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Linking Trade Law With the
Human Rights of Workers -
the Proposal to Incorporate a Social Clause
into the World Trade Organization

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Summary

The International Labour Organization (ILO) was created in 1919 and this organization is the main global actor as regards the creation and supervision of labour standards. The combination of the regular work of the ILO in assisting member countries to comply with labour standards and its multifaceted supervising system has made ILO a successful organization in developing and implementing the human rights of workers. However, the main channels of enforcement of the organization are 'name-and-shame', procedures common to most human rights instruments. These enforcement mechanisms are not punitive and the ILO has therefore been described as 'toothless'.

The World Trade Organization (WTO) was established in 1995. Since its creation there has been an ongoing debate of whether the rules regulating trade in this organization should be complemented with rules safeguarding the human rights of workers, a so-called 'social clause'. The power of the WTO has led many commentators to conclude that there is a discrepancy between the enforcement of economic and social rules at the international level. The ILO enforcement mechanism has by comparison been described as weak, as the possibilities of sanctioning violations of standards are not at all as developed and automatic as the rules of the WTO.

There are a number of unilateral mechanisms for linking trade and labour standards. This clearly demonstrates that there is nothing unprecedented about linking trade and labour rights. However, the negative aspects of the current mechanisms are numerous; they are often not legally enforceable and when they are, the mechanisms are often politicized and inadequate. This has led to misuse of these systems for protectionist reasons.

The International Confederation of Free Trade Unions has proposed a social clause based on co-operation between the ILO and the WTO. This social clause is to enforce the standards adopted in the ILO Declaration on Fundamental Rights and Principles at Work.

The discussion surrounding the social clause has mainly been described as a debate between the developed countries, supporting the clause, and the developing nations, opposing it. However, this picture needs to be complemented by the fact that several trade unions in the developing countries are positive to the social clause. Furthermore, the labour rights in the social clause might well work for the benefit of the developing nations. If the human rights of workers are not equally enforced worldwide all countries will have to struggle to compete with the most exploited labour force in the market.

Abbreviations

AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
CoC	Code of Conduct
DP	Dispute Panel
DSB	Dispute Settlement Body
EPZ	Export Processing Zone
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs
GSP	Generalised Systems of Preferences
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICJ	International Court of Justice
ILO	International Labour Organization
ILRF	International Labor Rights Fund
ITO	International Trade Organization
MFN	Most Favoured Nation
NAALC	North American Agreement on Labour Cooperation
NAFTA	North American Free Trade Agreement
NGO	Non Governmental Organization
OECD	Organisation for Economic Development and Co-operation
TNC	Transnational Corporation
TRIPS	Trade-Related Intellectual Property Agreement
UN	United Nations
UNDHR	United Nations' Universal Declaration of Human Rights
US	United States of America
USTR	United States Trade Representative
WTO	World Trade Organization

1 Introduction

1.1 General Background

The subject of international trade and labour rights has been in focus of the international human rights debate since the end of the Cold War in the beginning of the nineties. The globalization of the later years has brought about an expansion of the international ties between countries as regards trade and international co-operation and competition. The creation of the World Trade Organization (WTO) in 1995 marked an important step in the development of the international rule of law. The old General Agreement on Trade and Tariffs (GATT) system, which was a patch-work compromise with no real power to uphold the principles of international trade, was replaced by the WTO. With its powerful institutions and automatic rules-based adjudication system it was clear that international trade was to be performed according to a certain set of principles, similar for all members. This development was not matched by a similar development regarding international labour standards. Despite the knowledge of the interaction between international trade and labour rights the latter was left outside the new organization, to the detriment of the international labour movement and human rights groups.

The consequences of the increased globalization has been high lightened by the unprecedented growth of Export Processing Zones (EPZs), where labour standards are simply ignored. In numerous publications¹ and media revelations the appalling labour conditions of workers in the developing countries has been directly linked to the Transnational Corporations (TNCs) that sell their products in the developed countries. The consumers in the West have through these channels become aware of their influence on the conditions of labour in developing countries. This has spawned the violent confrontations that have accompanied all the high level meetings of the international trade institutions, especially memorable being the WTO Ministerial Meeting in Seattle in 1999. The pressure is mounting to provide fair labour standards for all the workers in the world as the TNCs voluntary and non-binding Codes of Conduct (CoC) often have been proved ineffective means of dealing with this issue.

