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European Union´s governance through trade: Considerations on the Proposal for a Regulation on prohibiting products made with forced labour on the Union market

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Abstract: The European Union has been governing through trade for decades, trying to export its core values beyond its borders through its trade instruments. Recently, the European Commission has launched a Proposal for a Regulation on prohibiting products made with forced labour on the Union market that aims to put an end to one of the most despicable contemporary practices: forced or compulsory labour. Nevertheless, this measure, like any other unilateral measure, must meet a number of requirements to be compatible with World Trade Organization law: it must fall within the exceptions contained in Article XX of GATT 1994 and must not constitute an arbitrary or discriminatory measure. In the event that the European Union's unilateral measure does not meet these requirements and a state is affected, the World Trade Organization's dispute settlement system could take action. However, the entire World Trade Organization is at an impasse that is very difficult to resolve, putting into risk the whole multilateral international trade system.

Keywords: European Union International Trade Forced Labour Unilateral Measures WTO Law

(A) INTRODUCTION

The elaboration of products using forced labour is one of the most despicable practices in existence. Even more so if this forced labour is carried out by children. Far from being an isolated occurrence, according to the data offered by International Labour Organization (ILO), 49.6 million people were living in modern slavery in 2021, of which 27.6 million were in forced labour, being the 12% of all those in forced labour children at a young age. More than half of these children are in commercial sexual exploitation[1].

The international community has been trying for years to combat these practices within the different regimes of international law. One of the regimes that has received the most attention has been the international trade law regime, because of its ability to bend the will of states in the face of fears of loss of access to foreign markets and the deterioration of their economies. The European Union (EU) was one of the first economic powers, along with United States, to use its trade instruments to enforce its values beyond its borders, including the abolition of forced or compulsory labour. This has been termed by Sophie Meunier and Kalypso Nicolaïdis as "govern through trade",

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1 ILO, `Global Estimates of Modern Slavery Forced Labour and Forced Marriage, September 2022', Geneve, 2022.

referring to the fact that the EU uses the power of its market access and market size to "export" its norms, standards and core values[2].

For decades, the EU has been incorporating core labour standards protection clauses into its free trade agreements and its generalized scheme of preferences. More recently, the European Commission has launched a Proposal for a Regulation that aims to prohibit the placing and making available on the EU market and the export from the EU of products made with forced labour, including forced child labour[3]. This is what is known as unilateral measures and, for the multilateral international trade system, they are permitted, or rather not prohibited, in very limited situations, namely, whenever these measures fall within the exceptions of the article XX of the GATT 1994 and do not constitute an arbitrary or discriminatory measure.

This research paper aims to analyze, firstly, what is meant by forced or compulsory labour and the importance of its abolition for the international community. Secondly, we will provide some considerations on the Proposal for a Regulation on prohibiting products made with forced labour on the Union market and, finally, we will examine its compatibility with World Trade Organization (WTO) law. As we will have the opportunity to witness, with a WTO on stand-by, the adoption of unilateral measures by States will be increasingly frequent and there is a risk that some of them will constitute a disguised restriction on international trade for protectionist purposes.

(B) THE ABOLITION OF FORCED AND COMPULSORY LABOUR: A PENDING SUBJECT

The abolition of forced or compulsory labour is a central mandate in international human rights law. However, this concept of forced or compulsory labour has undergone a long and complex evolution and is often confused with other related abusive practices such as slavery, servitude or trafficking in human beings, all of which fall under the umbrella of "human exploitation". Therefore, it becomes necessary to precisely delimit its content and differentiate it from other phenomena in order to determine whether the EU´s Proposal for a Regulation really focus on products made with forced labour or rather intend to go beyond[4].

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2 S. Meunier & K. Nicolaïdis, `The European Union as a Conflicted Trade Power´, 13 *Journal of European Public Policy* (2006) 906-925 at 906 [doi: 10.1080/13501760600838623].

3 EU, `Proposal for a Regulation of The European Parliament and of the Council on prohibiting products made with forced labour on the Union market´ (COM(2022) 453 final, 2022/0269 (COD), 14 September 2022).

4 Some authors that have studied these differences are:
C. Espaliú Berdud, `La Definición de Esclavitud en el Derecho internacional a Comienzos del Siglo XXI´, 28 *Revista Electrónica de Estudios Internacionales* (2014) 1-36 [doi: 10.17103/reei.28.04].
E. Rojo Torrecilla, `Nueva Esclavitud y Trabajo Forzoso. Un Intento de Delimitación Conceptual desde la Perspectiva Laboral´, in E. Pérez Alonso (dir), *El Derecho ante las Formas Contemporáneas de Esclavitud* (Tirant Lo Blanch, Valencia, 2017) at 721-756.
J. Allain, `125 Años de Abolición: El Derecho de la Esclavitud y la Explotación Humana´, in E. Pérez Alonso (dir), *El Derecho ante las Formas Contemporáneas de Esclavitud* (Tirant Lo Blanch, Valencia, 2017) at 147-182.

The different forms of human exploitation can be classified according to their degree of severity, understood as the level of coercion suffered by the victims. Regarding this scale, among the "less serious" forms of human exploitation, we find the one that just pursues economic ends, i.e., that seeks to exploit the victim's labour force, without the victim having volunteered and under the threat of a penalty, to obtain economic benefits. This form of exploitation does not preclude the possibility of the victim receiving remuneration or enjoying periods of rest. This is what is currently understood as forced or compulsory labour. When the victim, in addition, sees certain considerations of the labour relationship suppressed, such as salary or rest periods, and is "at the mercy" of the exploiter, we speak of servitude[5], which is an abusive practice analogous to slavery, but not identical, since in the latter figure, tacking on, the exploiter exercises attributes of the right to property, the victim is the property of the exploiter. Finally, the concept of "trafficking in human beings" should be understood as the "recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation"[6]. Therefore, we could affirm that human trafficking is a previous (but not essential) step to any of the above-mentioned forms of human exploitation. Although servitude, slavery or trafficking in human beings are really interesting to analyse, in this paper we will focus only on the elimination of all forms of forced or compulsory labour.

Some forms of human exploitation such as slavery, servitude and forced or compulsory labour have not always been regulated by international law. However, the Brussels Anti-Slavery Conference of 1890 marked a turning point by imposing limits on the practice of slavery, after which states began to agree on the progressive abolition of slavery and to enshrine it in binding international legal instruments. The first of these series of instruments was the 1926 Slavery Convention[7], adopted by the General Assembly of

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J. Bonet Pérez, `La Interpretación de los Conceptos de Esclavitud y de otras Prácticas Análogas a la Luz del Ordenamiento Jurídico Internacional: Aproximación Teórica y Jurisdiccional´, in En E. Pérez Alonso (dir), *El Derecho ante las Formas Contemporáneas de Esclavitud* (Tirant Lo Blanch, Valencia, 2017) at 183-210.
J. López Rodríguez, `Trabajo Forzado u Obligatorio: El Significado Contemporáneo de un Viejo Fenómeno a la Luz de la Jurisprudencia del Tribunal Europeo de Derechos Humanos´, 48 *Revista General de Derecho del Trabajo y de la Seguridad Social* (2018) 372-417.
L. Swepston, *Forced and Compulsory Labour in International Human Rights Law* (ILO Publishing, Geneve, 2014).
P. Rivas Vallejo, `Aproximación Laboral a los Conceptos de Esclavitud, Trabajo Forzoso y Explotación Laboral en los Tratados Internacionales´, 2 *Revista de Estudios Jurídico Laborales y de Seguridad Social* (2021) 99-135 [doi: 10.24310/rejlss.vi2.12445].

5 The categories of servitude most widely shared by the doctrine are debt bondage, serfdom of the glebe, servile marriage and child exploitation. Espaliú, *supra* n. 4, at 29; Bonet, *supra* n. 4, at 185; López, *supra* n. 4, at 402.

6 Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) *2237 UNTS 319*.

7 Slavery Convention (adopted 25 September 1926) *60 LNTS 253*.
This Convention has been amended by the Protocol amending the Slavery Convention signed at Geneva on 25 September 1926 (A/RES/794/(VIII) of 23 October 1953) and by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (A/RES/608/(XXI) of 30 April 1956).

the League of Nations on the proposal of the Temporary Slavery Commission[8]. Forced labour is included in Article 5 of the Slavery Convention, in which the "The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery". It also clarifies that it is understood that "compulsory or forced labour may only be exacted for public purposes" and that "this labour shall invariably be of an exceptional character [and] shall always receive adequate remuneration and shall not involve the removal of the labourers from their usual place of residence".

The 1926 Slavery Convention did not prohibit forced labour, but it opened the door to its limitation, thus constituting the most direct precedent for the first international legal instrument whose primary objective was the abolition of forced or compulsory labour imposed by colonial powers within indigenous communities: ILO Convention No. 29 on Forced Labour of 1930[9], one of the most widely ratified ILO conventions. For Lars Thomann, although the adoption of this Convention was justified from a moral perspective, in reality it served a clear economic purpose: to eliminate the comparative advantages of those states and territories that still engaged in these practices[10].

