as the measures taken by Myanmar were not sufficiently concrete and detailed to fulfil the provisions of the resolution. The 2000 resolution therefore entered into force November 30 2000.⁵² However, the Governing Body decided that despite the punitive measures directed at Myanmar, the Director-General should continue his cooperation with the country. Myanmar stated that the country would stop all cooperation with the ILO because of this 'great injustice on Myanmar', but that they would continue their work to abolish forced labour

⁴⁷ Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar, International Labour Conference, article 2.

⁴⁸ The order is appended to document 279/6/1(Add.2). Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/gb-6-1-ad2.pdf>, last visited 26 May 2006.

⁴⁹ Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation Concerning Convention No. 29, Forced Labour 1930 Myanmar (ratification: 1955)*, Published 2001, para. 7. Available via the ILO homepage, <www.ilo.org/ilolex/english/newcountryframeE.htm>, last visited 26 May 2006.

⁵⁰ *Ibid.*, para. 20-22.

⁵¹ *Ibid.*, para. 24.

⁵² Record of Decisions at GB 279, *Effect given by the Government of Myanmar to the recommendations of the Commission of Inquiry established to examine the observance of the Forced Labour Convention, 1930 (No. 29)*. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/refs/rod279.htm#_Effect_given_by>, last visited 26 May 2006.

in the country.⁵³ The Director-General responded by pointing out that the efforts of Myanmar would need the approval of an impartial actor, namely the ILO, to be acknowledged by the international community. The Director-General therefore urged the Myanmar authorities to continue cooperating with the International Labour Office, stressing that the International Labour Conference would soon, in June of that same year, re-evaluate the situation under the resolution. This argumentation seemed to convince the Myanmar authorities that a cooperative attitude towards the International Labour Office was in their own interest.⁵⁴

After further negotiations, a High Level Team (HLT) was appointed to carry out an objective assessment of the situation in Myanmar. This introduced a 'wait-and-see' attitude amongst the ILO members. Most members thus waited for the ILO dialogue to continue before fully acting on the 2000 resolution.⁵⁵

2.5 The High Level Team and the 'Plan of Action'

The HLT was composed of independent experts appointed by the Director-General. This team was to carry out an assessment during a period of three weeks in the autumn 2001.⁵⁶

The HLT carried out its instructions by conducting interviews with government officials and visiting various parts of the country as well as the bordering countries.⁵⁷ The findings of the Commission were of a mixed nature. The Orders affecting the TVA and prohibiting forced labour had been distributed to the population and the military in the larger parts of the country. However, there were regional disparities, and the Orders had only

⁵³ See Statement by His Excellency U Mya Than, Leader of the Myanmar Observer Delegation at the Plenary of the 279th session of the ILO Governing Body after the adoption of the decision on the situation of Myanmar 1 (Geneva, 16 November 2000), appended to document GB.280/6, 280th session Governing Body, March 2001. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb280/pdf/gb-6.pdf>, last visited 26 May 2006. See also Communication dated 11 February 2001 from the Government of Myanmar to the Director-General forwarded by the Permanent Mission of Myanmar, appended to document GB.280/6, 280th session Governing Body, March 2001.

⁵⁴ See Communication dated 1 March 2001 from the Director-General to the Minister for Labour of the Government of Myanmar, appended to document GB.280/6, Appendix 5.

⁵⁵ See document GB.291/5/2, Report of the Director-General, 291st session of the Governing Body, November 2004, para 7. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/gb-5-2.pdf>, last visited 26 May 2006.

⁵⁶ See 'Understanding on an ILO objective assessment', appended to document GB.282/4, Report of the High Level Team. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/gb-4.pdf>, last visited 26 May 2006.

⁵⁷ See document GB.282/4, Report of the High Level Team, paras. 11-17.

been distributed in English and Burmese, making them impossible to understand for certain parts of the Burmese population with other mother tongues.⁵⁸ As regards criminal procedures, there had still been no cases under section 374 of the penal code before the courts despite widespread instances of forced labour of all kinds.⁵⁹ The unwillingness of the population to make use of criminal procedures stemmed from mistrust in the authorities, the fear of reprisals, and the lack of trust in the impartiality of the court system.⁶⁰ The HLT concluded that there had been decrease in the usage of forced labour, but that this trend was not necessarily stable over time and uneven regionally. Forced labour was still practiced by the military.⁶¹ The HLT identified three main obstacles to the implementation of the Commission of Inquiry's recommendations:

- i) The 'self-reliance' of the military. The military had traditionally not been funded officially, but instead relied on their own capability to extract means to sustain the troops. Moreover, many soldiers were no longer needed for actual service, but instead received pay to engage in other activities, such as farming. These soldiers often lacked the skills and found to work in agriculture, and they thus relied on forced labour.⁶²
- ii) The uncertainty as regards substitute financial/practical arrangements. The public works and military projects that had previously been performed with forced labour needed to receive additional funding to provide for the voluntary labour force.⁶³
- iii) Institutional obstacles. The people of Myanmar did not trust the authorities and the judicial instances and this hampered the efforts to come to terms with the violations of the forced labour prohibition. If free and independent workers organizations had existed, as required by ILO Convention 87 (ratified by Myanmar), these could assist the victims of violations to make use of the applicable remedies and this could affect the situation in the country.⁶⁴

The HLT presented three interacting tools to deal with the problems in Myanmar: *economic modernization*, *consistent political will* and *continued engagement of the international community*. *Economic modernization* was stressed by all the NGO's contacted by the HLT as the most important factor in eradicating forced labour. The ILO procedures, and the fear of further sanctions and consumer boycotts were creating a vicious circle of economic decline as foreign investments and the tourist industry was

⁵⁸ *Ibid.*, paras. 35-42.

⁵⁹ *Ibid.*, paras. 50.

⁶⁰ *Ibid.*, paras. 53 and 68.

⁶¹ *Ibid.*, paras. 55-57.

⁶² *Ibid.*, paras. 59-62.

⁶³ *Ibid.*, paras. 63-66.

⁶⁴ *Ibid.*, paras. 67-68.

lagging behind. However, *consistent political will* was also vitally important. The HLT stated that the modernization of the society could not take place without a change in the mentality of the authorities regarding forced labour, which was not only morally repugnant but also economically inefficient. *Engagement of the international community* was a key factor in combating total lack of credibility in the judicial instances in the country. The HLT put forward two suggestions to strengthen the international community's engagement in the country.

i) The establishment of an *ombudsman*. This ombudsman would have a mandate to receive complaints and conduct investigations in order to assist victims of forced labour.

ii) This ombudsman should be complemented by a *long-term involvement of the ILO* in the country.⁶⁵

The Myanmar authorities accepted the second proposal by the HLT, a long-term involvement by the ILO. After months of negotiations an understanding on an ILO Liaison Officer in Yangon was signed in March 2002.⁶⁶ However, both the Governing Body and the International Labour Conference were of the firm conviction that this was only one step towards the goal of eradicating forced labour. Many delegates in the ILO organs stressed that there was still no concrete evidence that the Myanmar society had undertaken permanent changes as regards forced labour.⁶⁷

The establishment of an impartial complaints procedure through an ombudsman proved to be a more difficult proposal for the Myanmar government to accept. This was not very surprising considering the structure of the dictatorial and militarized Myanmar society. Moreover, the acceptance of an international complaints procedure with a mandate to function for the victims inside the territory of the state was obviously an intrusion into the sphere of the Myanmar state. However, the International Labour Conference⁶⁸ and the Committee of Experts⁶⁹ persisted in upholding

⁶⁵ *Ibid.*, paras. 70-80.

⁶⁶ See document GB.283/5/2, Report of the ILO technical cooperation mission to Myanmar (19-25 February 2002), the Understanding between the Government of Myanmar and the International Labour Office concerning the appointment of an ILO Liaison Officer in Myanmar is appended to the document. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb283/pdf/gb-5-2.pdf>, last visited 26 May 2006.

⁶⁷ See Provisional Record 28 of the 90th Session of the International Labour Conference, Geneva, Special sitting to examine developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29). Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-28p3.pdf>, last visited 26 May 2006.

⁶⁸ *Ibid.*

⁶⁹ See document GB.285/4, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Conclusions of the special sitting of the Committee on the Application of Standards, ILC, 90th Session (June 2002), appended to the document. Available via the ILO homepage,

the pressure on Myanmar during 2002. The threat to (re)activate the measures in the 2000 resolution was always in the background of these discussions. With these coercive measures pushing the process forward, the Director-General and the Liaison Officer managed to engage in discussions with the Myanmar government on a 'Plan of Action'. This plan contained a number of awareness-raising programmes, dissemination of information and a revised version of the ombudsman function, called a 'facilitator'. The facilitator should operate in the whole country and receive complaints to make a 'prima facie'-judgment of cases of forced labour. This judgement would then either form the foundation for a settlement, or be forwarded to the judicial institutions for prosecution.⁷⁰

Unfortunately, the development in Myanmar took a bad turn as the authorities cracked down on the opposition on May 30 2003. An assembly of the opposition party, NLD, was brutally attacked by soldiers and police forces. This led to the death and injury of several persons (estimates range from the official 4 to the opposition's 70), and the incarceration of up to a hundred NLD members, including General Secretary Daw Aung San Suu Kyi.⁷¹ This incident signaled that Myanmar was not able to go through with the 'Plan of Action' due to the instability of the country, and many called for re-implementing of the sanctions under the 2000 resolution.⁷²

2.6 The Events of 2004 - Continued Difficulties

In 2004 the Committee of Experts reported minor progress in the dissemination of the orders prohibiting forced labour in six ethnic languages and wider distribution to public officials, but concluded that forced labour was widespread in the country and that the Commission of Inquiry's three recommendations were still not implemented. They further urged the government to move ahead with the 'Plan of Action'.⁷³ The ILO Liaison Officer in Myanmar also reported that the practise of forced labour was still widespread despite certain improvements in the country.⁷⁴ Even more

<www.ilo.org/public/english/standards/relm/gb/docs/gb283/pdf/gb-5-2.pdf>, last visited 26 May 2006.

⁷⁰ See Francis Maupain, *Reflections on the Myanmar Experience*, p. 104.

⁷¹ Amnesty International Press Release the 2 June 2003, *Myanmar: Safety of Daw Aung San Suu Kyi and her party in danger*, available via Amnesty International homepage, <web.amnesty.org/library/Index/ENGASA160142003?open&of=ENG-MMR>, last visited 26 May 2006.

⁷² See document GB.291/5/2, Report of the Director-General, 291st session of the Governing Body, November 2004, para 8.

⁷³ Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning Convention No. 29, Forced Labour*, 1930 Myanmar (ratification: 1955) Published: 2004, paras. 42-44. Available via the ILO homepage, <www.ilo.org/ilolex/english/newcountryframeE.htm>, last visited 26 May 2006.