The international trade union movement has since its creation been aware of the pressure international trade puts on the labour standards on all countries. Without a common framework of basic labour rights the pressure to compete with the most exploited labour force in the global market will lead to a 'race to the bottom' and increased human rights abuses. This thesis focuses on the international labour unions proposal to make use of the

¹ See e.g. Naomi Klein, *No Logo: Märkena, Marknaden, Motståndet*, 2001, Ordfront förlag, Stockholm.

international trading regimes' main actor, the WTO, to enforce the human rights of workers.

1.2 Subject and Aim

The subject of this study is to examine the proposal for incorporating a 'social clause' into the WTO.

My aim with this thesis is to describe the contents of this proposal and to evaluate if the social clause is justified.

A social clause is in this thesis defined as a clause containing an obligation to uphold the basic human rights of workers. This clause is to be inserted into the present rules-based trading regime and to be enforced by the most powerful actor in this field, the WTO. The proposal examined in this thesis is based on a co-operation between the WTO and the ILO. To be able to assess the rationale for the social clause the historic background, principles, working methods and effectiveness of these two organizations will be examined. The current attempts to link trade and labour standards are also of great interest for the social clause debate and therefore the linkages of greatest importance will also be analysed.

The debate surrounding the social clause has been intense among countries as well as among governments, economic and human rights scholars, NGOs and trade unions. The positions taken in this debate will be outlined and analysed as to make an attempt at assessing the justification for the proposed social clause.

1.3 Disposition

In the second chapter I will give an overview of the ILO and the content and protection of the present system for the protection of the human rights of workers. In the third chapter I will present the WTO and the system for regulation of international trade. The most coherent and influential current efforts of linking trade and labour law will be briefly outlined and assessed in the fourth chapter. In chapter five I will examine the contents of the trade union proposal for a social clause. I will also in this chapter analyse the debate surrounding this proposal. Finally, in the sixth chapter, I will state the overall conclusions of this thesis.

1.4 Delimitations

I have limited my research of the current system for the protection of the human rights of workers to the ILO system, as this is the most comprehensive and global system of protection. The protection found in the supervising systems of other human rights conventions or in regional

systems will thus not be dealt with. I find this delimitation reasonable as this thesis is focused on the global protection of the human rights of workers and the ILO is the most influential actor in this field.

As for the current linkages between trade and labour law I have focused on a few systems, which I consider to be the most relevant for the social clause discussion. The voluntary forms of commitments to uphold labour standards will only be briefly mentioned as they are not directly linked to the social clause discussion.

1.5 Method and Materials

I will approach the social clause discussion by first evaluating the effectiveness of the current labour law protection. I then turn to the international trading regime to focus on the enforcement regime of this system. The common historic ties between the labour rights movement and the international trading regime will be examined in connection to this. The current forms of linkages between trade and labour law will then be discussed to assess what lessons can be learned from them.

The conclusions that I have drawn from the examination *de lege lata*, of the ILO, the WTO and the current forms of linkages will then be used in the discussion of the final chapters aimed at the possible future legal development, *de lege ferenda*. I will in my examination of the social clause debate evaluate the different arguments to form a personal opinion of the justification for a social clause in the WTO.

When examining the ILO, the WTO and the current forms of trade labour law linkages I will try to use the primary sources, that is to say the constitutions and the legal texts of these organizations, to the greatest possible extent. When I will examine specific cases, such as the actions taken by ILO against Myanmar, I will also refer to the primary sources of authority, meaning the actual resolutions and reports produced by the various ILO organs. Much of this material is primarily available through internet sources, the most reliable being the websites of the international organizations. I will use the literature in the field to examine the arguments raised in the social clause debate. To clarify the positions of the participants in this debate I will use statements and reports by the WTO, the international trade union movement and other actors. As for the evidence supporting the claims in the social clause debate, I will make use of previous research by scholars in disciplines of relevance to the debate as well as research provided by international organisations. I recognise that the claims in this debate are at times difficult to prove or disprove and I am aware of the difficulties involved in making use of academic research, as this is often influenced by the specific views of the particular author. To overcome this problem I will try to use many different sources to get a broader view of the issues. Ultimately, many of the arguments in the debate

stand or fall by their own inherent reasonableness, and the reader will have to be final judge of my assessment of these arguments.