ILO Convention No. 29 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"[11]. All authors agree on two elements that must always be present when we speak of forced or compulsory labour[12]: the first is the "involuntariness" of the individual to perform the work or service, understood as the lack of free and informed consent in the context of an employment relationship and his or her freedom to terminate the employment relationship at any time, and the second is the "threat of a penalty", this penalty not being understood as a criminal sanction, but as the loss of rights or privileges[13]. The duration of the work or the possibility for the individual to receive remuneration for it are irrelevant in qualifying it as forced or compulsory, as

8 J. Goudal, `The Question of Forced Labour before the International Labour Conference´, 19 *International Labour Review* (1929), 621-638 at 622.

9 ILO Forced Labour Convention, No. 29, 1930 (adopted 28 June 1930, entered into force 1 May 1932).

10 L. Thomann, *Steps to Compliance with International Labour Standards: The International Labour Organization (ILO) and the Abolition of Forced Labour* (VS Research, Bremen, 2011) at 190.

11 ILO Forced Labour Convention, *supra* n. 9, Article 2.

12 Allain, *supra* n. 4, at 159; López, *supra* n. 4, at 392; Rivas, *supra* n. 4, at 110; Thomann, *supra* n. 10, at 191. K. Bakirci, `Human Trafficking and Forced Labour: A Criticism of the International Labour Organisation´, 16 *Journal of Financial Crime* (2009) 160-165 at 162 [doi: 10.1108/13590790910951830].

13 Situations examined by the ILO have included threats to report victims to the police or immigration authorities when their employment status is irregular, or complaints to village elders in the case of girls forced into prostitution in distant cities. Other sanctions may be economic in nature, including economic sanctions linked to debts, non-payment of wages or loss of wages accompanied by threats of dismissal if workers refuse to work overtime beyond the scope of their contract or national law. Employers also sometimes require workers to hand over their identity documents and may use the threat of confiscation of these documents to demand forced labour. ILO, `A Global Alliance Against Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work´, adopted by the International Labour Conference at its 93rd Session, Geneva, 2005.

long as it is unjust and oppressive[14]. A decade ago, the ILO developed a list of indicators that represent the most common signs or "clues" that point to the possible existence of a forced labour case: abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, debt bondage, abusive working and living conditions and excessive overtime[15].

In 1953, the ILO and the UN decided to jointly set up an *ad hoc* Committee on Forced Labour to review the postulates of Convention No. 29[16]. As a result of the studies and reports of this Committee, one year after the adoption of the 1956 Supplementary Convention on the Abolition of Slavery[17], the International Labour Conference adopted Convention No. 105 on the Abolition of Forced Labour in 1957[18], which complements rather than revises Convention No. 29. As Pilar Rivas Vallejo states, "the Convention has no bearing on the concept itself, but rather on the purpose for which the subjection to forced or compulsory labour may be used, an element that also allows for the construction of the concept, which in reality defines the cases in which forced labour may be considered prohibited (...) This nuance distances forced labour even more clearly from the concept of slavery or trafficking and seems to bring it closer to a situation of transitory instrumentality, linked to political regimes that use forced labour mainly as a way of subduing political ideologies"[19].

Later on, 1998 was the year of adoption of the ILO Declaration on Fundamental Principles and Rights at Work[20], which states that forced or compulsory labour is one of the five principles concerning the fundamental rights[21], deserving, therefore, the special protection foreseen in its Follow-up mechanism.

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14 A. Naidu, `The Right to be Free from Slavery, Servitude and Forced Labour´, 20 *The Comparative and International Law Journal of Southern Africa* (1987) 108-113 at 111.

15 ILO, `ILO Indicators of Forced Labour´, Geneve, 2012.

16 Swepston, *supra* n. 4, at 8.

17 The adoption of this Convention has a noteworthy historical background: in the context of the Cold War, there was an exchange of accusations between Western and socialist states that both were using forced or compulsory labour. In the case of the Western states, for economic purposes. In the case of the socialist states, as a means of exerting political pressure against ideological opponents. The facts were reflected in the Report of the Special Committee on Forced Labour, which is why Convention No. 105, in its articles 1(a) and 1(b), mentions forced labour as a means of political coercion and as a method of using labour for economic purposes. See Thomann, *supra* n. 10, at 196; Allain, *supra* n. 4, at 160-161.

18 ILO Abolition of Forced Labour Convention, No. 105, 1957 (adopted 25 June 1957, entered into force 17 January 1959).

19 Rivas, *supra* n. 4, at 115.

20 ILO, `Declaration on Fundamental Principles and Rights at Work and its Follow-up´, adopted at the 86th Session of the International Labour Conference (1998) and amended at the 110th Session (2022).

21 Since the adoption of the Declaration, this categorization has supposed legal problems of interpretation: are the core labour rights included in the Declaration abstract principles or enforceable rights? The author of this paper coincides with the part of the doctrine that believes that the Declaration clearly placed the emphasis on the 'meta-constitutional' dimension of the concept of principles, on the principles understood as constitutional objectives. See F. Maupain, `Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights´, 16 *The European Journal of International Law* (2005) 439-465 at 450.
Moreover, the use of the word principle deliberately facilitates a certain amount of ambiguity, which is necessary in this case so that states that have not ratified the ILO fundamental conventions are willing to follow them .Thus, the 1998 ILO Declaration systematises labour rights in the legal sense of the term

In 2001, the ILO Governing Body adopted a Special Action Programme to Combat Forced Labour[22] as part of its work to promote and follow up the 1998 ILO Declaration on Fundamental Principles and Rights at Work. The origin of this programme is to be found in the Director-General's Global Report "Stopping Forced Labour"[23] and the discussions at the 89th Session of the ILC in 2001. The idea of this Special Action Programme is to adapt the postulates of Conventions Nos. 29 and 105 to the new contemporary forms of forced or compulsory labour. To this end, the Programme has a core staff and a budget for awareness-raising activities, studies and research, seminars and dissemination of results[24].

Finally, in 2014, the ILC adopted a Protocol to the Forced Labour Convention[25] that reaffirms the definition of "forced or compulsory labour" contained in the 1930 Convention.

Outside of the ILO, several states and international organizations have their own action programmes. For example, the African Union has the African Union Ten Year Action Plan on Child Labour. The United States has the National Action Plan to Combat Human Trafficking and the Focused Trade Strategy to Combat Forced Labour. Also, Spain presented in 2022 its National Strategic Plan against Trafficking and Exploitation of Human Beings 2021-2023. It is worth mentioning, finally, that the abolition of forced or compulsory labour is one of the main objectives (Objective No. 8.7) of the 2030 United Nations Agenda for Sustainable Development.

Notwithstanding all of the above, almost one hundred years later, the complete abolition of forced or compulsory labour is still a pending subject. As stated in the introduction, 49.6 million people were living in modern slavery in 2021, of which 27.6 million were in forced labour, being 3.3 million of all those in forced labour children at a young age[26]. Instead of decreasing, forced labour has grown in recent years. According to the ILO, "A simple comparison with the 2016 global estimates indicates an increase of 2.7 million in the number people in forced labour between 2016 and 2021, which translates to a rise in the prevalence of forced labour from 3.4 to 3.5 per thousand people in the world"[27]. Forced labour occurs mostly in the private sector, being the 63% in the private economy other than commercial sexual exploitation, the 23% in the commercial sexual exploitation and the remaining 14% in state-imposed forced labour[28]. Regarding the forms of coercion to compel people to work against their will, these have not changed

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that have been categorised as fundamental because they refer to the principles contained in the ILO Constitution, which have a special value. *Ibid*., at 451.

22 ILO, `Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: Priorities and action plans for technical cooperation´, adopted by the Governing Body at its 282nd Session, Geneva, 2001 (GB 282/TC/5).

23 ILO, `Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work´, adopted by the International Labour Conference at its 89th Session, Geneva, 2001.

24 R. Plant & C. O´Reilly, `El Programa de la OIT para Luchar contra el Trabajo Forzoso´, 122 *Revista Internacional Del Trabajo* (2003) 81-95 at 84.

25 ILO Protocol of 2014 to the Forced Labour Convention, 1930 (adopted 21 June 2014, entered into force 9 November 2016).

26 ILO, *supra* n 1, at 2.

27 *Ibid*.

28 *Ibid*., at 3.

either. The systematic and deliberate withholding of wages is still the most common one, and within the less common but worst forms of coercion, we find forced confinement, physical and sexual violence, and the deprivation of basic needs[29]. Finally, it is worth mentioning that forced labour nowadays has an important gender dimension: within forced commercial sexual exploitation, four out of five people trapped in these situations are women or young girls[30].