⁷⁴ See document GB.291/5/1, Report of the Liaison Officer, 291st session of the Governing Body, November 2004, para 9. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/gb-5-1.pdf>, last visited 26 May 2006.

alarming, three persons had been sentenced to long-time imprisonment because of their contacts with the ILO. This verdict was later reversed upon appeal, and the Supreme Court clarified that contacts with the ILO were not prohibited.⁷⁵ The Liaison Officer furthermore reported of incidents where persons who had been in contact with him subsequently had been arrested and interrogated by the police. Despite the ongoing forced labour violations no one had been found guilty of this offence. In fact, the only results of the complaints of forced labour so far had been that two complainants had been counter-sued, found guilty of defamation and sentenced to prison. These two individuals had previously been sentenced to prison for their refusal to perform forced labour.⁷⁶ In a meeting with Myanmar authorities, the Liaison Officer was informed that these two individuals had later been released following the payment of a fine.⁷⁷ The Myanmar authorities continued to assert their willingness to implement the 'Plan of Action', but the repeated incidents of judicial violations on the rights of individuals, by both the police and the courts, cast the sincerity of the authorities into grave doubts.⁷⁸

The general feeling amongst the ILO members in late 2004 was that the period of 'wait-and-see' had come to an end.⁷⁹ The Director-General's report to the Governing Body in November 2004 reflected on the recent events and came to the conclusion that there were two main options for the Governing Body. One was to treat the later verdict in the high treason case as a positive development, the legality of contacts with the ILO now clearly supported by the Supreme Court, and continue the implementation of the 'Plan of Action'. This was however conditioned on the display of willingness of the authorities, especially the military, to take the necessary action.⁸⁰ A second option would be to inform the relevant entities that the conditions justifying the 'wait-and-see'-approach had come to an end, and that the 2000 resolution should take full force.⁸¹ However, the Director-General recognized that certain elements were lacking for the Governing Body to make an informed judgement in this matter. There had been a recent change in the leadership of the country and consequently there was uncertainty regarding what position the new leaders of the country would take on this issue.⁸² In the debate in the Governing Body both the Workers' and the Employers' group as well as many governments were of the

⁷⁵ The three persons were nevertheless convicted because of their contacts with foreign illegal organizations, *see* document GB.291/5/1, Report of the Liaison Officer, 291st session of the Governing Body, November 2004, paras. 6-7.

⁷⁶ *See* document GB.291/5/1, Report of the Liaison Officer, 291st session of the Governing Body, November 2004, paras. 16 and 21.

⁷⁷ *See* Addendum to document GB.291/5/1, Report of the Liaison Officer, 291st session of the Governing Body, November 2004, para 3. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/gb-5-1-ad.pdf>, last visited 26 May 2006

⁷⁸ *Ibid.*, para 3.

⁷⁹ *See* document GB.291/5/2, Report of the Director-General, 291st session of the Governing Body, November 2004, para 16.

⁸⁰ *Ibid.*, para 20.

⁸¹ *Ibid.*, para 21.

⁸² *Ibid.*, para 23.

conviction that further measures under article 33 were fully justified following the developments of the year. However, after the recent changes in senior leadership, the attitude of the present Myanmar government needed to be evaluated. Therefore, the Governing Body instructed the Director-General to send out a very High-Level Team (vHLT) to Myanmar, to assess the attitudes of the Myanmar government.⁸³ The Governing Body would on the basis of the Mission's report be able to make a full judgment on whether to proceed with action under article 33, explicitly mentioning foreign direct investments (FDI) as forming a part of these measures.⁸⁴

2.7 The Developments of 2005 – The ‘Wait-And-See’ Period Ends

In March 2005 the Liaison Officer reported that forced labour was still being practiced in Myanmar, but that there were some positive signs. Four local officials had been sentenced to prison for the illegal imposition of forced labour and several other prosecutions had been initiated on cases raised by the Liaison Officer. The Liaison Officer considered this to be important steps to eradicate the impunity that had so far prevailed on this issue. Extending this trend to the military was now vital, considering that the military was the main offender in the country.⁸⁵

The vHLT visited Myanmar in February 2005. The visit was gravely disappointing for the ILO. The main reason of the team's visit was to meet with the senior officials of the ruling party, the State Peace and Development Council (SPDC), who had the authority to decide on the actions of the military. Despite repeated demands, the team was not able to have any meetings with senior officials, and therefore they cut their visit short.⁸⁶ Another disturbing point was the reluctance of the Ministers of Labour and the Minister for Foreign Affairs to discuss the 'Plan of Action' and the facilitator mechanism. The main theme of their response was that the traditional working methods of the Myanmar people had been misunderstood, and that the few instances of forced labour where village heads had exceeded their authorities now had been dealt with through

⁸³ See Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Governing Body's conclusions, 291st session of the Governing Body, November 2004, paras. 1-3. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/gb-5-conc.pdf>, last visited 26 May 2006.

⁸⁴ *Ibid.*, para. 3.

⁸⁵ See document GB.292/7/2, the Report of the Liaison Officer, 292nd session of the Governing Body, Geneva, March 2005, para. 8. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb292/pdf/gb-7-2.pdf>, last visited 26 May 2006.

⁸⁶ See document GB.292/7/3, Report of the very High-Level Team, 292nd session of the Governing Body, Geneva, March 2005, paras. 6-8. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb292/pdf/gb-7-3.pdf>, last visited 26 May 2006.

criminal proceedings. The ministers were thus implying that the ‘Plan of Action’ was no longer needed. Moreover, there were no direct answers to the vHLT’s pleas to address violations perpetrated by the military.⁸⁷

When receiving the vHLT’s report, the Governing Body condemned the failure of the Myanmar government to take advantage of this opportunity. The Governing Body asked the International Labour Office to take formal steps to strengthen the measures under article 33, but also to strengthen the Liaison Office.⁸⁸ The Governing Body formulated three considerations to be assessed by each member regarding further action:

- i) There was no question of adopting new measures, as the 2000 resolution was still in force and binding on all the organization’s constituents.
- ii) There was a need to renew the considerations of each member’s measures, as most of them had applied a ‘wait-and-see’ attitude since the beginning of 2001. The growing feeling was that the ‘wait-and-see’ attitude had now lost its *raison d’être*.
- iii) The ILO could not, under the relevant resolution, prejudge the actions each member felt appropriate to take after their individual review. However, the members were under an obligation to report, at intervals, on their actions and the rationale for these actions.⁸⁹

The Governing Body also stressed that positive dialogue with Myanmar was still an objective for the ILO. Members should take any development in this regard into account when reviewing their measures under the resolution.

The Governing Body through this recent decision added additional pressure on the Myanmar government to live up to its obligations. It is too early to assess what actual effects this action will have in form of economic sanctions etc. However, it is clear that the ILO machinery has responded firmly to the inaction of the Myanmar government.

⁸⁷ See document GB.292/7/3, Report of the very High-Level Team, 292nd session of the Governing Body, Geneva, March 2005, para. 13.

⁸⁸ See Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Governing Body’s conclusions, 292st session of the Governing Body, March 2005, para. 7. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb292/pdf/gb-7-conc.pdf>.

⁸⁹ See Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Governing Body’s conclusions, 292st session of the Governing Body, March 2005, para. 9.

2.8 Measures Implemented by States and other Actors Based on the 2000 resolution

It is difficult to form a comprehensive picture of all the measures taken by states and other actors based on the ILO resolution adopted in 2000. Each member is under the resolution bound to perform its own evaluation of its relations with Myanmar and act accordingly. This individualized method obviously makes it difficult to assess what actions are directly attributable to the resolution and what actions are of a more unilateral character. This uncertainty could be clarified by the reporting that each member is bound to perform under the resolution's article 1(b)(ii). However, as the 'wait-and-see' attitude has prevailed among most members during the ILO dialogue with Myanmar, there are no formal reports containing an overview of the current situation. Instead, the main sources are investigations conducted by the International Labour Office and delivered to the Governing Body at its November session 2004 and its March and November sessions 2005.⁹⁰

The United States Congress enacted the 'Burmese Freedom and Democracy Act' (BFDA) on the 28 February 2003. The US had earlier enacted sanctions on Myanmar, but this act specifically refers to the ILO resolution, recalling the instruction for all members to review their relations with Myanmar.⁹¹ The act proscribes import restrictions (which have been renewed annually), frozen assets and a travel ban of the government's members. According to the BFDA, the US should also use its membership in international financial institutions to hinder awards of funds to Myanmar from these organizations. Moreover certain states, for example Massachusetts, New York, California and Vermont, are taking administrative and/or legal action relating to business disinvestment.⁹²

Japan has withheld economic cooperation with Myanmar, with the exception of certain forms of humanitarian assistance. *Australia* has frozen certain agricultural assistance. In the *UK*, companies have been called upon to review investments in Myanmar and assets have been frozen. As a result of the events of 2003, the *Canadian* government tightened the restrictions regarding visa, travel and exports to Myanmar. The *Swiss* government also

⁹⁰ See document GB.291/5/2, Report of the Director-General, 291st session of the Governing Body, November 2004, document GB.292/7/1, Further action taken pursuant to the resolution of the International Labour Conference regarding forced labour in Myanmar, 292st session of the Governing Body, March 2005, Geneva, and document GB.294/6/1, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29): Further action taken pursuant to the resolution adopted in 2000 by the International Labour Conference. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/docs/gb292/pdf/gb-7-1.pdf> and <www.ilo.org/public/english/standards/relm/gb/docs/gb294/index.htm>, last visited 26 May 2006.

⁹¹ See document GB.291/5/2, Report of the Director-General, 291st session of the Governing Body, November 2004, para. 9.

⁹² See document GB.292/7/1, Further action taken pursuant to the resolution of the International Labour Conference regarding forced labour in Myanmar, 292st session of the Governing Body, March 2005, para. 5.

extended its measures in 2003, by tightening its arms embargo, and adding on financial and travel restrictions.⁹³

The *Council of the EU* has been denying Myanmar access to the Generalized Systems of Preferences, a tariff-reducing programme designed to benefit developing countries, since 1997. It has also enacted a Common Position, renewed every second year since 1996, which deplores the usage of forced labour in Myanmar. The European Parliament has adopted several resolutions condemning the use of forced labour in Myanmar. Moreover, the Council of Europe has referred to the failure of the Myanmar authorities to follow the recommendations of the HLT report of 2001 in an attempt to tighten the measures already taken, such as visa ban, asset freeze, arms embargo and financial restrictions on contacts with Myanmar state-owned enterprises.⁹⁴

The *ICFTU* has lead a campaign together with *Global Union Federations* and other unions to promote the implementation of the 2000 resolution. This has included the targeting of multinational companies doing business in Myanmar and urging them to withdraw from the country. The campaign has also contacted EU institutions, financial institutions and countries in Asia to inform of the resolution. Trade unions in a number of countries has followed this example and targeted companies doing business in Myanmar. Various NGO's has also organized boycotts and campaigned against investments in Myanmar. Moreover, general human rights and Corporate Social Responsibility (CSR) campaigns and programmes have noted the ILO resolution on Myanmar and acted on it. All these efforts have resulted in the withdrawal of several companies from Myanmar and cut-downs of foreign investments.⁹⁵

As can be seen above, the ILO resolution has, despite the 'wait-and-see' process, already had a big impact on international organizations', countries' and companies' contacts with Myanmar. However, it is difficult to separate measures that were taken on the basis of the 2000 resolution from measures that would have been imposed by the particular actor irrespective of the ILO's recommendations on the matter. The measures that were imposed before the 2000 resolution can hardly be considered as deriving from this resolution. In contrast, measures referring directly to the resolution, such as the BFDA act, can be considered as deriving their authority from the ILO resolution.