2 The International Labour Organization

2.1 Introduction

The International Labour Organization has worked to promote international labour standards throughout the world for more than 80 years. In this chapter I will examine the creation of the organization and the principles that guides its work. I will also describe the main elements of the ILO's decision-making process and supervising system. Apart from assessing the effectiveness of the present system of protection for the human rights of workers this chapter will illustrate that the trade-labour law linkage constantly has formed part of the labour rights movement.

2.2 History and Principles

The ILO was founded in 1919 and today it has 178 member states.² The organization was constructed as an autonomous part of the League of Nations system and its Constitution formed Part XIII of the Treaty of Versailles.³ The rationale for the creation of the ILO was connected to the increase of international trade that had taken place during the late nineteenth century during what has been called the first wave of globalization. An organization for the protection of labour rights and social justice was needed to ensure that abusive labour standards did not translate into unfair trading advantages.⁴ The preamble of the ILO Constitution clearly articulated that the improvements of labour rights in a country was dependant on the labour practises in other countries:

the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.⁵

The founders of the organization, which were mainly the labour movements in the US and Western Europe, saw the ILO as an instrument to raise labour standards throughout the world by building up a code of

² See the ILO homepage, available on

www.ilo.org/public/english/standards/reilm/country.htm, last visited 14 March 2005.

³ See Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions*, 5th ed., 2001, Sweet & Maxwell, London, p. 98.

⁴ Philip Alston and James Heenan, 'Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration of Fundamental Principles and Rights at Work?', 36, *International Law and Politics*, (2004), p. 225.

⁵ ILO Constitution, Preamble para. 3.

international legislation.⁶ This function was performed with success during the period between the two World Wars.⁷ The ILO continued its work during WWII and in 1944 a conference was held in Philadelphia to plan the future work of the organization and its relationship with the planned United Nations Organization.⁸ A declaration of labour rights, called the Declaration of Philadelphia, was incorporated into the ILO's Constitution and reaffirmed the fundamental principles of the organization:

(a) labour is not a commodity;

(b) freedom of expression and of association are essential to sustained progress;

(c) poverty anywhere constitutes a danger to prosperity everywhere;

(d) the war against want requires to be carried on with unrelenting vigor within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare⁹

The Declaration of Philadelphia further contained a number of objectives for the future programmes of the ILO. The objectives concerning labour rights shared much in common with the later United Nations' Human Rights Covenants: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), such as equitable remuneration and protection for the life and health of workers. Furthermore, the Declaration of Philadelphia was focused on the links between social and economic policy and stated that economic progress by national and international action was necessary to achieve the objectives in the Declaration.¹⁰

2.3 Organizational Structure

The ILO's three main organs are the International Labour Conference, the Governing Body and the International Labour Office. The International Labour Conference is the deliberative body of the organization vested with powers to take action on resolutions concerning new conventions and recommendations, the organization's budget and numerous other issues.¹¹ The Governing Body formulates policies and programmes and adopts the

⁶ See James Avery Joyce, *World Labour Rights and Their Protection*, 1980, Croom Helm Ltd, London, p. 28.

⁷ *Ibid.*

⁸ *Ibid.*, p. 29.

⁹ Declaration of Philadelphia para. I.

¹⁰ *Ibid.* para. IV.