The ILO has been trying to put an end to this practice for several decades. Nevertheless, the enforcement capacity of the Organization is rather limited. The complexity of the ILO supervisory system, the lack of timely and reliable information from the states, and the limited scope of Article 33 of its Constitution[31] are limits that make the doctrine affirm that the ILO is a "toothless tiger", being "naming and shaming" the main system of control, which does not provide any legal sanctions against the member states[32]. This is the reason why states and doctrine have been paying attention to other regimes of international law to make the abolition of forced or compulsory labour effective, being the international trade law the most attractive one due to its capacity to bend the will of states in the face of fears of loss of access to foreign markets and the deterioration of their economies. The impossibility of including labour clauses within the multilateral international trade system, i.e., the WTO law, made states include them in their bilateral and regional free trade agreements[33]. In today's majority trade agreements, when a state violate core labour norms, within which we find the abolition of forced labour, this state can be seen trade benefits derived from the agreement supressed. Apart from these labour clauses, and due to the impasse of the WTO that we will study next, several states and regional blocs are adopting unilateral measures in order to protect the main multilateral environmental conventions[34] and fundamental labour conventions, as is the case with the ILO Forced Labour Convention No. 29 and ILO Abolition of Forced Labour Convention No. 105. One of the most active ones in doing so is the EU, who has

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29 *Ibid*.

30 *Ibid*., at 4.

31 Article 33 of the ILO Constitution foresees that "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". These actions can include sanctions; however, this article has only been used once against Myanmar in 1996. Precisely because of the use of forced labour. Nevertheless, the actions were finally carried out by States, instead by the ILO.
See ILO Constitution (adopted 28 June 1919).

32 N. Lyutov, `The ILO System of International Labour Standards and Monitoring Procedures: Too Complicated to be Effective?´, 64 *Zbornik Pravnog Fakulteta u Zagrebu* (2014) 255-276, at 256.

33 See C. Martínez San Millán, `Hacia una efectiva implementación de los capítulos de Comercio y Desarrollo Sostenible de los Acuerdos de Libre Comercio de la Unión Europea´, 75 *Revista de Estudios Europeos* (2020) 72-85; X. Fernández Pons, `La Unión Europea y la promoción del desarrollo sostenible a través del comercio internacional´, in A. Pigrau Solé, *et al*. (eds), *La comunidad internacional ante el desafío de los objetivos de desarrollo sostenible* (Tirant lo Blanch, Valencia, 2023) 289-310.

34 Although it is not the subject of study in this paper, it is worth mentioning the EU´s `Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010´ (COM(2021) 706 final, 2021/0366 (COD), 17 November 2021), which aim is to curb deforestation and forest degradation that is provoked by EU consumption and production.

recently proposed a Regulation on prohibiting products made with forced labour on the Union market. In subsequent sections we will analize this Proposal, together with its compatibility with WTO law.

(C) KEY FEATURES OF THE PROPOSAL FOR A REGULATION ON PROHIBITING PRODUCTS MADE WITH FORCED LABOUR ON THE UNION MARKET

On 15 September 2021, Ursula Von der Leyen, current president of the European Commission, on her speech about the State of the Union stated that "doing business around the world, global trade, all that is good and necessary. But this can never be done at the expense of people's dignity and freedom. There are 25 million people out there, who are threatened or coerced into forced labour. We can never accept that they are forced to make products and that these products then end up for sale in shops here in Europe. So, we will propose a ban on products in our market that have been made by forced labour"[35]. Few months later, in the Commission Communication on decent work worldwide[36], the European Commission outlined the first fundamental elements of its Proposal: "The initiative will cover both domestic and imported products and combine a ban with a robust, risk-based enforcement framework. The new instrument will build on international standards and complement existing horizontal and sectoral EU initiatives, in particular the due diligence and transparency obligations"[37]. Finally, on 14 September 2022, and after stakeholder consultations[38], the Commission released its Proposal for a Regulation on prohibiting products made with forced labour on the Union market[39], legally based on Articles 114 and 207 TFEU, which final goal is to prohibit economic operators from placing and making available on the Union market or exporting from the Union market products made with forced labour. This prohibition includes domestically produced and imported products.

On its particularly long recital, the Proposal alludes to the definition of forced labour given by the 2014 ILO Protocol of the Convention No. 29, according to which, the forced labour constitutes serious violation of human dignity and fundamental human rights[40]. Right after, the Proposal confirms the nature of the abolition of forced labour as a principle concerning the fundamental rights as systematised in the aforementioned 1998 ILO Declaration.

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35 EU, `2021 State of the Union Address by President von der Leyen´, 15 September 2021.

36 EU, `Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery´, (COM(2022) 66 final, 23 February 2022).

37 *Ibid*., at 14.

38 The main stakeholders consulted included companies, trade union organizations, EU Member States and non-EU countries, international organizations and civil society organizations, including NGOs. Regarding these consultations, it is worth mentioning that representatives of Member States and other stakeholders underlined the importance that the envisaged EU instrument must be compatible with WTO law and based on international standards, such as the ILO's definition of forced labour. EU, *supra* n 3, at 5-6.

39 EU, *supra* n 3.

40 ILO Protocol of 2014 to the Forced Labour Convention, *supra* n. 25.

The recital of the Proposal also emphasizes the fact that all Member States have ratified the fundamental ILO Conventions on forced labour and child labour but remains strategically silent about the aforementioned 2014 ILO Protocol, which has not been yet ratified by 8 EU Member States almost 10 years later. Although the 2014 Protocol has optional nature and it deems to supplement the Forced Labour Convention and complement existing international instruments by providing specific guidance on effective measures to be taken, its ratification by all EU Member States would support the statement made by the European Commission on the Proposal, according to which "the eradication of forced labour is a priority for the Union"[41].

The twentieth paragraph of the Proposal´s preamble affirms that "in order to increase the effectiveness of the prohibition, competent authorities should grant reasonable time to economic operators to identify, mitigate, prevent and bring to an end the risk of forced labour"[42]. Also, if the competent authorities find out that economic operators have violated the prohibition, these authorities should set a reasonable time within which the economic operators should comply with the decision taken[43]. Although certain level of flexibility is needed when the economic operators are heterogeneous in distance, size and shape, the failure to determine certain time periods may lead to disparate implementation of the Regulation in the different territories of the EU Member States.

It is also important to stress the connection between this Proposal and the Proposal for a Directive on corporate sustainability due diligence[44], which lays down rules on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship and on liability for violations of the obligations mentioned above[45]. The author of this paper is critical with the concept of "due diligence" as it remains undefined. The Article 3 of the Proposal for a Directive on corporate sustainability due diligence, among all the definitions, does not include the definition of "due diligence". Instead, Article 4 gives substance to the concept by listing several actions that constitute "due diligence" for the purpose of this Directive[46]. This list is, nevertheless, *numerus apertus*. Surprisingly, the Proposal for a Regulation on prohibiting products made with forced labour on the Union market does define "due diligence" but only in relation to forced labour as "the efforts by economic operator to implement mandatory requirements, voluntary guidelines, recommendations or practices to identify, prevent, mitigate or bring to an end the use of forced labour

41 EU, *supra* n 3, at 12.

42 *Ibid*., at 16.

43 *Ibid*., at 17.

44 EU, `Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937´ (COM/2022/71 final, 2022/0051(COD), 23 February 2022).

45 *Ibid*., at 46.

46 These actions include integrating due diligence into their policies; identifying actual or potential adverse impacts; preventing and mitigating potential adverse impacts and bringing actual adverse impacts to an end and minimizing their extent; establishing and maintaining a complaints procedure; monitoring the effectiveness of their due diligence policy and measures; and publicly communicating on due diligence. *Ibid*., at 53.

with respect to products that are to be made available on the Union market or to be exported"[47]. In the view of the author, the main problem of this concept relies on how to measure the efforts made in relation to implement voluntary or non-binding norms. Moreover, will these non-binding international norms become practically binding for non-state actors that have not formally and solemnly consent to it at some point due to the implementation of these future Regulation and Directive? We won´t dive into this debate, as it would constitute another completely different research.

An additional important definition included in the Proposal is the one regarding forced labour. For the purpose of this Regulation "forced labour" means forced or compulsory labour as defined in Article 2 of the Convention on Forced Labour No. 29 of the ILO, including forced child labour. Cross-referencing this definition with that of Article 2 of the Convention No. 29, we can conclude that "forced labour" for the purpose of this Regulation means "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"[48]. As we noted above, respecting the definition of forced labour given by the ILO was a very important issue for the stakeholders consulted prior to the formulation of the Proposal. However, we can find a loophole in the Proposal: Article 2 of the Convention No. 29 lists certain situations which could constitute forced labour that the Convention does not consider included in the definition[49]. The Proposal fails to clarify if these listed situations remain exceptions for the purposes of the Regulation. Although one can deduce that the definition includes de same exceptions, it would be necessary for the final text to specify it and interesting to update them, as they were stablished almost a hundred years ago.

Article 3 of the Proposal sets out the main obligation of EU Member States: "Economic operators shall not place or make available on the Union market products that are made with forced labour, nor shall they export such products"[50]. It does not matter whether it is the final product or one of its components that benefited from forced labour. The origin of the product and the sector in which it was produced is also irrelevant to the applicability of the main prohibition.

Chapter II of the Proposal deals with the investigations and decisions of competent authorities as a decentralized enforcement mechanism. As this Proposal for a Regulation

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47 EU, *supra* n 3, at 22.