⁹³ See document GB.292/7/1, Further action taken pursuant to the resolution of the International Labour Conference regarding forced labour in Myanmar, 292st session of the Governing Body, March 2005, para 6, and document GB.294/6/1, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29): Further action taken pursuant to the resolution adopted in 2000 by the International Labour Conference, paras. 6 and 14.

⁹⁴ See document GB.292/7/1, Further action taken pursuant to the resolution of the International Labour Conference regarding forced labour in Myanmar, 292st session of the Governing Body, March 2005, para. 12.

⁹⁵ *Ibid.*, paras. 7-9.

The sanctions that have been imposed include numerous types of measures, and they affect international trade as well as personal possessions of the Myanmar government members. The latest developments in the relations between ILO and Myanmar will probably result in similar, and most probably heavier, pressure from the international community upon the Myanmar military regime.

2.9 Concluding Analysis

The actions of the ILO regarding Myanmar were unique and they were a definite change from the usual working methods of the organization. The ILO system usually advances through voluntary measures, whereby the ILO convinces the member states that the implementation of the international labour rights are for the benefit not only for the individual workers, but also for the country as a whole.⁹⁶

So why did the ILO change this concept with regards to Myanmar, and how will this affect the work of the organization in the future? The first question can be analysed both from the perspective of the present political reality and from the perspective of the advancement of international human rights norms. Myanmar is a country in political isolation, and a country of little political, economic and military significance from an international perspective. Most importantly, the country has no close allies among the powerful members of the international community, and it is therefore a possible target for international sanctions. Few other countries fill all these criteria. This line of reasoning implies that the Myanmar case is unique, and therefore not interesting from a general perspective. However, the particular political situation of the Myanmar regime is not the single decisive factor for the present ILO action. If it were, article 33 would surely have been used earlier in history. The ILO action on Myanmar must be understood as an integral part of the international development.

During the later parts of the nineties the pressure had escalated on the governments, multinationals and decision makers of the world to act on the so-called globalization issues. These issues evolved around the perceived lack of interest in social issues, such as labour rights, social justice, inequality and poverty, which the new masters of globalization had displayed. The enhanced freedoms of capital, services and goods following in the footsteps of globalization had not been paralleled with any form of development as regards the mechanisms that bind states and multinationals to respect the freedoms and rights of the individual. The fall of the

⁹⁶ See Robert Howse and Brian Langille with Julien Burda, *The World Trade Organization and Labour Rights: Man Bites Dog*, in *Social Issues, Globalization and International Institutions*, by Virginia A. Leary and Daniel Warner (Eds.), 2006, Martinus Nijhoff Publishers, Leiden, p. 173. For a practical example of this successful approach as regards trade and labour, see Lejo Sibbel, *Linking Trade with Labour Rights: the ILO Garment Sector Working Conditions Improvement Project in Cambodia*, 2004, Master thesis at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law.

communist regimes had led to an increase in the cooperation between states. However, this cooperation had not been able to fulfil the expectations that followed the rapid changes that took place in the beginning of the nineties. There was therefore a growing feeling of disappointment due to the lack of progress in social issues. The creation of the World Trade Organization was perhaps the greatest intergovernmental institutional achievement during this period. This organization was targeted by much of this critique, as it seemingly wished to place the issue of liberalized trade above all other considerations, such as human rights, conditions of work and poverty. The international labour movement, together with many civil society organizations, NGO's and certain governments, made several attempts at including a so-called 'social clause' into the WTO.⁹⁷ This social clause would bind the WTO, and its powerful enforcement machinery, to respect the core labour rights of the ILO. This attempt failed due to the persistent resistance by many developing nations.⁹⁸ The WTO instead named the ILO as the relevant forum for dealing with labour rights issues.⁹⁹ This development had a definite impact on the resolute of the ILO, and foremost the worker delegates, when wanting to display force in the Myanmar case. The worker representative of the UK, Mr. Brett, referred directly to the trade-labour debate in the WTO in the Governing Body discussion on the Myanmar resolution in 2000:

It was perhaps not coincidental that those who were most opposed to taking any action against forced labour in Myanmar were the same group of countries that were opposed to doing anything about trade and labour in another forum. They should understand that if the ILO did nothing about forced labour in Myanmar, its credibility would be destroyed and solutions would have to be found in the WTO.¹⁰⁰

This warning can be seen as an expression of the pressure under which the leading actors within the ILO has acted with regard to Myanmar. Put in other words, if the ILO members did not display the political will to use force on this matter, a solution would have had to be found in another organization, rendering the ILO useless in future situations of a similar kind.

As stated above, the ILO formulated the Declaration on the Fundamental Principles and Rights at Work in 1998. This move towards greater emphasis on core labour standards and human rights has been both lauded and criticized.¹⁰¹ The Declaration was combined with a weak supervising

⁹⁷ See e.g. the ICFTU, *Building workers' human rights into the global trading system*, 1999, available via the ICFTU homepage

www.icftu.org/list.asp?Language=EN&Order=Date&Type=Publication&Subject=ILS, last visited the 26 May 2006.

⁹⁸ See Virginia A. Leary, 'The WTO and the Social Clause: Post-Singapore', 8:1, *European Journal of International Law*, (1997), p. 118.

⁹⁹ See the Ministerial Declaration of Singapore, 1996, para. 4, available via the WTO homepage, <www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>.

¹⁰⁰ Provisional Record 4 of the 88th session of the International Labour Conference, p. 12.

¹⁰¹ See e.g. Anne Trebilcock, *The ILO Declaration on Fundamental Principles and Rights at work: A New Tool*, in Roger Blanpain and Chris Engels (Ed.), *The ILO and the Social Challenges of the 21st Century*, 2001, Kluwer Law International, Hague, and Philip Alston and James Heenan, 'Shrinking the International Labour Code: An Unintended Consequence

system, called the 'Follow-Up', based solely on voluntarism. This created a somewhat ambiguous signal, as the system put in place to enforce the core labour standards was in fact weaker than the traditional ILO supervising system. The Myanmar case is thus important as it serves as a predecessor in enforcing the core labour standards by the most severe sanctions in the ILO system. The Declaration, and the clear determination that certain labour rights are human rights and 'core labour standards' might have had a decisive effect on the determination of the ILO members to take a firm stance towards Myanmar. After all, the violations of the Forced Labour Convention had been ongoing for more than 30 years before the ILO passed the 2000 resolution. The whole process demonstrates that the ILO is prepared to use action to enforce the core labour rights of the Declaration.

The ILO has proceeded with a combination of cooperative and punitive measures, giving the Myanmar authorities every possible chance to demonstrate genuine political will to eradicate the problem of forced labour. The Director-General's letter to the Myanmar government following its condemnation of the 2000 resolution¹⁰² is interesting in this context as it pointed out the strength of this dual role; only by cooperating with the ILO can a government get an impartial evaluation of its progress. The concerned government is therefore forced to cooperate to be able to clear its name in order for the sanctions of the member states to cease. In this respect, there is a world of difference between the sanctions imposed unilaterally by states and the sanctions imposed under the auspices of an international organization. The former sanctions can and have been used for all types of politically motivated reasons that have little or nothing to do with the respect for human rights.¹⁰³ Even if the ILO process is similar to the unilateral process in that it is selective and political factors thus decide in what cases sanctions will apply, there are two important differences. Firstly, there is no question as to the legal foundation of the organization's demands; only human rights obligations of the treaties that have been ratified by the concerned member can be the object of a complaint under article 26. Secondly, there are always several venues open for the concerned member to change the situation instantly, by cooperating and demonstrating a willingness to abide by its human rights obligations.

Can the Myanmar method, that is a combination of voluntary and punitive, (or threats of punitive) methods based on article 33, be used in other future cases? For the time being it seems questionable whether the political will can be mustered for another action. Although there are a number of countries that to a varying degree violates ratified core conventions, few or

of the 1998 ILO Declaration of Fundamental Principles and Rights at Work?', 36, *International Law and Politics*, (2004).

¹⁰² See above, page 15.

¹⁰³ See for example George Tsogas, 'Labour Standards in the Generalized Systems of Preferences of the European Union and the United States', 6:3, *European Journal of Industrial Relations*, (2000), and Philip Alston, *Labor Rights Provisions in U.S. Trade Law - Aggressive Unilateralism?*, in Lance A. Compa and Stephen F. Diamond (Ed.), *Human Rights, Labour Rights, and International Trade*, 1996, University of Pennsylvania Press, Philadelphia.

none are as politically isolated as Myanmar. Moreover, the Myanmar case is still ongoing and its outcome will of course determine the future relevance of the methods that have been used. Lastly, the legal uncertainty of the trade-labour law conflict that shall be explored in this thesis is still not resolved. However, it is important to notice that the tripartite structure of the ILO enables worker delegates to initiate an investigative process without risking the political repercussions that a government would. The Myanmar experience has displayed that even the worker delegates from countries that are generally the most negative to labour rights being attached to trade sanctions have been willing to support this process.¹⁰⁴ If the Myanmar case is considered a success, this precedent might be very difficult to ignore once the process has started. One future example might be Belarus; a Commission of Inquiry was in 2003 appointed by the Governing Body after a complaint by a number worker delegates, accusing the Belarus of violating its obligations under the Freedom of Association and Protection of the Right to Organise Convention (No. 87), and the Right to Organise and Collective Bargaining Convention (No. 98).¹⁰⁵

The question then arises if the international trade sanctions that have been imposed on Myanmar, and that will be imposed in the future, are compatible with the rules of the WTO.

¹⁰⁴ See above, page 13.

¹⁰⁵ See Governing Body doc. GB.288/205, 288th Session, Nov. 2003, para. 18. Available via the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/refs/pdf/rod288.pdf>, last visited 26 May 2006.

3 Are Economic Sanctions decided under article 33 of the ILO Constitution Compatible with the Rules of the WTO?

3.1 Introduction

My aim with this chapter is to analyse the legal questions that would arise, if the trade sanctions on Myanmar would be challenged before the WTO Dispute Settlement Mechanism. Myanmar is a member of the WTO and could therefore make use of its dispute settlement system, even if this is not likely due to the political reality of the present conflict.¹⁰⁶ The recent development in the ILO thus needs to be examined against the framework of international law.