¹¹ See e.g. art. 19 of the ILO Constitution.

agenda for the meetings of the International Labour Conference.¹² The ten states of chief industrial importance, currently Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States¹³, have permanent government representatives in the Governing Body.¹⁴ Voting in the Governing Body is performed by simple majority except when the Constitution states otherwise. There are no special voting privileges for the states of chief industrial importance. The International Labour Office is the permanent secretariat of the organization and it is controlled by the Governing Body, which also appoints the head of the office, the Director-General.¹⁵ The functions of the International Labour Office are laid out in article 10 of the Constitution and include assisting the other major bodies in preparation of their work, lending assistance to governments in the field of labour law. This assistance takes many different forms, such as multidisciplinary teams and presence in member states.¹⁶

The principle of *tripartism* is a feature that distinguishes the ILO from other international organizations. As a consequence of this principle representatives of workers' and employers' organizations are allowed to participate in the proceedings of the organization on equal footing with those of governments.¹⁷ Each member state is thus represented at the International Labour Conference by four representatives: two from their government and the other two from their workers' and employers' organizations.¹⁸ Similarly in the Governing Body, half of the 56 delegates represent their governments and the remaining half represent workers' and employers' organizations. Critics of tripartism, normally government delegates, have claimed that it slows down the work of the organization. However, according to both authors and practitioners the participation and commitment of the trade union movement and the workers' organizations gives strength and authority to the organization both in implementation and in understanding the 'grass roots' workers' views on social problems.¹⁹ Another benefit of tripartism is that the governmental statements concerning their national labour rights protection can be challenged by the representatives of the workers of that country.²⁰

The International Labour Conference decides whether an agenda item shall be transformed into a convention or if it is a subject more suitable for a

¹² See art. 14 of the ILO Constitution.

¹³ See the ILO homepage, <www.ilo.org/public/english/standards/relm/gb/>, last visited 4 February 2005.

¹⁴ See art 7(2) of the ILO Constitution.

¹⁵ See art 8 and 9 of the ILO Constitution.

¹⁶ See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, 1996, Westview Press, Colorado, p. 85.

¹⁷ See Ebere Osieke, *Constitutional Law and Practise in the International Labour Organization*, 1985, Martinus Nijhoff Publishers, Dordrecht, p. 52.

¹⁸ See art 3(1) of the ILO Constitution.

¹⁹ See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization* p. 10.

²⁰ Interview with Lee Swepston (Chief, Equality and Employment Branch and Human Rights Coordinator, International Labor Office, Geneva), 22 February 2005.

recommendation.²¹ The conventions are legally binding upon ratification as oppose to the recommendations, which give guidance as to policy, legislation and practice.²² An important feature of the ILO conventions is that reservations upon ratifications are not permitted. This is to ensure the uniform development of labour law. The flexibility to national concerns should instead be considered during the drafting process and be built into the convention.²³

2.4 The Human Rights of Workers

The ILO has to this day adopted more than 180 conventions and 185 recommendations, this forming the basis of international labour legislation, the 'International Labour Code'.²⁴ The labour rights conventions of the ILO preceded the human rights framework of the United Nations by decades. However, at the time of the drafting of the early ILO conventions the concept of human rights was not yet developed as binding legal obligations. The ILO declarations and conventions speak of social justice and humane conditions of labour. The concept of social justice is not contrary to human rights but it is different and wider.²⁵ Where the United Nations' Human Rights Conventions mainly focus on the relation between the individual and the state, the ILO conventions are often directed directly towards the employers and the states main role is as a guarantor.²⁶

2.4.1 Labour Rights in the the United Nations' Human Rights Framework

The 'International Bill of Human Rights', which consists of the 1948 United Nations' Universal Declaration of Human Rights (UNDHR) and the two covenants of 1966, the ICCPR and the ICESCR, forms the basis of international human rights law. Certain labour rights are included in the instruments of the International Bill of Human Rights.

The prohibition of slavery found in article 4 of the UNDHR can be described as setting the outer limit on all labour rights. Rights more directly

²¹ See the International Labour Office, *Handbook of procedures relating to international labour Conventions and Recommendations*, Rev. 2, 1998, para. 1, available via the ILO homepage

www.ilo.org/public/english/standards/norm/sources/handbook/index.htm#fb1, last visited 4 February 2005.

²² See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, p. 20.

²³ *Ibid.* p. 50.

²⁴ See the ILO homepage, www.ilo.org/public/english/standards/norm/whatare/index.htm, last visited 4 February 2005.

²⁵ See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, p. 127.