48 ILO, *supra* n. 9.

49 These situations are: "any work or service exacted in virtue of compulsory military service laws for work of a purely military character; any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country; any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations; any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population; and minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services". *Ibid*.

50 EU, *supra* n 3, at 23.

aims to prohibit products made with forced labour on the Union market, the competent authorities on every Member State shall conduct investigations in order to check if an available product on the Union market has been made with forced labour. To that end, according to Article 4, competent authorities shall follow a risk-based approach in assessing the likelihood that economic operators violated the prohibition of placing and making available on the Union market products that are made with forced labour based on all relevant information available to them[51]. If the information creates substantiated concern, competent authorities shall decide to initiate an investigation on the products and economic operators concerned[52] and economic operators shall submit the information within 15 working days from the request or make a justified request for an extension of that time limit. When deciding on the time limits, competent authorities shall consider the size and economic resources of the economic operators concerned[53]. This is an example of the flexibility announced in the Preamble of the Proposal. As mentioned above, although it is true that a certain amount of flexibility is necessary, and even more so in the case of small and medium-sized enterprises that may find it difficult to access certain types of product information quickly, the Proposal should establish more solid criteria for these temporary extensions so that future disparities do not arise between the territories of the different EU Member States. Article 6 of the Proposal provides that if the competent authorities can prove that there has been a violation of the Regulation, they shall without delay adopt a decision containing a prohibition to place or make the products concerned available on the Union market and to export them[54]. This decision, which can be review, contains a reasonable time limit for the economic operators to comply with the order, which shall not be less than 30 working days and no longer than necessary to withdraw the respective products[55]. Again, this timeframe should be more clearly defined by stablishing a maximum time period to implement the decision, because what is the necessary time to withdraw a product? The answer to this question can derivate into disparities between EU Member States, which should not be the case when implementing a Regulation. Finally, according to Article 11, the European Commission is in charge of providing an indicative, non-exhaustive, verifiable and regularly updated database of forced labour risks in specific geographic areas or with respect to specific products including with regard to forced labour imposed by state authorities[56].

Chapter III is related to the controls and information on products entering or leaving the Union market. The main important obligation for the Member States is to suspend the release for free circulation or the export of the product that may be violating the Regulation when customs authorities identify it[57].

The last Chapter of the Proposal, and the most technical one, regards to information systems, guidelines and coordinated enforcement. The most interesting provision

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51 *Ibid*., at 24.
52 *Ibid*., at 25.
53 *Ibid*., at 26.
54 *Ibid*.
55 *Ibid*., at 27.
56 *Ibid*., at 29.
57 *Ibid*., at 32

is contained in Article 24, which stablishes a Union Network Against Forced Labour Products in order to serve as a platform for structured coordination and cooperation between the competent authorities of the Member States and the Commission, and to streamline the practices of enforcement of the Regulation within the Union, thereby making enforcement more effective and coherent[58]. This Union, well used, can provide the link to avoid the above-mentioned possible disparities in the application of the Regulation.

(D) COMPATIBILITY OF THE PROPOSAL FOR A REGULATION ON PROHIBITING PRODUCTS MADE WITH FORCED LABOUR ON THE UNION MARKET WITH WTO LAW

International trade relations between states continue to be governed by the rules of the multilateral system of international trade, mainly the 1947 General Agreement on Tariffs and Trade (GATT) and the subsequent Marrakesh Agreement of 1994, which created the World Trade Organization (WTO). These rules include the obligation for states not to discriminate against products on the basis of their origin and to treat foreign products as they treat national products. In order to monitor compliance with the rules of the multilateral trade system, in 1994 the WTO orchestrated a dispute settlement understanding (DSU) in which expert panels (EP) and the Appellate Body (AB), through reports, declare the compliance or non-compliance of a state or group of states and, if necessary, recommend the certain measures. Unfortunately, since the Doha Round, the WTO has been dragging along an institutional crisis that has worsened with the blocking of the AB in 2021.

Unilateral measures with extraterritorial reach adopted by states, such as the Proposal for a Regulation that aims to prohibit the entry of products made with forced labour into the EU market, tend to discriminate some products against others for a certain purpose, like the protection of universal human rights[59]. In the European case, the aim is to prevent products made using forced labour from entering the EU market. A *priori*, as mentioned above, discrimination between like products is prohibited by WTO law. However, when the measures fall within the scope of Article XX GATT, on general exceptions, they are no longer considered prohibited because they have found a justification. Nonetheless, in the event of a conflict between states, it is the AB who, in the final instance, declares the discriminatory nature of the measure, its justification under the umbrella of Article XX GATT and, ultimately, its compatibility with WTO law. With the AB blocked, the rules of the multilateral trade system are weakened and the law of the strongest is imposed.

In this section we will first analyze whether the EU´s Proposal collides with the general principle of non-discrimination between like products. Secondly, we will consider the various ways in which, under an evolutionary interpretation of the GATT,

58 *Ibid*., at 35.

59 L. Huici Sancho, `La Organización Internacional del Trabajo y la extraterritorialidad en orden a la aplicación de las normas internacionales del trabajo´, in J. Bonet Pérez y R. A. Alija Fernández (eds), *La extraterritorialidad y la protección de los derechos humanos respecto a conductas de los actores privados* (Marcial Pons, Madrid, 2021) 267-295, at 268.

the EU´s Proposal could be considered compatible with WTO law, despite contravening the principle of non-discrimination. Thirdly, attention will be paid to the possibility of adopting a waiver as a feasible solution in the case of incompatibility of the EU´s Proposal with WTO law declared by the DSU bodies. Finally, it is relevant to assess the WTO crisis and impasse as an impediment to a definitive declaration of compatibility or incompatibility of the EU's Proposal with the WTO law from the DSU bodies.

(1) The principle on non-discrimination between like products

Article I of the GATT contains one of the most important principles of the multilateral trade system concerning non-discrimination. Entitled as "General Most-Favoured-Nation Treatment", this article states that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties"[60]. Thus, there is discrimination, and thereby a violation of the rules contained in the GATT, when two "like" products are treated differently on the basis of their origin. If it is interpreted evolutionarily a task that should be carried out by the groups of experts and the AB , a product manufactured using forced or compulsory labour is not similar to a product that is manufactured respecting the core labour standards, even if its final physical appearance is the same. Then, a potential restrictive measure on products manufactured in violation of this fundamental labour right coming from a third State would not be in breach of the principle of non-discrimination.

However, a review of some of the most important cases decided by the DSU bodies shows that this interpretation differs from the practice followed by the EP and the AB. For example, in 1994, in United States-Measures Regarding the Importation, Marketing and Sale of Tuna and Tuna Products (US-Tuna)[61], the US Marine Mammal Protection Act of 1972 included dolphin protection measures that had to be complied with by both the US fishing fleet and countries whose vessels fished for yellowfin tuna. If a country exporting tuna to the US could not demonstrate that it had complied with the provisions of the Act, for which the US government required a certificate, the US government could seize the goods. This provision led the European Economic Community and the Netherlands, tuna-exporting states, to appeal to the DSU of the GATT in 1992, before the WTO existed, and to request the establishment of a panel. The panel found that Article III requires a comparison between the treatment accorded to like domestic and imported products, not a comparison between the policies or practices of the country of origin and those of the importing country. Thus, applying Article III of the GATT to measures relating to the processes and production methods (PPMs) that did not affect the characteristics of the final product as such constituted less favourable treatment of like products not produced in accordance with the domestic policies of the importing

[60] WTO, `General Agreement on Tariffs and Trade (GATT 1947)´, 30 October 1947 (LT/UR/A-1A/1/GATT/2 of 15 April 1994).

[61] WTO, `Report of the WTO Panel: United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products´ (WT/DS29/R, 16 June 1994). This report was never adopted.

country[62]. In this sense, the EP states that "like" products are those that are the same in their physical properties regardless of their PPMs, and it can be deduced that, although states have the right to determine the characteristics that a product must meet in order to be marketed in their territory, nevertheless, Article III of the GATT does not cover an extraterritorial regulation of the manner of production of that product in another state[63]. This restrictive interpretation of the concept of product from the EP has been extensively criticized by the doctrine, which states that such a distinction between the legality of restrictive measures adopted in relation to the non-similarity of two finished products by reason of their physical characteristics and the illegality of restrictive measures adopted on the occasion of the different process through which two products are manufactured is not expressly included in Article III of the GATT and, therefore, it is a jurisprudential creation with no normative basis[64]. Moreover, the existence of Article XX (e) concerning products manufactured in prisons, which does take into account the conditions under which the product is made, casts doubt on the immovability of the product-process distinction[65]. However, there are other authors[66] that defend to continue focusing the analysis of the likeness between products on physical aspects, since opening the door to the consideration of any non-product related PPMs would introduce major legal uncertainty. These authors consider that it would be difficult to determine a limit on the possible types of non-product related PPMs to be taken into account, which could give rise to undue extraterritorial interference by a country in the most diverse internal issues of other countries.