The most hard-hitting of the sanctions against Myanmar, both as regards scope and impact, is probably the United States' trade measures, the so-called Burmese Freedom and Democracy Act (BFDA). The BFDA refers directly to the 2000 resolution and bans imports of any product that is 'produced, mined, manufactured, grown, or assembled in Burma',¹⁰⁷ as well as imports of companies affiliated with the Myanmar regime. These trade sanctions are to be enacted until the Myanmar government has made substantial progress regarding the human rights situation in the country and 'the [US] Secretary of State, after consultation with the ILO Secretary General'...'reports'...'that the SPDC no longer systematically violates workers rights, including the use of forced and child labour, and conscription of child-soldiers'.¹⁰⁸ The BFDA is estimated to deprive Myanmar of as much as 30 % of its export sector.¹⁰⁹

This total import ban on Myanmar products raises the question of the legality of trade measures under the WTO agreements. Myanmar is a member of the WTO and is thus entitled to challenge the trade measures imposed by the US or any other WTO member state. Measures that are taken to hinder trade are generally inconsistent with the 'free-trade' principles that underpin the agreements of international trade law. There is

¹⁰⁶ This possibility of the Myanmar government to make use of the dispute system of the WTO has been noted in mass media, *see for example* Alan Boyd, 'A WTO trick up Yangon's sleeve', *Asia Times*, July 18, (2003), available on <www.atimes.com/atimes/Southeast_Asia/EG18Ae02.html>, last visited 26 May 2006.

¹⁰⁷ BFDA Sec. 3(a)(1) and (2). Available on www.theorator.com/bills108/hr2330.html, last visited the 21 July 2005.

¹⁰⁸ BFDA Sec. 3(3)(a).

¹⁰⁹ *See* Francis Maupain, *Reflections on the Myanmar Experience*, p. 114. *See also* Alan Boyd, 'A WTO trick up Yangon's sleeve'.

therefore much uncertainty on the legality of the usage of trade measures for the promotion of human rights, environmental standards and other types of non-trade related issues.¹¹⁰

In this chapter I will examine the WTO and the main principles of its trade agreements. I will then investigate whether the sanctions on Myanmar can be covered by the exception clauses in these trade agreements.

3.2 The World Trade Organization

The WTO was established in 1995 and today it has 149 member states.¹¹¹ The creation of the organization can be described as the culmination of longstanding efforts to regulate international trade.

In 1948, a meeting under the auspices of the United Nations resulted in the so-called 'Havana Charter'.¹¹² The Havana Charter was originally intended to create an international trade organization, but this attempt failed. Instead, the substantive rules formulated at the meeting, the General Agreement on Tariffs and Trade (GATT), survived and formed the basis for international trade regulation during the following fifty years.¹¹³ As the GATT agreement was inherently flawed by its absence of an international organization to supervise, develop and overlook the member states' observance of its standards, its members became interested in creating a more coherent system for international trade.¹¹⁴ After several years of discussion the 'Marrakech Agreement' establishing the WTO was signed on 15 April 1994 and it came into force the following year.¹¹⁵

The WTO is an independent organization with its own legal personality and with regard to membership and substantive content it extends much beyond the GATT.¹¹⁶ The coherent and rules-based approach in the WTO system is formulated in the 'single undertaking' in article II:2, which expresses the legally binding obligation of all member states to abide by the international trade agreements. The WTO's function is outlined in article II:1:

¹¹⁰ See e.g. Gudrun Monica Zagel, 'The WTO & Human Rights: Examining Linkages and Suggesting Convergence', *IDLO Voices of Development Jurists*, Vol. 2, No. 2, (2005), p. 11, Available on <www.worldtradelaw.net/articles.htm#zagel>, last visited the 14 February 2006.

¹¹¹ See the WTO homepage, available on <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, last visited 1 February 2006.

¹¹² See John H. Jackson, *The World Trade Organization*, 1998, Wellington House, London, p. 16.

¹¹³ *Ibid.*, p. 12.

¹¹⁴ *Ibid.*, p. 24.

¹¹⁵ *Ibid.*, p. 1.

¹¹⁶ See Celso Lafer, *The Role of the WTO in International Trade Regulation*, in Philip Ruttley, Iain Macvay and Carol George (Eds.), *The WTO and International Trade Regulation*, 1998, Cameron May, London, p. 35.

The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

The WTO system thus comprises organizational rules, as well as substantive trade rules. The organization aims at legally converging State performance to promote the common purposes of the organization.

One of the most important institutions of the WTO-system the Dispute Settlement Mechanism, which has competence to deal with any dispute arising between member states regarding breaches of international trade law. The Dispute Settlement Mechanism contains punitive elements.¹¹⁷ The Dispute Settlement Body (DSB) is the main dispute resolution organ of the WTO and consists of one representative from each member of the organization.¹¹⁸ When a dispute arises between two member states of the WTO, the DSB will establish a Dispute Panel (DP). The panel will deliver a report establishing whether or not the WTO-rules have been violated. The report can be appealed to the Appellate Body (AB), a group of experts in international trade law.¹¹⁹ The decision of the AB is final and will be adopted by the DSB, unless there is a consensus against it. If the offending party fails to comply within a reasonable time accorded to it, the complainant ultimately can be granted permission from the DSB to suspend concessions or obligations due to the offending party. This is the major punitive measure of the WTO system and its effectiveness depends on the economic power of the offended state.¹²⁰

3.3 The Substantive Principles in the GATT

The WTO supervises and develops the following three major substantive agreements: the GATT, the General Agreement on Trade in Services (GATS) and the Trade-Related Intellectual Property Agreement (TRIPS). The GATT deals almost entirely with trade in products. The main focus is to 'liberalize trade' by constraining governments from imposing means to distort trade such as tariffs, quotas, international taxes and regulations that discriminate against imports, subsidies, dumping practises and other measures that discourage trade.¹²¹

In this chapter the investigation of the legality of trade measures based on the human right of workers, will be limited to the rules and principles of the GATT. However, the GATS and the TRIPS are based on the same principles and contain similar exception clauses.¹²²

¹¹⁷ See John H. Jackson, *The World Trade Organization*, p. 59.

¹¹⁸ See Konstantinos Adamantopoulos, *An Anatomy of the World Trade Organization*, 1997, Kluwer Law International Lmt., London, p. 61.

¹¹⁹ *Ibid.*, p. 64.

¹²⁰ *Ibid.*, p. 68.

¹²¹ GATT article I.

¹²² See GATS article XIV and TRIPS article 27(2)

The GATT has three major principles. Article I sets out the *Most Favoured Nation* principle (MFN), which states that governments' export and import regulations should not discriminate between other countries' products.¹²³ A country is thus not entitled to treat country A's products more favourable than country B's products. Article III binds the member states to apply *national treatment*, which means that imported products cannot be treated less favourably than domestic products.¹²⁴ Article XI *prohibits quantitative restrictions*, such as quotas and import or export licenses.¹²⁵ However, the three major principles in the GATT may be deviated from under certain conditions. These conditions are outlined in the exception clause, Article XX.

The trade measures imposed on Myanmar are possible violations of the MFN-principle, as Myanmar's products are clearly discriminated against. The question then arises whether or not these trade measures are in accordance with the general exceptions of the GATT, outlined in article XX.

3.4 The General Exceptions of the GATT

The GATT has since its entry into force in 1947 contained a list of exceptions in its article XX. The exceptions have allowed member states to deviate from their obligations in pursuit of certain non-trade related values. The parts of Article XX relevant to this investigation read:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (...)
- (e) relating to the products of prison labour;

These measure must be necessary, in the case of (a) and (b), and they must also, according to the first paragraph or 'chapeau' of the article, be applied in a manner that avoids discrimination between countries where the same conditions prevail. Moreover, the application of measures must not amount to a 'disguised restriction of international trade'. These three exceptions, (a) (b) and (e), all have a potential impact on the trade-labour relationship.¹²⁶

¹²³ GATT article I.

¹²⁴ GATT article III.

¹²⁵ GATT article XI.

¹²⁶ See Christine Breining-Kaufmann, *The Legal Matrix of Human Rights and Trade Law*, in *Human Rights and International Trade*, by Thomas Cottier, Joost Pauwelyn and

The exception on *prison labour* (e) is the only exception specifically relating to the conditions of labour in other countries. However, this paragraph can hardly justify the trade measures on Myanmar as they fall outside its scope for two reasons. Firstly, forced labour is the pertinent issue rather than prison labour. Secondly, the measures on Myanmar are broader than the prison labour-exception in that they, both according to the ILO resolution and the practice of the BFDA, affect all contacts with the Myanmar regime that can aid the practice of forced labour. The measures do not particularly target the products of forced labour.¹²⁷

The exception on *life and health* (b) seems quite possible to apply to the situation in Myanmar. The forced labour situation certainly amounts to serious threats to the life and health of the affected population as the Commission of Inquiry's report clearly established. However, there may be difficulties establishing the proper 'necessity' for the measures on Myanmar in relation to this paragraph. As shall be examined below, the necessity requirements have been set at a high level and it is difficult to see how the trade measures would be directly necessary for the life and health of the Myanmar population.¹²⁸

There are several reasons to consider the exception relating to *public morals* (a) as being the best defence for the trade sanctions on Myanmar. This exception is wider than exception (b) in that it does not merely focus on the direct threat to life and health but also to other issues relevant to public morals. This makes the exception possible to apply directly to forced labour (and other human rights violations of a comparable magnitude), as the morally repugnant violation it is, instead of having to prove the trade measures' direct effect on the life and health of the population of Myanmar. I will focus the discussion in the next chapters on the exception on public morals contained in article XX(a).

3.5 Interpreting the General Exception on 'Public Morals'

Can the exception on 'public morals' be used to justify the trade measures applied by the ILO member states on the basis of the 2000 resolution on Myanmar? A close analysis of exception XX(a) is needed to identify *what* morality and *whose* morality can be guarded with the exception. Does the morality in question cover only the basic moral standards of the collected humankind and if so, what are those basic morals? Is it only the morality of

Elisabeth Bürgi (Eds.), 2005, Oxford University Press, Oxford, p. 107-108. *See also* Francis Maupain, *Reflections on the Myanmar Experience*, p. 109.

¹²⁷ *See* the Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (2005), *A Global Alliance Against Forced Labour*, p. 26, available via the ILO homepage, <www.ilo.org>, last visited the 24 March 2006.

¹²⁸ *See* Francis Maupain, *Reflections on the Myanmar Experience*, p. 109.

the population using the exception that can be covered by it, or can this morality cover the population of the country that the measures are being used against? The text in article XX(a) does not any give any clear answer to the questions above. Moreover, the question of what kind of measures that can be deemed *necessary* to guard this morality needs to be answered. Finally, the requirements of non-discrimination in the *chapeau* of the article must be analysed. So, how has the WTO organs interpreted the exceptions in article XX(a)?