²⁶ *Ibid.*

linked to the conditions of labour are laid out in article 23 and 24 of the UNDHR. Article 23 establishes the right to work, the freedom of association, the right to just remuneration and equal pay. Rights concerning reasonable limitation of working hours and the right to leisure and holiday are found in article 24. Labour rights were also incorporated in both the ICESCR and the ICCPR. ICESCR article 6 defines the right to work as an opportunity for everyone to gain his living by ‘work which he freely chooses or accepts’.²⁷ Article 7 outlines a number of just and favourable conditions of work such as fair remuneration, a safe working environment, equal opportunity to be promoted and reasonable limitation of working hours.²⁸ The ICESCR also contains regulations on child labour. Work that is ‘harmful’ to children’s development is to be prohibited and each country is to set a minimum age level below which paid employment of children is punishable by law. Trade union rights are protected by article 8, which ensures the right of anyone to form and join a trade union of his choice.²⁹ The ICCPR also protects the right to organize trade unions as it forms part of the freedom of association.³⁰ Article 8(3)(a) of the same Covenant states that ‘No one shall be required to perform forced or compulsory labour’.

Regarding all the human rights in the UNDHR and the two Covenants discrimination of any kind is prohibited as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³¹

The human rights of workers that are incorporated in the International Bill of Human Rights are mainly reiterations of what had previously been elaborated in the conventions of the ILO. However, their incorporation in the human rights covenants demonstrate their status as global human rights.³²

2.4.2 The ILO Declaration on the Fundamental Principles and Rights at Work

In the 1990s the ILO decided to proclaim a set of ILO conventions as fundamental human rights conventions, or ‘core conventions’.³³ In 1998 the General Conference adopted³⁴ the ‘ILO Declaration on the Fundamental Principles and Rights at Work’. The Declaration stated that all member

²⁷ CESCR art. 6.

²⁸ CESCR art. 7.

²⁹ CESCR art. 8.

³⁰ CCPR art. 22.

³¹ See UNDHR art. 7, CESCR art. 2(2) and CCPR art. 2(1).

³² See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, p. 128.

³³ *Ibid.*, p. 129.

³⁴ Adopted by 273 votes in favour and none against and with 43 abstentions, see the *Report of the Committee on the Declaration of Principles*, available via the ILO homepage, <www.ilo.org/public/english/standards/relm/ilc/ilc86/com-decd.htm#Record%20vote>, last visited 15 February 2005.

countries, whether or not they had ratified the relevant conventions, had an obligation arising from their membership in the organization to ‘respect, to promote and to realize, in good faith and in accordance with the Constitution’ the principles concerning the following fundamental rights:

- (a) freedom of association and the effective recognition of the right to collective bargaining;³⁵
- (b) the elimination of all forms of forced or compulsory labour;³⁶
- (c) the effective abolition of child labour;³⁷ and
- (d) the elimination of discrimination in respect of employment and occupation.³⁸

The origins of the Declaration is directly linked to the discussion surrounding the linkage of trade and labour rights. The effects of globalization and its impact on the workers of the world were high lightened in the end of the nineties. There was an increasing interest in including a social pillar in the global economy but much controversy about how to achieve this goal.³⁹ In 1994, a Director-General report and the following discussion in the International Labour Conference led to the establishment of a working party in the Governing Body on the social dimensions of the liberalisation of international trade.⁴⁰

Outside the ILO the 1995 World Summit on Social Development in Copenhagen renewed the political commitment for the labour rights in general and in particular the ILO conventions regarding the rights later enshrined in the Declaration. The Copenhagen Summit inspired an ILO ratification campaign that managed to increase the member states bound by the core conventions by 25%.⁴¹ The Ministerial Conference of the World Trade Organization held in Singapore 1996 again reiterated the world community’s commitment to core labour rights and recalled that the ILO was the competent body to deal with these issues. This outside recognition

³⁵ ILO Conventions No. 87 and 98.

³⁶ ILO Conventions No. 29 and 105.

³⁷ ILO Conventions No. 138 and 182 (The Worst Forms of Child Labour Convention was adopted in 1999).

³⁸ ILO Conventions No. 100 and 111.