Having said that, in the subsequent case European Communities Measures Affecting Asbestos and Asbestos Containing Products (EC Asbestos)[67], the AB did not reject but did not endorse the assertion that the PPMs are relevant for the purpose of determining the likeness of two products, holding that potential health risks should be included as a relevant factor in establishing likeness under Article III of the GATT[68], opening the door to a possible broad interpretation of the term "likeness" in Article III to include the production process as a possible difference factor between two products, even if they have the same physical characteristics, and thus allowing for unilateral restrictive measures by WTO member states[69]. With this evolutionary interpretation and the consideration of the production process to determine the similarity between two products, a product manufactured using forced labour would not be similar to a product

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62 *Ibid*., at par. 5.8.

63 *Ibid*., at par. 4.19.

64 R. Howse, `The World Trade Organization and the Protection of Workers´ Rights´, 3 *The Journal of Small and Emerging Business Law* (1999) 131-172, at 139; L. M. Hinojosa, *Comercio justo y derechos sociales* (Tecnos, Madrid, 2002), at 84; J. Bonet Pérez, *Mundialización y régimen jurídico internacional del trabajo. La Organización Internacional del Trabajo como referente político-jurídico universal* (Atelier, Barcelona, 2007), at 313.

65 Howse, *supra* n. 64, at 143.

66 J. H. Jackson, `Comments on Shrimp/Turtle and the Product/Process Distinction´, 11 *European Journal of International Law* (2000) 303-307, at 304; P. Low *et. al.*, *The Interface Between the Trade and Climate Change Regimes: Scoping the Issues* (WTO, Geneve, 2011), at 23.

67 WTO, `Report of the WTO AB: Measures Affecting Asbestos and Asbestos-Containing Products´ (WT/DS135/AB/R, 12 March 2001).

68 *Ibid*., at par. 41.

69 R. Chartres and B. Mercurio, `A Call for an Agreement on Trade-Related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards´, 37 *North Carolina Journal of International Law and Commercial Regulation* (2012) 665-724, at 706-707.

that in its production process does respect this core labour right, even if the physical characteristics of both finished products are the same, and a possible restrictive measure on this series of products would not incur in discrimination, not being incompatible with Articles I and III of the GATT. However, to date, there has not yet been a case in which the WTO DSU endorses a trade restrictive measure between the Contracting Parties that seeks to prohibit the importation of products with different production processes and, even less so, when the difference in the production process has its origin in the violation of internationally recognized core labour standards. At present, the idea that WTO law is concerned with "finished products" still prevails, although, as Professor Luis Miguel Hinojosa Martínez states, "it cannot be ruled out that, in the future, the growing consensus in international society on the execrable nature of certain forms of labour exploitation could evolve the interpretation of Article III, to the point that restrictive measures justified on social grounds could be considered compatible with it, provided they are not discriminatory in nature"[70]. This interpretation would also encourage the compatibility of WTO member states' trade obligations with their ILO membership obligations[71].

Apart from that, the fact that a measure based on non-product related PPMs is presumably incompatible with the basic principles of non-discrimination between like products does not prevent that the measure could ultimately be justified under one or more exceptions foreseen in Article XX of the GATT.

(2) The exceptions foreseen in article XX of the GATT

When we try to justify a given unilateral measure with extraterritorial effects that does not take into account the final appearance of the product but its PPMs in order to make it compatible with WTO law, the appropriate way to do so is to take into account the general exceptions provided for in Article XX of the GATT, which contemplate certain legitimate objectives recognized multilaterally that, under certain conditions, may justify the imposition of trade restrictions or distinctions between like products based on some non-product related PPMs. In this section, we aim to analyze Article XX of the GATT in order to prove whether the EU´s Proposal for a Regulation on prohibiting products made with forced labour on the Union market falls within the scope of this Article and, therefore, is compatible with WTO law.

(a) The chapeau of article XX of the GATT

Article XX lists exceptions from the application of the other principles and provisions contained in the GATT, as the principle of non-discrimination between like products. Nevertheless, the introductory paragraph of Article XX of the GATT specifies that these measures must not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on

[70] Hinojosa, *supra* n. 64, at 85.
[71] Chartres and Mercurio, *supra* n. 69, at 705.

international trade"[72]. This condition has been baptized by the doctrine as the *chapeau* of article XX of the GATT, given its importance and its systematic position[73], and interpreted by the AB in the US Shrimps case[74], in which it was recorded what is to be understood by "unjustifiable discrimination" on the one hand, and "arbitrary discrimination" on the other. In this case, the unilateral measure imposed by the US to protect sea turtles, although covered by Article XX (g) of the GATT, was found to constitute an unjustifiable discrimination and an arbitrary discrimination in the absence of a "transparent and predictable" procedure.

A second condition *sine qua non* for determining the legality of the exception is that the measure is "relating to" or "necessary for", which is specified in the different paragraphs of GATT Article XX. The EP and the AB of the WTO have interpreted this "necessity" requirement as implying a strict justification by States that the measures adopted are, in addition, the least restrictive, within the available measures, to international trade in order to achieve the objective pursued. *Sensu contrario*, a measure would not be "necessary" if there is a less restrictive alternative to international trade that is reasonably available to achieve the objective in question[75].

At the outset, we can question whether a possible unilateral measure whose ultimate purpose is to protect one of the core labour rights, such as the prohibition of forced or compulsory labour, would constitute, firstly, an arbitrary or unjustifiable means of discrimination or a disguised restriction on international trade, and, secondly, whether it would be really necessary.

Thus, in order for such a measure not to be in collision with the *chapeau* of Article XX of the GATT, it is first necessary to demonstrate that it is not discriminatory, in the sense of being applied differently to different WTO member states that are in the same conditions (for example, a measure aiming at the abolition of forced labour would be considered discriminatory if applied to Pakistan but not to Canada) and of being applied only to certain products and not to all products that are made in violation of this fundamental labour right, and that it does not constitute a disguised restriction on international trade, in the sense that it cannot have a protectionist intent. Secondly, it is necessary for such a measure to pass the necessity test, in the sense of demonstrating that the measure finally adopted was the least restrictive of international trade among all available alternatives. Given that many of the measures proposed for the effective protection of core labour rights advocate the use of trade restrictions on states that do not respect these rights, it seems difficult for these measures to find a shelter under GATT Article XX, as there are many other possible measures that do not require trade restrictions, such as, for example, recourse to negotiations within the ILO[76].

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72 WTO, `General Agreement on Tariffs and Trade (GATT 1947)', *supra* n. 60.

73 C. Thomas, `Should the World Trade Organization Incorporate Labor and Environmental Standards?´ 61 *Washington and Lee Law Review* (2004) 347-404, at 359.

74 WTO, `WTO Appellate Body Report: United States Import Prohibition on Certain Shrimp and Shrimp Products´ (WT/DS58/AB/R, 12 October 1998).

75 Chartres and Mercurio, *supra* n. 69, at 713.

76 *Ibid*., at 715.

Nonetheless, these difficulties have not prevented the doctrine[77] from envisaging the possibility of an evolutionary interpretation of the different paragraphs of Article XX of the GATT in order to include among this series of measures those aimed at protecting internationally recognized core labour rights. This possibility is supported by the change of paradigm in the environmental issue, around which, although GATT/WTO jurisprudence was traditionally very restrictive when admitting measures that seek to protect the environment at the cost of imposing obstacles to international trade, currently, and especially after the US-Shrimp case, the admission of this type of measures is becoming more flexible in order to comply with the objective of sustainable development set out in the preamble of the Marrakesh Agreement of 1994[78] and the latest decisions of the WTO AB seem to be inclined to maintain a balance between the rights of exporting states and the general interests that the importing state seeks to protect by adopting the measure in question[79].

(b) Article XX (a) of the GATT

When trying to justify the compatibility of the EU´s Proposal for a Regulation on prohibiting products made with forced labour on the Union market with WTO law, one of the main arguments lay down the Article XX (a) of the GATT. This article excludes from the application of general principles of international trade law, such as the principle of non-discrimination, unilateral trade restrictive measures necessary to protect public morals. The EU, adopting such a Proposal, aims to protect a maxim present in European collective morality: the complete abolition of slavery and forced or compulsory labour[80].

To date, there are few cases in which WTO jurisdictional organs have interpreted and ruled on this provision. An example is the EC Seals case of 2014[81], in which the AB confirmed the panel's finding that the unilateral measure adopted by the then EC for the protection of seals fell within the material scope of Article XX (a) of the GATT, considering that the main purpose of European Regulation 1007/2009 was to address EU public morals concerns relating to the welfare of seals, rather than environmental concerns[82] and that, in doing so, it took into account other interests or considerations related to Inuit communities, the management of marine resources, and seal products for the personal use of travelers, exceptions which are covered by the Regulation and the subject of the dispute[83]. Another case we can take as a reference is the US Gambling

77 See Hinojosa, *supra* n.64 or Chartres and Mercurio, *supra* n. 69.

78 R. M. Fernández Egea, *Comercio de Mercancías y Protección del Medio Ambiente en la OMC* (Marcial Pons, Madrid, 2008) at 392.