Though there are no previous decisions regarding the interpretation of art XX(a), the Appellate Body has taken decisions on other exceptions in article XX. In *US-Gasoline*¹²⁹, the first decision according to the WTO rules, the Appellate Body established a general framework for analyzing the exceptions in article XX(a) to (j). A ‘two-tiered test’ was used. According to this test a measure must

- i) fall within the scope of the relevant sub-paragraph (a)-(j) to enjoy ‘provisional justification’ and
- ii) meet the requirements of the chapeau.¹³⁰

The first part of the two-tiered test has itself two distinct part; one setting out the scope of the exception, namely ‘public morals’, and one limiting the measures to those that are ‘necessary’. I will begin this chapter by interpreting the scope of the exception.

3.5.1 The Scope of the Term Public Morals

According to the so-called Dispute Settlement Understanding¹³¹ (DSU), the WTO Dispute Settlement Mechanism shall clarify the rights and obligations in the WTO treaties ‘in accordance with customary rules of interpretation of public international law’.¹³² The WTO Dispute Panel and Appellate Body have on several occasions used the rules of the Vienna Convention on the Law of Treaties (VCLT)¹³³ to interpret the texts of the WTO agreements.¹³⁴

¹²⁹ World Trade Organization Appellate Body, Report of the Appellate Body on United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (1996) (hereinafter *US-Gasoline*).

¹³⁰ *US-Gasoline*, p. 17. See also World Trade Organization Appellate Body, Report of the Appellate Body on United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/2 (1998) (hereinafter *US-Shrimp*) para. 118 and World Trade Organization Appellate Body, Report of the Appellate Body on Korea-Measures affecting Imports of Fresh, Chilled and Frozen Beef (2000) (hereinafter *Korea-Various Measures on Beef*), para. 156.

¹³¹ Understanding of Rules and Procedures Governing the Settlement of Disputes.

¹³² DSU art. 3.2.

¹³³ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679. Available on <www1.umn.edu/humanrts/instrree/viennaconvention.html>, last visited the 15 February 2006.

¹³⁴ See e.g. *US-Gasoline*, p. 13, and *US-Shrimp*, p. 42. See also Christine Breining-Kaufmann, *The Legal Matrix of Human Rights and Trade Law*, p. 114.

The meaning of 'public morals' should therefore be interpreted on the base of the rules in the VCLT. According to article 31, the 'General rule of interpretation' in the VCLT, a treaty shall be interpreted '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'.

The *ordinary meaning* of the words 'public morals' was explored in *US-Gambling*¹³⁵, the only case so far that has dealt with to the moral exceptions contained in the WTO agreements. The case related to a ban imposed by the US on Internet gambling, challenged by Antigua. The relevant treaty was thus GATS, as it evolved around the supply of services. The DP, and later the AB, in *US-Gambling* was able to comprise such issues as underage gambling, fraud and compulsive gambling within the moral exception. The exceptions of the GATS are very similar to the exceptions in the GATT, and the Dispute Panel and the Appellate Body relied heavily on earlier decisions regarding the GATT. The *US-Gambling* decision can thus probably be a good indicator on how the GATT exception on public moral could be interpreted in a future case. The practise of forced labour as such should thus clearly fall within the term public moral.

However, even if the question of *what* morality might not be problematic in the Myanmar case, the question of *whose* morality remains. In *US-Gambling* the measures were aimed at providing protection for the domestic population, and it is clear that article XX(a) can be used for this purpose. In the Myanmar case the purpose of the trade measures is to influence the Myanmar government to uphold its obligations under the Forced Labour Convention by implementing the recommendations of the Commission of Inquiry. The aim is to provide protection for the Myanmar population suffering from massive human rights violations. Steve Charnovitz employs the term 'outwardly-directed' to describe trade measures to protect the populations of foreign countries as opposed to 'inwardly-directed' measures to protect the acting country's own population.¹³⁶ For example, the exception in XX(e), relating to prison labour is directed against another country rather than simply protecting the acting country's own population. Other terms used are 'extrajurisdictional' or 'extraterritorial'.¹³⁷ Of course these terms are somewhat ambiguous since outwardly-directed measures for example can be aimed at providing the domestic consumers with a protection from the 'moral taint' of products from Myanmar.¹³⁸ However, the terminology suffices for the purposes of differentiating between different forms of trade measures.

¹³⁵ World Trade Organization Appellate Body, Report of the Appellate Body on United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R (2005) (hereinafter *US-Gambling*).

¹³⁶ Steve Charnovitz, 'The Moral Exception in Trade Policy', 38 *Va. J. Int'l L.*, 689, (1998), p. 4. Available on <www.worldtradelaw.net/articles/charnovitzmoral.pdf>, last visited the 26 May 2006.

¹³⁷ See e.g. United States - Restrictions on Imports of Tuna, (1991), GATT B.I.S.D. (39th Supp.), (hereinafter *Tuna I*), p. 44.

¹³⁸ Steve Charnovitz, 'The Moral Exception in Trade Policy', p. 4.

In *US-Gambling* the Dispute Panel examined the definition of the terms public and morals in the 'Shorter Oxford English Dictionary' to establish the ordinary meaning of them. The Panel first examined the term 'public' and stated that a measure to be justified 'must be aimed at protecting the interests of the people within a community or a nation as a whole'. This seems to imply an inwardly looking perspective. However, the Panel in the following paragraphs defined public morals as meaning 'standards of right and wrong conduct maintained by or on behalf of a community or nation'.¹³⁹ The use of the words 'on behalf of' seems to imply an outwardly dimension. In sum, no definite conclusion can be drawn from these statements as regards the reach of the moral exception since the measure in this case was inwardly directed. The DP and the AB were not forced to give a statement on an outwardly measure and therefore they did not provide any reasoning on the topic.

The ordinary meaning of the wording in article XX(a) does not reveal if the exception includes outwardly-directed measures. However, according to the VCLT this meaning shall be read in the 'context' of the treaty and in the light of its 'object and purpose'. Since the purpose of the GATT treaty is to reduce tariffs and other barriers to trade, and article XX allows for exceptions from this purpose, a further examination of the object and purpose is probably futile.

There are no agreements regarding the interpretation of the general exceptions.¹⁴⁰ The options left for interpretation in VCLT article 31 are thus subsequent practise and/or any relevant rules of international law. The rules of international law might be important for determining whether an issue falls within the scope of the article, but regarding whether or not the provision includes outwardly-directed measures it does not give any guidance. Furthermore, there is no subsequent practise as the only case so far that has evolved around the moral exceptions, *US-Gambling*, dealt with inwardly-directed measures. However, there is some practise regarding the other exceptions that might be relevant, this will be dealt with below.

In conclusion, an interpretation of the moral exception in article XX(a) according to article 31 of the VCLT does not reveal anything about *whose* morality the provision includes. The meaning is still ambiguous as regards inwardly and outwardly measures. Therefore it seems justifiable to resort to supplementary means of interpretation in VCLT article 32, which include the preparatory work of the treaty and the circumstances at its conclusion.¹⁴¹

The GATT was drafted at a UN Conference on trade and Employment 1946-48. The agreement formed a part of the so-called 'Havana Charter', which was divided into three parts, where one part concerned the structure

¹³⁹ World Trade Organization Dispute Panel, Report of the Dispute Panel on United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R (2004) (hereinafter *US-Gambling DP*), para. 6.465.

¹⁴⁰ VCLT article 31(2)(a) and (b), and article 31(3)(a).

¹⁴¹ VCLT article 32.

of the planned International Trade Organization (ITO) and the other two the multilateral agreements to reduce tariffs (GATT) and the general rules regulating this agreement.¹⁴² The Havana Charter was also an early attempt to create a link between trade and labour law. Article 7 of the Charter stated:

The members recognise that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognise that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The members recognise that unfair labour conditions, particularly in product for export, create difficulties in international trade, and accordingly, each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

This statement demonstrates an awareness of the international trade and labour law dimension. However, it was never linked to the moral exception in article XX. Moreover, the Havana Charter never came into force, due to the resistance in the US Congress against the creation of an international trade organization.¹⁴³ However, even though no international trade organization was created, the agreement in the charter concerning the reduction of tariffs was applied as the GATT.¹⁴⁴

As for the specific legislative history of article XX(a), the records does not illuminate the scope of the exception, other than noting that the provision might be applicable to the importation of alcohol. There are no indications as to whose morality might be covered by the exception.¹⁴⁵ The absence of discussion as to the contents of the exception has been explained by some authors as an indicator that the negotiating states considered the exception to be similar to others in commercial agreements of the time.¹⁴⁶ Other exception clauses at the time might thus be important, as they arguably influenced the mindset of the GATT negotiators. In 1923 the first international trade treaty was agreed upon. This treaty, the International Convention Relating to the Simplification of Custom Formalities, contained a clause exempting measures to protect public morals from the scope of the convention. Another multilateral trade treaty was negotiated in 1927, in the Economic Committee of the League of Nations. When discussing the exception clauses, which referred to ‘moral or humanitarian’ reasons, the Committee stated that these exceptions were established through international practise and were indispensable with regards to the freedom of trade.¹⁴⁷ The DP in the US-Gambling case referred to the negotiations of this Committee to confirm that the sale of lottery tickets formed part of the moral exception at that time.¹⁴⁸ Many commercial treaties had exceptions for moral and humanitarian grounds. This can be directly linked to the anti-

¹⁴² See John H. Jackson, *The World Trade Organization*, p. 16.

¹⁴³ *Ibid.*, p. 17.

¹⁴⁴ *Ibid.*, p. 1.

¹⁴⁵ Steve Charnovitz, ‘The Moral Exception in Trade Policy’, p. 8.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, p. 9.

¹⁴⁸ US-Gambling DP para. 6.472.

slavery treaties, which were the first global attempts to prohibit trade for moral and humanitarian reasons. In 1815 an anti-slavery Convention was concluded in Vienna and the parties stated that slave trade was ‘repugnant to the principals of humanity and universal morality’.¹⁴⁹ Several other treaties were concluded during the nineteenth century with the intent of banning certain forms of immoral trade, such as slave trade, narcotics, obscene publications etc. Many states followed these examples and banned the importation of materials that were deemed offensive to the national morality.¹⁵⁰ Some of the national and international prohibitions were outwardly-directed, as the ones on slavery, and some were inwardly-directed, as the ones regarding imports of pornographic material. It is interesting to note that the pre-GATT trade exceptions often referred to public morals or *humanitarian grounds* whereas the GATT only refers to public morals. This is important since the wording *humanitarian grounds* can be understood as containing outwardly-directed measures. Normally, humanitarian measures are directed towards foreign countries rather than at the national population. That *humanitarian grounds* were left out of the GATT exception can either mean that humanitarian action was never to form a part of the GATT exception, or that public morals included *humanitarian grounds*.¹⁵¹

What can be concluded regarding the outwardly-directed applicability of article XX(a) from the examination in accordance with the VCLT? The ordinary meaning of the text in accordance with the object and purpose of the treaty does not give a clear answer. There are no subsequent agreements or practise. The travaux préparatoires are also largely inconclusive. However, there are two factors that can be accorded some weight when deciding if the moral exception has outwardly-applicability. Firstly, the silence of the legislative preparation implies that the negotiators were in agreement of what was to be included in the exception. When examining the plethora of international trade agreements that had been concluded up to 1948 there were many that included different forms of outwardly-directed trade measures on humanitarian grounds. If the GATT was intended to ban these types of measures there would certainly have had to be lengthy discussions on the topic. The silence on the matter could be interpreted as an indicator that there was no intention of narrowing the scope of the moral exceptions to only encompassing inwardly-directed measures. Secondly, all three parts of the Havana Charter were negotiated as one package. Even if the non-GATT parts of the Havana Charter do not hold any legal significance of their own, they may give guidance as to the mind-frame of the negotiators at the time of the GATT-negotiations. As the Havana Charter clearly puts an emphasis on the relation between labour rights and trade, this further emphasises the improbability that a ban on outwardly-measures to promote labour rights could be inserted into the GATT without debates on the topic. However, these conclusions are based on a rather weak legal basis. An examination of the case law on the other exceptions in article

¹⁴⁹ Steve Charnovitz, ‘The Moral Exception in Trade Policy’, p. 10.