³⁹ See Anne Trebilcock, *The ILO Declaration on Fundamental Principles and Rights at work: A New Tool*, in Roger Blanpain and Chris Engels (Ed.), *The ILO and the Social Challenges of the 21st Century*, 2001, Kluwer Law International, Hague, p. 111.

⁴⁰ The forum was later renamed the Working Party on the Social Dimension of Globalization, see *Ibid*.

⁴¹ See Anne Trebilcock, *The ILO Declaration on Fundamental Principles and Rights at work: A New Tool*, in Roger Blanpain and Chris Engels (Ed.), *The ILO and the Social Challenges of the 21st Century*, p. 111. Today 105 countries have ratified all eight core conventions, see the ILO homepage,

webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN, last visited the 14 March 2005.

of the importance of the ILO led to the idea of the Declaration and its subsequent follow-up mechanism.⁴²

The Declaration on the Fundamental Principles and Rights at Work was a clear statement of a renewed commitment to the fundamental human rights of workers. In the preamble economic growth is said to be ‘essential but not sufficient to ensure equity, social progress and the eradication of poverty’ and fundamental rights are necessary to enable workers to claim their share of the economic development.⁴³

The Declaration further emphasises the importance of the core conventions and establishes a ‘Follow-Up’ mechanism. The ‘Follow-Up’ mechanism is a promotional tool designed to complement the supervising procedures of the ILO. The mechanism consists of two procedures based on the constitutional obligation of member states in article 19(5)(e) to report on unratified conventions. The first procedure consists of annual reports by the member states that have not ratified all of the eight core conventions.⁴⁴ The reports are reviewed by a group of seven independent Expert-Advisors, which may draw the attention of the Governing Body to specific issues. The second procedure is the ‘Global Report’ that is meant to serve as an assessment for the effectiveness of the ILO system and to determine the priorities for the following years. This annual report, which is drawn up under the responsibility of the Director-General and then discussed at the International Labour Conference, is focused on one of the four core human rights principles in turn. The Governing Body is then to use the Global Report and the following discussion to draw up the priorities and action plan for technical cooperation.⁴⁵

Opinions of the impact of the Declaration are mixed. Some commentators are positive, besides from creating a focus on the importance of the enabling principles and rights inside as well as outside of the ILO the Declaration has stimulated many non-ratifying states to reconsider the core conventions.⁴⁶ However, critics have stated that the Declaration undermines the traditional labour standards approach as it emphasises on a few selective civil and political rights and promotes them through non-binding measures. This

⁴² See Anne Trebilcock, *The ILO Declaration on Fundamental Principles and Rights at work: A New Tool*, in Roger Blanpain and Chris Engels (Ed.), *The ILO and the Social Challenges of the 21st Century*, p. 111.

⁴³ Declaration on the Fundamental Principles and Rights at Work, Preamble, para. 2 and 5.

⁴⁴ See article II(A)(1) of the *Follow-up to the Declaration on the Fundamental Principles and Rights at Work*, available via the ILO homepage, www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONFOLLOWUP, last visited 1 March 2005.

⁴⁵ See article III(B)(2) of the *Follow-up to the Declaration on the Fundamental Principles and Rights at Work*.

⁴⁶ See Anne Trebilcock, *The ILO Declaration on Fundamental Principles and Rights at work: A New Tool*, in Roger Blanpain and Chris Engels (Ed.), *The ILO and the Social Challenges of the 21st Century*, p. 109.

could have negative effects on the coherent and legally based supervising system of the ILO that entails all labour rights.⁴⁷

2.5 The ILO Supervising System

The supervising system of the International Labour Conventions and Recommendations is multilayered and consists of reporting by member states on both ratified and unratified conventions as well as the possibility of workers' and employers' organizations to make complaints and representations. A special procedure is established on the protection of the freedom of association.