79 Hinojosa, *supra* n. 64, at 94.

80 Article 5 of the Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force 1 December 2009) DO C 202, 7.6.2016, 389-405.

81 WTO, `Appellate Body Report: European Communities Measures Banning the Import and Marketing of Seal Products´ (WT/DS401/AB/R, 22 May 2014).

82 E. J. Martínez Pérez, `Restricciones Comerciales por Razones Éticas: La Prohibición de la Unión Europea a la Importación de Productos derivados de las Focas´, 42 *Revista Española de Derecho Europeo* (2012) 5-48, at 36.

83 *Ibid*., at 37-38.

case[84], in which Antigua and Barbuda complained to the WTO DSU bodies against the US for measures on the cross-border supply of gambling and betting services that the US government justified under Article XX (a) of the GATS, equivalent to Article XX (a) of the GATT, i.e. under the need to protect the public morals of the US population. In this case, the AB agreed with the EP in stating that "the term public morals denotes standards of good and bad conduct by or on behalf of a community or nation"[85], a conception that, on the other hand, cannot be frozen in time, being imperative to adapt it to the existing reality[86].

Within this interpretation of "public morals", some authors understand that it is possible to include within the measures provided for in Article XX (a) of the GATT all those with an ethical component aimed at protecting human rights and, more specifically, core labour rights such as the abolition of forced or compulsory labour or the elimination of child labour[87], since the manufacture of products violating this series of rights would form part of what the AB has called "misconduct on the part of a community or nation". In the words of Chartres and Mercurio, "interpreting GATT Article XX (a) to permit the prohibition of the importation and sale of products manufactured in violation of the core labour rights would allow importing nations to protect their citizens from an internationally condemned practice that offends the deeply held beliefs and fundamental values of their citizens"[88]. Nevertheless, in order for the measure in question not to be incompatible with the provisions contained in the GATT, it must not entail unjustified or arbitrary discrimination, which would require the measure to be applied to all products from any state[89]. In this case, according to Professor Enrique Jesús Martínez Pérez, "there is a risk, if strict conditions of application are not established, of turning [this] justification into a catch-all that serves as an escape valve for non-compliance with GATT obligations"[90].

(c) Article XX (b) of the GATT

One can also try to justify EU´s Proposal for a Regulation on prohibiting products made with forced labour on the Union market under the scope of the Article XX (b) of the GATT, which excludes from the application of general principles of international trade law, such as the principle of non-discrimination, unilateral trade restrictive measures necessary to protect human, animal or plant life or health. The EU, adopting such a Proposal, aims to protect the lives of those workers on whom forced labour has been imposed.

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84 WTO, `Appellate Body Report: United States Measures Affecting the Cross-Border Supply of Gambling and Betting Services´ (WT/DS285/AB/R, 7 April 2005).

85 *Ibid*., at par. 296.

86 Howse, *supra* n. 64, at 172.

87 S. Charnovitz, `The Moral Exception in Trade Policy´, 38 *Virginia Journal of International Law* (1998) 689-746, at 729; R. Howse and M. Mutua, `Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization´, in H. Stokke and A. Tostensen (eds), *Human Rights in Development* (Brill Academic Publishers, Leiden, 1999) 53, at 64 and 71; Martínez, *supra* n. 78, at 48.

88 Chartres and Mercurio, *supra* n. 69, at 710.

89 *Ibid*., at 716.

90 Martínez, *supra* n. 82, at 48.

Article XX (b) of the GATT has been extensively interpreted by the different DSU bodies, but in regard to environmental issues. One of the most important cases is the US Shrimp case[91]. In this case, the EP considered that the US unilateral measure was contrary to WTO law because, although it is true that numerous international treaties recognise the principle of conservation of exhaustible natural resources, these agreements do not specifically address the measures taken by the US. The AB, for its part, reverses the panel´s report and states that "such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply"[92]. Rather than focusing on condemning the unilateral measures taken by the US, the AB examines whether such measures constitute a means of arbitrary and unjustifiable discrimination and thus violate the so-called *chapeau* of Article XX of the GATT. This important US-Shrimp case addresses several difficulties from the point of view of the application of Article XX (b) of the GATT. The first of these is the possible extraterritorial application of the provision, i.e. the possible adoption of unilateral measures by a WTO member state to protect human, animal or plant life or health that are applied outside the territory of the state itself. In the US Shrimp case, this difficulty was overcome by justifying the extraterritorial scope measure by the existence of a "sufficient nexus between the endangered migratory and marine populations in the case and the US"[93], thus avoiding directly pronouncing on the jurisdictional limitation of Article XX[94] and leaving unresolved the question of whether future EP will allow states to implement measures intended to protect human and animal health and life beyond their domestic jurisdiction[95]. Furthermore, in the US Tuna case[96], the EP noted that the text of Article XX (b) "does not detail any limitation on the location of the living creatures to be protected"[97].

Justifying the extraterritoriality of a unilateral measure on the basis of the nexus of that measure with the creature affected is simpler in the case of animal species. However, this solution does not seem applicable in the case of unilateral measures intended to protect the core labour rights, such as the abolition of forced labour, since, according to Professor Luis Miguel Hinojosa Martínez, the population of the punished country (which is intended to be protected) has no direct nexus with the importing country[98]. The measure directly protects rights, not persons. Moreover, as mentioned in relation to the chapeau of Article XX of the GATT, it must also be demonstrated that the measure is "necessary", for which it must be analyzed beforehand that it constitutes the least restrictive, within the available measures, to international trade to achieve the objective

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91 WTO, *supra* n. 74.

92 *Ibid*., at par. 121.

93 *Ibid*., at par. 133.

94 A. H. Qureshi, `Extraterritorial Shrimps, NGOs and the WTO Appellate Body´, 48 *International and Comparative Law Quarterly* (1998) 199-206, at 204.

95 B. Simmons, `In search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body report´ 24 Columbia Journal of Environmental Law (1999) 413-454, at 440; H. F. Chang, `Toward a Greener GATT: Environmental Trade Measures and the Shrimp/Turtle Case´, 74 *Southern California Law Review* (2000) 31-47, at 34.

96 WTO, *supra*, n. 61.

97 *Ibid*., at par. 5.31.

98 Hinojosa, *supra* n. 64, at 98.

set or the least incompatible with the provisions of the GATT[99], being difficult to justify this "necessity" in relation to a possible measure that aims to abolish forced labour, given that there are alternatives such as cooperation with the ILO or technical and financial assistance to developing countries[100]. Finally, any unilateral measure intended to protect human and animal health and life must also comply with the requirements of the *chapeau* of Article XX of GATT, i.e. not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, which is also difficult to justify in the case of measures intended to put an end to the use of forced or compulsory labour[101].

Despite the difficulties, a significant number of authors argue that Article XX (b) of the GATT provides the right context for an eventual evolutionary interpretation that would allow the inclusion of labour provisions in WTO law[102].

(d) Article XX (e) of the GATT

Contrary to the previous cases, EU´s Proposal for a Regulation on prohibiting products made with forced labour on the Union market cannot be explicitly justified under the scope of the Article XX (e) of the GATT, as it constitutes a very limited disposition. Article XX (e) excludes from the application of general principles of international trade law, such as the principle of non-discrimination, unilateral trade restrictive measures relating to articles manufactured in prisons. This is the only mention in the GATT to working conditions.

On the one hand, the inclusion within the exceptions of Article XX of a provision related to products that are manufactured in prisons and that can create situations of unfair competition and, more importantly, of violation of the core labour rights such as the prohibition of forced labour, given that the control of activities in prisons is more complicated than the control of factories and production halls, confirms the desire of the drafters of GATT 1947 to include exceptions to the basic multilateral trade principles not only for environmental reasons, but also for labour reasons, which opens the door to a possible modification of GATT in the sense of extending the material scope of Article XX (e) to include products, not only manufactured in prisons, but also manufactured using forced labour, which would automatically make the EU's Proposal compatible with WTO law. Indeed, many authors agree that the reform of this Article XX (e) of the GATT would be "the ideal method" to introduce labour provisions into WTO law[103]. Nonetheless, as we will see in subsequent sections, the WTO is currently in a deep crisis and the reform of its multilateral agreements is not at the top of the negotiating agenda, and even less so if this reform aims to include labour provisions in WTO law.

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99 Thomas, *supra* n. 73, at 361-362.

100 Hinojosa, *supra* n. 64, at 101.

101 Howse, *supra* n. 64, at 145.

102 J. M. Diller and D. A. Levy, `Child Labor, Trade and Investment: Toward the Harmonization of International Law´, 91 *American Journal of International Law* (1997) 663-696, at 682; Chartres and Mercurio, *supra* n. 66, at 696.