¹⁵⁰ *Ibid.*, p. 12.

¹⁵¹ *Ibid.*, p. 13.

XX is therefore justified, to seek an analogy as regards outwardly-directed measures.

The two, so-called *Tuna*-cases¹⁵² in the beginning of the nineties (1991 and 1994) were adjudicated by the GATT Panel, which was the predecessor to the current Dispute Settlement Mechanism. It is important to note that neither of the *Tuna*-cases were adopted by the GATT Council and therefore they were never legally binding for the GATT member states.¹⁵³ However, these cases might still be relevant, as the substantive rules of the GATT regarding the exceptions have not been changed. The legal reasoning in a future case might thus be similar. *Tuna I* dealt with the Marine Mammal Protection Act (MMPA), a piece of US legislation regulating the harvest of tuna by fishermen, so as to avoid the incidental taking of dolphins. The MMPA stipulated that countries wanting access to the American tuna market had to prove that they had a regulatory regime, with regards to the protection of dolphins, comparable to that of the US. Mexico challenged this legislation on the basis of article XI of the GATT, the prohibition of quantitative restrictions.¹⁵⁴ After the GATT Panel had concluded that the MMPA constituted a violation of article XI, it continued to the examination of the exceptions in article XX. The Panel stated that the exception clauses generally should be interpreted narrowly (a statement that has later been criticized¹⁵⁵). When examining the exception related to the life and health of animals, XX(b), the Panel investigated if this clause could possibly have an 'extrajurisdictional'¹⁵⁶ effect, and thus be aimed at protecting animals outside the jurisdiction of the acting party. The Panel first concluded that this question was not clearly answered by the text of the provision.¹⁵⁷ After examining the drafting history of the GATT, the Panel concluded that the provision was inwardly-directed. The Panel based this on an early draft of the Havana Charter where article XX(b) read 'for the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country'.¹⁵⁸ The Panel found this to be relevant proof of the intention of the drafters. Furthermore, the Panel argued that if the US legislation was found acceptable under the GATT exception clause, this would mean that all countries could unilaterally determine protection policies, which other countries had to abide by not to lose their privileges under the GATT. This later consideration led the Panel to also conclude that exception XX(g) was geographically limited.¹⁵⁹

¹⁵² *Tuna I* and GATT Panel, Report on United States — Restrictions on Imports of Tuna, (1994) (hereinafter *Tuna II*).

¹⁵³ Steve Charnovitz, 'The Moral Exception in Trade Policy', p. 14.

¹⁵⁴ *Tuna I*, p. 37 and 42.

¹⁵⁵ *Tuna I*, p. 43. For critique of the Panel's assessment see Steve Charnovitz, 'The Moral Exception in Trade Policy', p. 15.

¹⁵⁶ *Tuna I*, p. 46.

¹⁵⁷ *Tuna I*, p. 44.

¹⁵⁸ *Tuna I*, p. 45.

¹⁵⁹ *Tuna I*, p. 47.

In *Tuna II* the European Commission and the Netherlands challenged the US' MMPA. The Panel once again concluded that the exceptions of article XX(b) and (g) were inapplicable, but their reasoning differed as to the geographic considerations. Regarding (g) the Panel stated that the exception did not spell out any limitation. The Panel then investigated article XX(e) regarding prison labour, to conclude that there was no principle limiting the exceptions from being outwardly-directed.¹⁶⁰ The Panel further observed that there was nothing in international law prohibiting states from regulating the conduct of their nationals with respect to person, animal or national resources outside of their territory. After having made use of the interpretation methods of the VCLT, article 31 and 32, the Panel concluded that there was 'no valid reason supporting the conclusion that the provisions of article XX(g) apply only to policies related to the conservation of exhaustible natural resources located *within* the territory of the contracting party invoking the provision'.¹⁶¹ The exception thus included outwardly-directed measures.

As can be seen above the *Tuna* decisions came to different conclusions on the geographic reach of the concerned general exceptions. *Tuna I* made a distinct interpretation, based on material that did not seem all too conclusive. In *Tuna II* the GATT Panel reasoned in a fairly different manner, and held that the supplementary materials were inconclusive. The Panel then made a somewhat surprising deduction with a form of *e contrario* interpretation; as there was nothing explicitly prohibiting outwardly-directed measures they were therefore included in article XX. The Panel did not focus on the fact that GATT generally prohibits punitive trade measures and that the exception thus must be interpreted as creating a right to deviate from the general rules. The two dispute panels thus reached different conclusions on similar material.

My overall conclusions on the geographical reach of the moral exception in the GATT will have to be based on the findings of the examination under the articles of the VCLT. As stated above, there are indicators that imply that an outwardly-dimension was intended when the GATT was drafted. The practise of the GATT or WTO organs does not contravene this conclusion. If the GATT was intended to deviate from other trade agreements of the time by limiting its moral exception only to inwardly directed measures, this would probably have been reflected in the debate leading up to the conclusion of the Havana Charter.

3.5.2 Necessity

Article XX(a) has never been the object of adjudication in GATT or WTO Panels, but the necessity-requirement of the exceptions in article XX has

¹⁶⁰ *Tuna II*, p. 50.

¹⁶¹ *Tuna II*, p. 50.

been thoroughly analyzed in the context of the other exceptions, XX(b) and (g).

In *Tuna II* the GATT Panel held a very strict limit on the term necessity as regards the application of the exception on life and health. The Panel stated that necessary, in its ordinary meaning, meant that ‘no alternative existed’.¹⁶² It then referred to earlier practice according to which necessity required that no other measure that a party could be reasonably expected to employ could be available. Moreover, if no such measure was available, the measure that was least inconsistent with the GATT provisions should be applied.¹⁶³ Influenced by these findings, the Panel concluded that measures ‘taken as to force other countries to change their policies within their jurisdictions’,¹⁶⁴ could not be necessary.¹⁶⁵

If the exceptions in article XX can only be used to protect specific interests and not to change government policies, this would be very problematic in the Myanmar case as the whole rationale behind the ILO’s actions in Myanmar has been to change the policies of the country. However, the *Tuna II* necessity-doctrine has not been fully upheld in the WTO.

In *Korea-Various Measures on Beef* Korea was challenged by the US and Australia for applying certain measures on imported beef, such as the dual retail system. This meant that imported beef was displayed, labelled or sold in different shops from the domestic beef. Korea stated that these measures were necessary to hinder the common problem of fraudulent misrepresentation as to the origins of the beef.¹⁶⁶ The Appellate Body started its examination of necessity under article XX(g) with establishing the ordinary meaning of the term, by the usage of dictionaries of English (Shorter Oxford English Dictionary) and of law (Black’s Law Dictionary). The AB found that ‘necessary’ did not only encompass that which is indispensable or inevitable, but also other measures.¹⁶⁷ If degrees of necessity could be found between the extreme pools of ‘indispensable’ and ‘making a contribution to’, the necessity in article XX(g) was significantly closer to ‘indispensable’. Whether a measure is necessary or not, should be determined by ‘the weighing and balancing’ of several factors including the following three¹⁶⁸, which have been upheld in later cases:

- i) The importance of the common interest or value pursued. The more important the value, the easier to accept as necessary.
- ii) To which extent the measure contributes to the end. The greater the contribution, the more necessary.

¹⁶² *Tuna II*, p. 55.

¹⁶³ *Tuna II*, p. 55.

¹⁶⁴ *Tuna II*, p. 55.

¹⁶⁵ *Tuna II*, p. 56.

¹⁶⁶ *Korea-Various Measure on Beef*, p. 50.

¹⁶⁷ *Korea-Various Measure on Beef*, p. 49.

¹⁶⁸ *Korea-Various Measure on Beef*, p. 50.

- iii) To which extent the measure produces restrictive effect on international commerce.¹⁶⁹

The AB found that Korea had other possible alternatives to minimize misrepresentation as other, WTO-consistent measures were used on similar meat products.¹⁷⁰ However, the necessity standard that evolved after Korea-Various Methods on Beef was based on this balancing test, which is more lenient than the rigid approach of *Tuna II*.

In *EC-Asbestos*¹⁷¹ France's ban on chrysotile-cement products was challenged by Canada.¹⁷² On appeal, Canada asserted that France had a 'reasonably available' alternative in 'controlled use' of the dangerous products instead of import restrictions. The AB observed that the interest of France was of the highest degree, and that 'controlled use' would not allow France to achieve its chosen level of protection. The measure was therefore in conformity with article XX(b).¹⁷³

In conclusion, when considering whether an application of one of the exceptions in article XX is necessary, a balancing test based on the importance of the value pursued, the degree to which the measure contributes to the end, and the extent to which the measure restricts international commerce should be performed.

Turning to the sanctions on Myanmar, when examining the necessity of trade measures the three factors above must weigh into the conclusion. The value of abolishing forced labour must be of the highest possible interest to mankind. Forced labour is officially illegal in all countries and the fight to abolish this practice started already in the early-nineteenth century and was already then considered to be 'repugnant to the principals of humanity and universal morality'.¹⁷⁴ The global dimension of this horrendous practise is also pertinent. The foundation of all international human rights is the principle that all persons are free and equal, as expressed in article 1 of the Universal Declaration of Human Rights.¹⁷⁵ This factor thus lowers the bar for necessity. On the other hand, the import restrictions are with no doubt very restrictive on international commerce as they totally bar Myanmar companies and those associated with the Myanmar government from conducting trade with other countries. Herein lies a troubling point of the import restriction, they are 'blind' as they do not only target products, or even companies, that use forced labour. The forced labour abuses are not

¹⁶⁹ See e.g. US-Gambling paras. 15-16.

¹⁷⁰ Korea-Various Measure on Beef, p. 55.

¹⁷¹ World Trade Organization Appellate Body, Report of the Appellate Body on European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (2000) (hereinafter *EC-Asbestos*).