103 Hinojosa, *supra* n. 64, at 104.

Given that the reform of the Article XX (e) does not seem likely in the short term, one can only appeal to a possible extensive interpretation of it[104]. However, this interpretation does not seem likely either, given the conciseness of its terms, referring only to products manufactured in prisons. This conciseness has reduced the relevance of considering Article XX (e) as one of the possible GATT articles that, with a possible evolutionary interpretation, would allow for the inclusion of labour provisions in the multilateral system of international trade, such as the abolition of forced labour. However, there are authors who argue that, despite the limitation of the terms used in Article XX (e), if a contextual interpretation is made, we can conclude that labour provisions do have a place in this article. A predecessor of GATT, the 1927 International Convention for the Abolition of Restrictions on Imports and Exports, contained a provision similar to Article XX (e) of the GATT, which was the subject of an interpretative declaration by the US at the time of ratification, according to which products manufactured using slave labour were included[105].

Be that as it may, to date there have been no trade disputes under Article XX (e) of the GATT within the WTO's DSU.

(3) The possible adoption of a waiver

As is well known and criticized , decisions in the WTO are taken by consensus, in accordance with Article IX.1 of the 1994 Marrakesh Agreement. However, in its third paragraph, Article IX provides that in exceptional situations, "the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph"[106]. It can be inferred from this paragraph that a waiver could be adopted by a three-fourths majority of the Members of the Ministerial Conference, according to which a Member State would not have to comply with the provisions of the GATT, e.g. Article XI on quantitative restrictions, and could therefore adopt measures restricting international trade[107] (Murase, 1995: 346). However, in order to comply with the requirements of Article IX.3 of the Marrakesh Agreement, in addition to the agreement of three quarters of the Ministerial Conference, a very demanding majority in the WTO, it is necessary to justify the exceptionality of the circumstances, which is difficult in relation to the abolition of forced labour and has rarely occurred within the WTO[108].

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104 X. Ferández Pons, ` Los derechos económicos, sociales y culturales y los Acuerdos de la Organización Mundial del Comercio´, in J. Bonet Pérez and R. A. Alija Fernández (eds), *La exigibilidad de los derechos económicos, sociales y culturales en la sociedad internacional del siglo XXI: una aproximación jurídica desde el Derecho internacional* (Marcial Pons, Madrid, 2016) 263, at 292-293.

105 Diller and Levy, *supra* n. 102, at 683-684.

106 WTO, `Marrakesh Agreement Establishing the World Trade Organization´ (LT/UR/A/2, 15 April 1994).

107 S. Murase, `Extraterritorial Application of Domestic Environmental Law´, in S. Murase, *Perspectives from International Economic Law on Transnational Environmental Issues* (Martinus Nijhoff, Leiden, 1995) 287-372, at 346.

108 E. U. Petersmann, `The "Human Rights Approach" Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it Relevant for WTO Law and Policy?´, 7 *Journal of International Economic Law* (2004) 605-627, at 626 [doi: 10.1093/acprof:oso/9780199282623.003.0018].

Nevertheless, there is now a precedent that may suggest that these waivers can be justified on human rights grounds. The Kimberley Process Certification Scheme (KPCS) of 2002 is an international agreement[109] which, while not an international treaty *per se*, contains provisions that Participating states have implemented in their national legislation. The KPCS aims to eliminate from the legal diamond trade those diamonds that have been mined by non-state and terrorist groups in violation of human rights to finance armed conflicts (mainly in the African continent) and, to this end, provides that Participating states must ensure that no shipment of rough diamonds is exported to or imported from a non-Participating state[110]. In other words, KPCS Participating states can adopt measures restricting international trade in diamonds vis-à-vis non-Participants in the Process, which is clearly incompatible with Article XI of the GATT, regarding quantitative restrictions. To remedy this inconsistency, the WTO adopted a waiver under Article IX.3 of the 1994 Marrakesh Agreement and temporarily suspended the application of the principles contained in the GATT in relation to measures necessary to prohibit the import and export of rough diamonds from non-Participating states in the KPCS in May 2003[111], as last extended in 2018[112]. In Professor Joost Pauwelyn's view, the best solution in this regard would have been a subsequent agreement or interpretative decision stating that all measures prohibiting or restricting the import or export of conflict diamonds necessary for the proper implementation of the KPCS are presumed to fall under the exception provided for in Article XXI of the GATT[113].

All in all, this particular case opens the door to the consideration of waivers to the basic GATT principles relating to the prohibition of trade restrictions between WTO members states on human rights issues, such as the abolition of forced and compulsory labour, which would make the EU´s Proposal compatible with WTO law. However, once again, due to the crisis that the WTO is undergoing, these kind of solutions with a certain political feature that require a voting are not very likely to happen.

(4) The WTO impasse: A chronicle of a death foretold?

The current impasse in the WTO is the result of a combination of a series of factors that need to be analyzed, such as the proliferation of bilateral and regional free trade agreements, the role played by some countries such as China and the US within the Organization, the crisis of the DSU and the AB, and the special and differential treatment of developing countries. All these factors mean that the WTO is gradually

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109 KPCS, `Kimberley Process Certification Scheme, Core Document´, 5 Novembre 2002.

110 E. J. Martínez Pérez, `El Comercio de Diamantes Conflictivos ante el Derecho internacional´, in A. Embid Irujo (coord), *Comercio internacional y derechos humanos* (Thomson Reuters Aranzadi, Pamplona, 2007) 247-264; Martínez San Millán, C., `The Different Initiatives on Due Diligence for Responsible Mineral Supply Chains from Conflict-Affected and High-Risk Areas: Are there More Effective Alternatives?´, 9 *Paix et Sécurité Internationales* (2021) 1-39 [doi: 10.25267/Paix_secur_int.2021.i9.1201].

111 WTO, `Waiver concerning Kimberley Process Certification Scheme´ (WT/L/518, 27 May 2003).

112 WTO, `Extension of waiver concerning Kimberley Process Certification Scheme´ (WT/L/1039, 30 July 2018).

113 J. Pauwelyn, `WTO Compassion or Superiority Complex: What to Make of the WTO Waiver for Conflict Diamonds´, 24 *Michigan Journal of International Law* (2003) 1177-1207, at 1204.

losing its capacity and legitimacy to regulate multilateral international trade relations[114]. Moreover, in our case study, a WTO whose DSU bodies are on stand-by means that it will be difficult for the bodies that are genuinely responsible for doing so to declare the compatibility or incompatibility of the EU's Proposal for a Regulation on prohibiting products made with forced labour on the Union market with WTO law.

Firstly, as mentioned above, over the last three decades or so we have witnessed an exponential growth in the number of international free trade agreements concluded bilaterally and regionally by states and trading blocs. These international treaties represent an exception to the principle of non-discrimination, as they seek to reduce trade barriers only between a small group of states, which is, however, permitted by Article XXIV of the GATT on Customs Unions and Free Trade Areas. The problem is that what was conceived as an exception has become the rule. We have gone, as Professor Ana Manero Salvador rightly says, from a more or less predictable multilateral trade framework to an atomization of trade relations through free trade agreements, many of them bilateral[115], thus giving rise to a fragmentation of world trade. Within the doctrine, there are mixed views on this increase in free trade agreements. On the one hand, some authors argue that these types of agreements are like "termites" that undermine legitimacy and pose a threat to the continuity of the multilateral system of international trade and its basic principles[116]. On the other hand, other authors argue that, although it is true that the nature of these agreements is discriminatory, free trade agreements are a very important instrument for states wishing to advance in the process of international trade liberalization[117].

Secondly, the role played by some world powers within the WTO, principally China and the US, has also contributed to exacerbating the crisis that the Organization is going through. On the one hand, China, which acceded to WTO membership in December 2001, was considered a non-market economy state, a status that was due to expire after 15 years. Today, China claims to be a market economy, but most WTO member states disagree, given evidence of increased state intervention in the Chinese economy and financial institutions, the number of state-owned enterprises, subsidies and aid granted by the government, and government intervention in various sectors[118]. The government's interventionism in China's economy is reflected in the number of disputes brought before the WTO DSU bodies against China, most of them concerning intellectual and industrial property[119]. The rapid transformation of China's economy and its astonishing export capacity have made it one of the world's factories alongside other

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114 C. Martínez San Millán, `La crisis de la COVID-19 y la Organización Mundial del Comercio: ¿Una oportunidad?´, 3125 Boletín Económico de ICE (2020), 43-53, at 43 [doi: 10.32796/bice.2020.3125.7057].

115 A. Manero Salvador, *Los Tratados de Libre Comercio de Estados Unidos y de la Unión Europea* (Bosch Editor, Barcelona, 2018) at 29.

116 J. Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford University Press, Oxford, 2008).

117 G. P. Sampson, `Challenges Facing the World Trade Organization: An Overview´, 51 *Australian Economic Review* (2018) 453-473, at 457 [doi: 10.111/1467-8462.12301].

118 W. Jannace and P. Tiffany, `A New World Order: The Rule of Law, or the Law of Rulers´, 42 Fordham International Law Journal (2019) 1379-1418, at 1390.

119 As of August 2023, 49 disputes have been brought against China before the WTO. WTO, `Disputes involving or involving China´, accessed 16 August 2023.

countries such as India. However, its behaviour in world trade represents, in the words of Professor Andrés González Martín, a "serious pathology" that will end up damaging the globalization process. In this context, "the only alternative is to economically and commercially discipline the Asian giant"[120]. On the other hand, the US and, more than the US, its former president Donald Trump, have seriously wounded the WTO and the multilateral international trading system after his term in office. An important event, especially for the functioning of the WTO, was the blocking of its DSU by the refusal to renew the judges that make up the AB. When Democrat Joe Biden was elected as the new US president in November 2020, it was expected that the US approach to international trade relations would be turned on its head. However, while Biden publicly professes sympathy for his traditional allies in Europe and Asia and a preference for the multilateral system of international trade and a rule-based international order, there is far more continuity between the foreign policy of the current president and that of the former president than is usually recognized[121]. "Buy American" and "America First" remain the slogans of reference in his domestic and foreign policy and have materialized, for example, in the limitation of exports of COVID-19 vaccines, despite the fact that supply exceeds demand in the country[122]. As for the WTO, the Biden administration has shown little interest in strengthening it and pulling it out of its current crisis[123].

Thirdly, the issue of special and differential treatment for developing countries is another factor keeping the WTO in a serious institutional crisis. The Preamble of the 1994 Marrakesh Agreement recognizes that there is a need for "positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development"[124]. These efforts have resulted in 148 special and differential treatment provisions for developing countries in the WTO Agreements, all of which are designed to provide legal flexibility in trade for the least developed states[125]. Despite this formal recognition of their unequal situation, however, the reality is that developing countries continue to have innumerable problems in asserting their interests within the WTO. Furthermore, the fact that the category of "developing country" is not homogeneous within the WTO means that it is not possible to efficiently differentiate between countries according to their level of development in order to grant them the aid they are entitled to. In the opinion of Professor Carmen López-Jurado, this fact "points to the need to elaborate a particular commercial legal status for each of them and, from a much broader perspective, to the need to reformulate the international development aid system"[126], as one of the main reasons for the lack of effectiveness of many of the "legally

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120 A. González Martín, `La Globalización está en Cuarentena´, 11 *Documento de Análisis IEEE* (2020), 1-27, at 1.

121 R. Haass, `The Age of America First: Washington's Flawed New Foreign Policy Consensus´, 100 *Foreign Affairs* (2020) 85-98, at 85.

122 *Ibid*., at 90.

123 *Ibid*., at 92.

124 WTO, `Marrakesh Agreement Establishing the World Trade Organization´, *supra* n. 106.

125 Sampson, *supra* n. 117, at 461.

126 C. López-Jurado, `El Tratamiento de los Países en Vías de Desarrollo en la OMC y las Iniciativas Unilaterales de la Comunidad Europea´, 3 *Revista Electrónica de Estudios Internacionales* (2001) 1-38, at 2.

flexible" provisions in favour of developing countries is precisely that these are generic for all of them and forget their specificities[127].

Last but not least, another of the WTO's major problems is the aforementioned blockage of the WTO DSU due to the impossibility of renewing the membership of the AB. According to the WTO's own website, "the Appellate Body is currently unable to consider appeals because of unfilled vacancies. The term of office of the last active AB Member expired on 30 November 2020"[128]. This blockage in the renewal of AB Members and the termination of their functions poses a major systemic risk, as, in the absence of an impartial report and recommendations, the party affected by the dispute may decide to resort to unilaterally determined retaliation without any checks and balances[129]. But why is this body blocked? The fundamental reason is that the renewal of these judges is done by consensus of all WTO Members and, at present, the US opposes such renewal for several reasons. The first reason is its disagreement with "Rule 15" adopted by the AB itself and included in the Working Procedures for Appellate Review[130], since the US considers that, in any case, it should be the Dispute Settlement Body that approves extensions of the terms of office of AB judges[131]. Moreover, according to the US, Rule 15 is not part of the Agreement on the Dispute Settlement Understanding and therefore does not constitute a rule approved by WTO member states. The second reason for US opposition to the DSU is the slowness of the process and the delay in resolving disputes. The third and final reason is that the US considers that the Appellate Body includes interpretations in its reports that are not necessary for the settlement of the dispute and that even affect the domestic law of the states. According to the US, these interpretations are forming a body of law that has not been negotiated or agreed upon by WTO member states[132]. Nonetheless it is worth mentioning that some states have reached a multi-party interim appellate arbitration agreement to solve disputes in which all WTO member states that wish to participate are invited to do so[133].

All of the factors discussed above have meant that the WTO, in barely 29 years of existence, has been plunged into a serious crisis, not only institutionally but also in terms of legitimacy. Regardless of what may happen in the coming years on the international scene, if one thing is clear it is that the WTO urgently needs a reform of its institutional and regulatory structure to ensure that the multilateral system of international trade survives beyond 2030. Some authors point to the reform of the decision-making system and of the DSU rules as the only possible solutions to overcome the crisis[134]. However,

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127 Sampson, *supra* n. 117, at 461.

128 WTO, `Appellate Body´, accessed 16 August 2023.

129 C. Martínez San Millán, `Trabajo decente y crecimiento económico: la necesaria reforma institucional de la Organización Mundial del Comercio para su adaptación a la Agenda 2030´, 57 *Con-Texto* (2022) 17-62, at 26 [doi: 10.18601/01236458.n57.03].

130 WTO, `Working Procedures for Appeal Review´ (WT/AB/WP/6, 16 August 2010).

131 R. Arredondo and L. M. A. Godio, `La Crisis del Órgano de Apelación de la Organización Mundial de Comercio´, 7 *Revista Da Secretaria Do Tribunal Permanente de Revisão* (2019) 163-179, at 172 [doi: 10.16890/rstpr.a7.n13.p163].

132 A. Sanz Serrano, `Estados Unidos y el Sistema Multilateral de Comercio´, 3110 *Boletín Económico de ICE* (2019) 75-84, at 77 [doi: DOI: 10.32796/bice.2019.3110.6789].

133 EU, `International trade dispute settlement WTO: Appellate Body crisis and the multiparty interim appeal arrangement´(European Parliament Briefing 690.521, April 2021).

134 Martínez San Millán, `Trabajo decente…, *supra* n. 129.

given the complicated landscape of international relations between states in a multipolar scenario, such solutions do not seem possible in the short term.

Be that as it may, the blocking of the AB means that the body ultimately responsible for declaring the EU's Proposal for a Regulation on prohibiting products made with forced labour on the Union market compatibility or incompatibility with WTO law will not be able to do so, and, should the Proposal constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, no State would be able to sue it and see its interests protected, thus international trade being left to the strongest powers.

(E) FINAL REMARKS

In the context of an increasingly fragmented international legal order, the norms and principles underlying international public morality need to be present in all international normative sub-systems. The manufacture of products using forced labour is a despicable practice to which the entire international community is opposed. The EU, a strong advocate of human rights, including the abolition of forced or compulsory labour, is committed to ending this scourge. To this end, it has adopted a series of measures, the most recent of which is the EU's Proposal or a Regulation on prohibiting products made with forced labour on the Union market. Under this measure, the EU´s Commission aims to prohibit economic operators from placing and making available on the Union market or exporting from the Union market products made with forced labour. This prohibition includes domestically produced and imported products.

It is not the first time that the EU has used its advantageous position in international trade, its market access power and its market size to integrate standards related to human rights, core labour rights and environmental protection into this regime in order to increase their compliance. This is what the doctrine has called "govern through trade". We have seen it before in EU´s free trade agreements, and now we see it in this Proposal and in many other unilateral measures that the EU has been adopting in recent years.

Having said that, just as free trade agreements are negotiated between two or more States, unilateral measures sometimes contain extraterritorial effects that third States have not expressly consented to, which may ultimately clash with other domestic or international rules. In our study, as we have had the opportunity to see, the EU's Proposal clashes head-on with the principle of non-discrimination contained in the GATT 1947, which means that, *a priori*, this measure is incompatible with the multilateral rules of international trade. However, a possible extensive interpretation of Article XX of the same text opens the door to a possible formal declaration of compatibility of the Proposal with WTO law, as one can justify that the EU´s measure tends to protect the public moral.

Those in charge of declaring the compatibility or incompatibility of a unilateral measure with extraterritorial effects with WTO law are the bodies of the DSU, a system currently in crisis given the AB bloc. The blockage of this body, of the DSU and of the WTO itself is evidence of a systemic risk that could lead to the collapse of the multilateral system of international trade as we know it, and to international trade relations being

governed by the rules imposed by the strongest powers. Although in this case the EU's intentions with its proposal are impeccable, any measure adopted by a state or trading bloc has to respect minimum rules agreed at the multilateral level in order to provide the whole system with predictability and legal certainty.

Although it does not seem possible in the short term, the only solution is the institutional reform of the WTO and the updating of all its agreements to the current commercial reality. Furthermore, an eventual amendment of the GATT would be the appropriate occasion to normatively integrate fundamental norms of other subsystems of international law related to the protection of human rights in order to improve their enforcement, to increase the legitimacy of the multilateral system of international trade and, ultimately, to provide formal and material unity to the entire international legal order.