¹⁷² *EC-Asbestos* p. 60.

¹⁷³ *EC-Asbestos* p. 63.

¹⁷⁴ Steve Charnovitz, 'The Moral Exception in Trade Policy', p. 10.

¹⁷⁵ Universal Declaration of Human Rights (1948) (UN.Doc. A/811), para 1.

common in the garment sector, which is the sector most affected by the trade restrictions, but rather committed by the authorities and the military.¹⁷⁶

The second factor must also be considered in this weighing process: To what extent does the measures contribute to the end? An answer to this question will have to take into account the whole ILO procedure that culminated in the 2000 resolution, as well as the following events leading up to this day. The measures recommended in the 2000 resolution are a response to the fact that the ILO had been left with no other option. However, the 2000 resolution does not spell out any specific measure that members are required to take, it only stipulates that members should review their relations with Myanmar and take ‘appropriate measures’ so as not to aid the regime in their violations of the Forced Labour Convention. In a sense this builds the necessity-requirement into the resolution itself through the notion of appropriateness.¹⁷⁷ If a country were challenged on trade measures taken against Myanmar, it would most likely argue that their chosen measure was ‘appropriate’ to avoid aiding the Myanmar government in their violation of the ILO convention. If the measure is appropriate, it would also arguably make a substantial contribution to the goal pursued - Myanmar compliance with the Forced Labour convention - and therefore be justified under article XX(a). In this sense there would be no conflict between the ILO resolution and the WTO rules, as the measures that are appropriate would also be necessary. A more complex issue arises if appropriate is interpreted as a wider formulation than necessary. In this case, an appropriate measure might not be necessary and a conflict of norms between the ILO and the WTO might arise. The possible outcome of such a conflict will be discussed below in chapter 4.

In conclusion, the test elaborated in *Korea-various Measures on Beef* and the following practise demonstrates a rather lenient attitude towards the necessary requirement regarding the exceptions. Considering the importance of the values at stake, and also the built in safe-guard of appropriateness, a WTO DP might well be convinced that the measures on Myanmar are necessary, despite their highly restrictive impact on international trade. However, this presupposes that the ILO considers the measures applied as being appropriate.

3.5.3 The Requirements of the Chapeau

If the sanctions against Myanmar were to find ‘provisional justification’ under the sub-paragraph (a) or (b), they would be tested against the requirements of the *chapeau*. The *chapeau* stipulates that the measures must not be applied in a manner that would amount to an ‘arbitrary or

¹⁷⁶ See the Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (2005), *A Global Alliance Against Forced Labour*, p. 26.

¹⁷⁷ See Francis Maupain, *Reflections on the Myanmar Experience*, p. 112.

unjustifiable discrimination' between countries with the same conditions or a 'disguised restriction on international trade'.¹⁷⁸

The chapeau was explored in the first case that came before the WTO Appellate Body, *US-Gasoline*. The AB stated that discrimination and disguised trade restriction should be read side-by-side, as they gave meaning to each other. The fundamental theme was the object of avoiding abuse or illegitimate use of the exceptions in article XX.¹⁷⁹ In this case the US had not acted in accordance with the chapeau, as the possibilities of cooperation with their foreign counterparts had not been adequately explored.¹⁸⁰

When interpreting the chapeau in *US-Shrimp*, an emphasis was put on the balancing between the right of a member to invoke an exception and the rights of the other members according to the substantive provisions of the GATT.¹⁸¹ Furthermore, the AB looked closely at the actual application of the measures, to clarify if this amounted to discrimination. The US protection laws, which were designed to protect sea turtles, stated that other countries to access the US market had to have a system that was in essence the same as the US. The AB found that this requirement was discriminatory as it forced countries to adopt the exact same regulatory programme as the US, without considering the different conditions in that specific country.¹⁸² The US had negotiated with some, but not all, of the countries affected by the regulation and this also amounted to discrimination.¹⁸³

Turning to the Myanmar sanctions, the provisions of the chapeau might in this case be the easiest hurdle to pass in article XX. The Myanmar sanctions are simply not an abuse of the rights in article XX. The decision of the ILO to, for the first time ever, invoke article 33 can not be seen as some form of hidden protectionism.¹⁸⁴ Nationalist of commercial gains cannot be seen as a motif for the sanctions in question. The sanctions are not coupled with a specific requirement to put in place a specific public policy, but merely to abide by the recommendations of the Commissions of Inquiry.¹⁸⁵ Moreover, the lengthy procedures have given the Myanmar authorities every possibility to display its good will towards the ILO. If it was simply a unilateral determination of the human rights situation that backed up the sanctions the chapeau would be much more difficult to comply with. Then, the acting country would possibly have to explain why other countries with similar human rights problems were not punished by trade sanction. However, the

¹⁷⁸ GATT, article XX.

¹⁷⁹ *US-Gasoline* p. 19.

¹⁸⁰ *US-Gasoline* p. 23.

¹⁸¹ *US-Shrimp* p. 63.

¹⁸² *US-Shrimp* p. 66.

¹⁸³ *US-Shrimp* p. 71.

¹⁸⁴ See general discussion in Robert Howse and Michael J. Trebilcock, *The free trade-fair trade debate: Trade, labour, and the environment*, in *Economic Dimensions in International Law*, by Jagdeep S. Bhandari and Alan o. Sykes (Eds.), 1997, Cambridge University Press, Cambridge, p. 220.

¹⁸⁵ See Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar, ILC 88th session, para 1(b).

present situation is not problematic as the sanctions are underpinned by a clear legal foundation in the ILO Forced Labour Convention and the ILO Constitution.

3.6 Conclusion

The Dispute Settlement Mechanism of the WTO has not yet been forced to give clear answers as to the legality of outwardly directed trade sanctions based on international human rights considerations. This makes any conclusion as to the outcome of a challenge against the sanctions against Myanmar uncertain. However, sanctions that are based on human rights considerations might well be considered legal under the WTO system.¹⁸⁶ An investigation into the legal history of the international trade rules gives a firm legal ground for arguing that trade sanctions can be outwardly directed. The practise of the WTO organs does not contravene this conclusion. As for the necessity-test in the exception clause, it is more difficult to state a general conclusion on the legality of the sanctions on Myanmar. The sanctions imposed by any actor must be analyzed in a balancing test and the outcome is uncertain. However, if the ILO considers a sanction 'appropriate' under the article 33-resolution, this should be an important factor for any WTO body to acknowledge.

The un-specific formulation of the exception clauses in the WTO-agreements leaves them open to interpretation. The future jurisprudence of the organization on this issue will be vitally important to determine the contents of the international trade agreements as well as the development of international law.

¹⁸⁶ Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights', *European Journal of International Law*, Vol. 13 (2002) No. 4, p. 790-791.

4 Conflict of Norms

4.1 Introduction

My conviction is that the sanctions on Myanmar should be considered as acceptable under the general exceptions clause in GATT article XX(a) or (b). However, if the exception clause is not interpreted as including outwardly-directed measures, or if the specific measures on Myanmar are not deemed to be 'necessary', a conflict of norms arises. If the sanctions are permissible under the ILO Constitution but illegal under the GATT, which set of rules are states to follow?

In this chapter I will explore the consequences if this conflict of norms arises between the ILO and the WTO. This is a complex and multifaceted issue, and I will only be able to give an overview of the pertinent legal issues that may arise and suggest the option that I find most convincing.

4.2 Determining the Legal Status of the 2000 Resolution

Before beginning the determination of which treaty will prevail in a situation of conflict between the ILO Constitution and the GATT, it is crucial to characterize the legal foundation underpinning the sanctions on Myanmar. Two questions have to be clarified:

- i) Does article 33 of the ILO Constitution contain a right for the Governing Body to recommend, and thereby authorize, economic sanctions against a member failing to carry out the recommendations of the Commission of Inquiry?

As mentioned above, article 33 of the ILO Constitution was created through an amendment in 1946. The text of article 28 of the 1919 Constitution, stated that the Governing Body could recommend 'measures, if any, of an economic character against a defaulting Government which it considers appropriate, and which it considers other Governments would be justified in adopting'. This section was deleted, and article 33 was modified to its present wording.¹⁸⁷ The purpose of the amendment was to remove reference to solely economic sanctions, so as to leave the Governing Body full discretion to choose any enforcement measure appropriate to the situation at hand.¹⁸⁸ It does not seem as if this amendment was meant to deprive the Governing Body of its powers to recommend action of an economic

¹⁸⁷ Steve Charnovitz: 'The influence of international labour standards on the world trading regime', in *International Labour Review*, No. 5, 1987, Penalties and Incentive: 9 International law. Available on <www.geocities.com/charnovitz/ILO.htm>, last visited 26 May 2006.

¹⁸⁸ GB 276/6, paras 12 and 19.

character to the ILC but rather to expand the possibilities to other areas as well. Moreover, the text of article 33 does not seem to pose any restrictions on the range of measures applicable to secure compliance with the recommendations of a Commission of Inquiry. The Governing Body should thus be able to recommend economic sanctions under article 33.

- ii) If i) is answered in the affirmative, did the 2000 resolution authorize member states to impose economic sanctions against Myanmar?

The text of the 2000 does not stipulate what types of action the members are required to take. The only requirement is that members take appropriate measures so as not to help Myanmar to use forced labour, and that they contribute to the implementation of the recommendations of the Commission of Inquiry. The Governing Body has explicitly mentioned foreign direct investments as forming a part of the measures under article 33.¹⁸⁹ When examining the measures that have been taken by member states up to date, there is no doubt that economic sanctions have been interpreted as being among the measures available under the 2000 resolution.¹⁹⁰ The open language of the resolution also supports that economic sanctions are among the possible options for action. In the end, it is up to the competent ILO organs to decide what measures are appropriate, and what measures are not.

It is important to notice that the 2000 resolution is formed as a recommendation rather than an obligation to take action. This might have bearing on the questions explored in this chapter.¹⁹¹ It might be argued, that the ILO resolution only leaves an option to impose trade sanctions and that states are free not to pursue this avenue, and thus still act in conformity with their obligations under the WTO treaties. However, that the 2000 resolution does not bind states to perform any particular measure does not mean that the resolution does not entitle states to act. The measures imposed by states, and reported to the ILO, also suggest that the member states interpreted the 2000 resolution as providing a right to impose economic sanctions on Myanmar. The 2000 resolution based on article 33 would be useless unless it provided the member states with legal authorization to act on the recommendations.

¹⁸⁹ See Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Governing Body's conclusions, 291st session of the Governing Body, November 2004, para. 3.

¹⁹⁰ See above, Chapter 2.8.

¹⁹¹ See Francis Maupain, *Reflections on the Myanmar Experience*, p. 108-109.

4.3 Which norm prevails?

Having answered the two above questions in the affirmative, the ILO has the power to authorize economic sanctions and the 2000 resolution gave effect to this right. If this action by the ILO and its member states is not legal under the exception clauses of the WTO treaties, would the WTO prohibition prevail over the ILO authorization?

When dealing with conflicting norms of international law there are certain general principles that are used to resolve disputes. Regarding conflicts between different treaties, or between a treaty and a custom, the later law in time will generally prevail, according to the principle of *lex posterior derogate priori*. However, there are exceptions to this rule, namely *lex posterior generalis non derogate prior speciali* (a later general law does not repeal an earlier law, more special in nature) and *lex specialis derogate legi generalis* (special law prevails over general law).¹⁹²

Lex posterior is based on the principle that the later intent of the parties should prevail over the earlier.¹⁹³ This approach is a logical consequence of *pacta sunt servanda* (pacts must be respected). Countries, being free to conclude treaties, should be able to alter their obligations and rights and obligations towards each other, as long as this does not infringe on the rights of other, non-participating countries.¹⁹⁴ Hence, the latest expression of intent should generally apply, as this most accurately reflects the present intent of the parties. This is also compatible with the contents of custom. The acts of members of the international community coupled with the *opinio juris* (accepted as law) over time changes the legal content of this source of international law, so that it reflects the present legal intent of the international community.¹⁹⁵ Article 30 of the VCLT codifies the principle of *lex posterior* between conflicting treaty norms. Between parties to both treaties, the norms of the later treaty thus prevails over the norms of the earlier treaty.¹⁹⁶

In the Myanmar case it is not the treaty norm itself but rather an *act of an international organization*, the ILO, that conflicts with the treaty norms of the WTO. There is no inherent hierarchy between acts of international organizations and treaties, and general conflict rules will have to be used. Since the ILO resolution is no doubt the later expression of state intent as between the parties, the *lex posterior* principle should presumably be used

¹⁹² See Peter Malanczuk, *Akehurst's Modern introduction to International Law*, 1997, 7 ed., Routledge, London, p. 56.

¹⁹³ See Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties*, 2003, Martinus Nijhoff Publishers, Leiden, p. 62. See also Robert Howse and Michael J. Trebilcock, *The free trade-fair trade debate: Trade, labour, and the environment*, p. 217.

¹⁹⁴ See VCLT article 41.

¹⁹⁵ See Peter Malanczuk, *Akehurst's Modern introduction to International Law*, p. 39.

¹⁹⁶ VCLT article 30 (3) and (4) (a).

in this case.¹⁹⁷ The 2000 resolution is based on the legal foundation of the ILO Constitution and its dispute settlement provisions, and the passing of the resolution was concluded in accordance with the rules of the organization. The intent of the ILO members is thus clear. Myanmar, being a member of the ILO, is bound by this expression of intent. As the 2000 resolution is later in time than the GATT and any other of the WTO treaties, it should prevail as between members of both the ILO and the WTO. This does not mean that the WTO rules are rendered illegal in other situations, the ILO authorization of trade measures are specific to the present conflict.

Any discussion as to the exceptions to the *lex posterior* principle, stipulating preference of *lex specialis*, further strengthens this conclusion. The 2000 resolution is presumably more special in character as regards the Myanmar situation than any rule of the WTO. The ILO dealings with Myanmar and the outcome of this process must surely be seen as the most specific of norms. On a more general level the Singapore Declaration can be recalled as a clear WTO statement that labour issues should be dealt with by the ILO.¹⁹⁸ In the light of this statement, it would be absurd for the WTO to argue that any ILO action regarding labour issues would infringe on the rules of the WTO. As the ILO has been designated as the sole forum for labour issues, the WTO would arguably be bound to uphold this distinction and not interfere with the enforcement of labour standards.

4.4 Conclusion

There are many uncertainties surrounding a conflict of norms as described in this chapter. The interaction between different treaties is seldom clarified in practise. As co-operation in the international community fosters a growing number of treaties, both on a universal and regional basis, and these treaties tend to expand in scope and complexity, the risk of conflict of norms increases. In the present case there are many possibilities to avoid such a conflict by interpreting the existing treaties in a coherent manner. This is not only the most likely option should a conflict arise in the WTO, but also the most preferable option from both a legal and a practical point of view. If the ILO makes use of a provision of its constitution and the member states act in accordance with this recommendation, this should be in accordance with international trade law. If the WTO organs should conclude that the economic sanctions against Myanmar are not legal under the WTO rules, the outcome of a legal process would be uncertain. However, under the assumptions that the ILO does have the right to authorize sanctions under article 33, and that this right was used in the present case, the ILO authorization would according to my view trump the WTO rules since the 2000 resolution is the later and more specific norm.

¹⁹⁷ See Joost Pauwelyn, *Human Rights in WTO Dispute Settlement*, in *Human Rights in International Trade*, p. 219. See also Joost Pauwelyn, *The Conflict of Norms*, p. 384.

¹⁹⁸ See the Ministerial Declaration of Singapore, 1996, para. 4, available via the WTO homepage, <www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>.

To further strengthen this conclusion, the WTO has not in any form criticized the sanction on Myanmar. The WTO Trade Policy Review of the US, published in January 2005, did not single out the Myanmar sanctions as a problem of US compliance with WTO rules.¹⁹⁹ Even though there may be political reasons for the silence of the WTO organs, it might also be a sign of acceptance of the ILO action.

¹⁹⁹ See Robert Howse and Brian Langille with Julien Burda, *The World Trade Organization and Labour Rights: Man Bites Dog*, p. 207.

5 Conclusion

The examination of the legality of the trade sanctions imposed on Myanmar gives support to the conclusion that the sanctions are compatible with WTO law. This conclusion of course presupposes that the specific sanction is performed in accordance with the 2000 resolution. However, if the ILO finds that this is the case the WTO should accept this as legal under international trade law.

So what are the consequences of this conclusion? Some have argued that this recent development has moved the trade-labour debate forward in a nonreversible way.²⁰⁰ After the Myanmar case, it is no longer an option to proclaim that trade and labour rights should be kept separated and isolated from one another. In a way, it has always been clear that these areas of international law must interact. Both the Havana Charter and the ILO Constitution acknowledges the relation between trade and labour.²⁰¹ However, the WTO has tried to maintain an artificial barrier between itself and labour rights through the Singapore Declaration and the complete silence on labour issues. Though this may seem discouraging, it is important to keep in mind that all members of the WTO are also members of the ILO.²⁰²

If the intention of the Singapore Declaration was to contain labour issues within the toothless tiger of the ILO, this move has certainly backfired through the recent events. The opponents against a linkage between trade and labour law, a so-called 'social clause', now finds themselves in a difficult position. If they were to openly challenge the sanctions on Myanmar, the WTO might pronounce that the sanctions are legal under international trade law, and the social clause would become an abundant fact. This creates an unwillingness to bring this issue before any judicial instance, and ironically creates an incitement for the opponents of a social clause to increase the pressure on Myanmar to change its behavior.²⁰³

So far, the Myanmar experience has created little attention from the WTO organs, but this will probably have to change if the situation continues, or if another situation of a similar kind arises. There are both risks and opportunities inherent in this inevitable interaction between trade law and labor rights. The creation of 'economic liberty rights'²⁰⁴ and 'the right to

²⁰⁰ See Robert Howse and Brian Langille with Julien Burda, *The World Trade Organization and Labour Rights: Man Bites Dog*, p. 229.

²⁰¹ See the Havana Charter, article 7, and the ILO Constitution, Preamble para. 3.

²⁰² See Robert Howse and Brian Langille with Julien Burda, *The World Trade Organization and Labour Rights: Man Bites Dog*, p. 197.

²⁰³ See Francis Maupain, *Reflections on the Myanmar Experience*, p. 113.

²⁰⁴ See Ernst-Ulrich Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, *European Journal of International Law*, Vol. 13 (2002) No. 3, p. 628. For critique of this article, see Robert Howse, 'Human Rights in the WTO: Whose

free trade’²⁰⁵, are images of what could be critical issues in the years to come. Even if the present WTO jurisprudence, as well as the underlying WTO agreements and legal texts, do not support these constructions, some commentators have construed international trade law as human rights by creating these new terms. International trade law and human rights law have different underpinnings; human rights being based on the inherent dignity of all human beings and trade law being a set of rules created to achieve an equitable international economic order. Whilst human rights should be the goal of the rules of international trade, the rules of the WTO are not ends in themselves, but means to achieve this goal. Transforming market freedoms into fundamental human rights must not be the WTO’s answer to its potential involvement in human rights issues. The purpose of the WTO is, according to the Marrakech Agreement, not to create ‘rights’ in the sense of human rights, but rather to shape economic transactions ‘with a view to raising standards of living’, ‘ensuring full employment’ and ‘allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development’.²⁰⁶ Even if popular in certain academic circles, the construction of trade law as human rights does not appear to have the support of the major WTO organs or governments in general.

When it comes to the enforcement of labour rights, or human rights in general, authorized by international organs, the WTO should attempt to stay out of the way. In a similar way, international actors should respect the system of international trade, by not making false use of human rights arguments to impose trade sanctions on protectionist grounds. The credibility of the human rights regime can be cast into doubt if trade measures are used for protectionist or other political reasons. Instead, the multilateral and global labour rights and human rights organs that are already in place should be used to enforce the labour rights and human rights that are globally accepted, as demonstrated by the Myanmar case.

An interesting possibility that a WTO Dispute Panel may wish to make use of is the mechanism in article 13 of the Dispute Settlement Understanding, which provides an opportunity to seek expert advice outside the organization. This expert review mechanism has been used in earlier cases.²⁰⁷ A Dispute Panel could make use of this provision if confronted with issues of whether trade sanctions are covered by the exception clauses

Rights, What Humanity? Comment on Petersmann’, *European Journal of International Law*, Vol. 13 (2002) No. 3, p. 651-661, and Philip Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’, *European Journal of International Law*, Vol. 13 (2002) No. 4, p. 815-845. See also Ernst-Ulrich Petersmanns defence against this critique in, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in *Human rights and International Trade*, p. 29-95.

²⁰⁵ See Qingjiang Kong, *A Human Rights Approach to Trade, Some Reflections, Commentary on Joost Pauwelyn*, in *Social Issues, Globalization and International Institutions*, p. 234.

²⁰⁶ Marrakech Agreement, Preamble, available on the WTO homepage, <www.wto.org/english/docs_e/legal_e/04-wto_e.htm>, last visited the 18 of May 2006.

²⁰⁷ See Sarah H. Cleveland, *Human Rights Sanctions and the WTO*, in Francesco Francioni (Ed.), *Environment, Human Rights and International Trade*, 2001, Hart Publishing, Oxford, p. 259.

in the trade agreements, as well as regards issues of conflict of norms.²⁰⁸ The ILO could for example provide advice on whether or not the actions of a member are in accordance with the 2000 resolution, what types of sanctions that are authorized by the organization etc. This procedure would respect the different legal areas that the WTO and ILO masters, while at the same time acknowledging the interaction between these areas.

²⁰⁸ Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights', *European Journal of International Law*, Vol. 13 (2002) No. 4, p. 791.

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