2.5.1 The Reporting System

All member states are obliged to bring a convention or recommendation to the attention of the competent national authority within eighteen months of the adoption by the International Labour Conference.⁴⁸ According to article 30 of the Constitution, other member states are authorised to bring the failure of another member state of this obligation to the attention of the Governing Body. However, this procedure has rarely been used.⁴⁹

The Committee of Experts on the Application of Conventions and Recommendations is an independent body consisting of 20 expert jurists.⁵⁰ The Committee reviews reports by states on ratified and unratified conventions. As regards *ratified conventions* member states are bound by article 22 of the ILO Constitution to report annually on the actions taken to comply with the conventions to which they are bound. However, due to the ever-increasing number of conventions and ratifications this obligation, both regarding timing and content, is now dependant on the specific convention.⁵¹ The Committee of Experts may request state reports whenever they find it necessary.⁵² The reports contain the measures to bring the convention before the competent authorities for the enactment of legislation as well as the action taken by these authorities. As regards *unratified conventions*, member states are bound by article 19 paragraph 5(e) of the Constitution to report on the present legislation regarding the content of the convention and the reasons that delay or prevent ratification. Member states

⁴⁷ Philip Alston and James Heenan, 'Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration of Fundamental Principles and Rights at Work?', pp. 223-224.

⁴⁸ See the ILO Constitution art. 19(5-6).

⁴⁹ See Ebere Osieke, *Constitutional Law and Practise in the International Labour Organization*, p. 172.

⁵⁰ See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, p. 75.

⁵¹ *Ibid.*, p. 68.

⁵² See the International Labour Office, *Handbook of procedures relating to international labour Conventions and Recommendations*, para. 34(b) and (c)(i).

are also bound to report on the measures used to implement the provisions of adopted recommendations.⁵³

When reporting on conventions and recommendations governments shall communicate the reports to organizations of employers and workers.⁵⁴ These organizations may make observations on the reports to the government or directly to the Committee.⁵⁵ These comments are increasingly being used by workers' and employers' organizations.⁵⁶

The conclusions of the Committee of Experts are either in form of an *observation* or in the form of a *direct request*. A *direct request* is directed to the reporting government and it is not published in the report of the Committee. It typically entails a question of a technical character or a request for clarification. In an *observation* the Committee draws the attention to a long-standing failure of a state to comply with its obligations under a certain convention. This is published in the report of the Committee that is delivered to the Conference Committee on the Application of Standards.⁵⁷ The Conference Committee consists of representatives of governments, employers and workers.⁵⁸ In the proceedings of this Committee governments have an opportunity to clarify and explain their difficulties in implementing the provisions of the conventions and workers' and employers' representatives are able to further discuss these issues. The Conference Committee finally submits its report to the International Labour Conference for adoption. The report has never been rejected by the Conference.⁵⁹

In addition to this, the Committee of Experts also publishes a separate survey based on the reports of the member states concerning the unratified conventions. The Committee reviews the current law and practise and furthermore examines and clarifies the difficulties governments claim concerning the standards. Through this procedure the Committee specifies the scopes of the standards and indicates ways of overcoming obstacles to implementation.⁶⁰

⁵³ See the ILO Constitution, article 19, para. 6(d).

⁵⁴ See the ILO Constitution, article 23, para. 2.

⁵⁵ See the International Labour Office, *Handbook of procedures relating to international labour Conventions and Recommendations*, para. 39.

⁵⁶ See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, p. 89.

⁵⁷ See the International Labour Office, *Handbook of procedures relating to international labour Conventions and Recommendations*, para. 58(a).

⁵⁸ *Ibid.*, para. 56.

⁵⁹ But on two occasions a lack of quorum has been used to prevent adoption, see Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, p. 84.

⁶⁰ *Ibid.*, p. 78.

2.5.2 The Protection of the Freedom of Association

The freedom of association has a specific place in the ILO system, as it is the basis for the tripartite structure of the organization. A tripartite organ of the Governing Body, the Governing Body Committee on Freedom of Association, is specifically assigned to deal with complaints regarding the freedom of association.⁶¹ This Committee is composed of nine of the members of the Governing Body and it examines complaints of infringements on the freedom of association and submits its conclusion to the Governing Body.⁶² By their mere adherence to the ILO Constitution all member states are under an obligation to respect the freedom of association and therefore the Committee is able to consider complaints raised against member states that have not ratified any conventions on the matter. Governments as well as workers' and employers' organizations may file complaints.⁶³ The Committee may request the concerned government to allow a representative of the Director-General to visit the country and carry out an inquiry to gain further information of the claims and it may also hold hearings with the parties.⁶⁴ If the government, despite the continuing efforts of the Committee, fails to cooperate on the matter or if anomalies are noted, the Committee will submit a report on the substance of the case and recommend what action to be taken by the Governing Body. The Governing Body may take the following courses of action:

- i) Referral of the matter to the Committee of Experts. This option is only possible if the concerned government has ratified the applicable convention(s).
- ii) Referral of the matter to the Fact-Finding and Conciliation Commission.⁶⁵ This Commission may only examine the alleged violations if the concerned government gives its consent. However, if the country in question has ratified the relevant convention consent is not needed as the Governing Body can designate the Fact-finding and Conciliation Commission as a Commission of Inquiry under article 26 of the ILO Constitution.⁶⁶
- iii) Publish the complaints made against the country in question.⁶⁷

⁶¹ See the International Labour Office, *Handbook of procedures relating to international labour Conventions and Recommendations*, para. 79.

⁶² *Ibid.*

⁶³ See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, p. 102.

⁶⁴ *Ibid.*, p. 104.

⁶⁵ See the International Labour Office, *Handbook of procedures relating to international labour Conventions and Recommendations*, para. 81(f).

⁶⁶ See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, p. 105.

⁶⁷ *Ibid.*

2.5.3 Representations

According to article 24 and 25 of the ILO Constitution representations can be made to the ILO. Workers' and employers' organizations are through this procedure entitled to complain on member states' non-compliance with a ratified convention. If the Government Body decides to communicate the representation to the concerned government and the government does not reply or if the reply is not satisfactory, the Government Body may publish the representation in the 'Official Bulletin' of the ILO.⁶⁸

2.5.4 Complaints

According to article 26 of the ILO Constitution a member state can file a complaint to the Governing Body if it considers another member state being in breach of a convention that they both have ratified. The Governing Body can also receive a complaint from a Conference delegate, either governmental, worker or employer, or commence the procedure 'on its own motion'. Under the article 26 procedure, the Governing Body can establish a Commission of Inquiry to deal with the matter. The Commission of Inquiry does not have a fixed mode of procedure; its work will be guided by the general principles of the Constitution.⁶⁹ Generally, the Commission will consider the complaints and receive communications from parties and hold hearings. The Commission may request to visit the country in question to interview public authorities, trade union members and others.⁷⁰ Under article 27 member states agree to cooperate with the Commission. When the Commission has reached a conclusion, this shall be communicated in a report to the Governing Body and to the concerned parties. The governments shall then within three months inform the Director-General whether they accept the recommendations or not and if they intend to pursue the matter in the International Court of Justice (ICJ).⁷¹ The ICJ procedure has never been used. If the defaulting government does not carry out a recommendation by the Commission of Inquiry, the Governing Body may take action according to article 33. This article states that the Governing Body may 'recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith'. The article 33 procedure leaves a venue open for the Governing Body to recommend a wide range of actions, including economic sanctions, to the International Labour Conference. Normally governments tend to accept the recommendations of the Commission and the case is then followed up through the regular reporting procedures.⁷²

⁶⁸ *Ibid.*, p. 91.

⁶⁹ See the International Labour Office, *Handbook of procedures relating to international labour Conventions and Recommendations*, para. 78.

⁷⁰ See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, p. 97.

⁷¹ See the ILO Constitution, para. 29(2).

⁷² See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, p. 95.

In an unprecedented move the ILO made usage of article 33 in the year 2000 in a resolution on Myanmar on account of the country's violations of the Forced Labour Convention (No. 29). The background to the case was a complaint, under article 26, by 25 workers' delegates to the 83rd Session of the International Labour Conference, in 1996. The complaint recalled that 'Myanmar's gross violations of the Convention [No. 29] have been criticized by the ILO's supervisory bodies for 30 years'.⁷³ The Governing Body of the ILO established a Commission of Inquiry but the Myanmar government refused the Commission entry into the country to investigate the allegations. Myanmar claimed that this would not further the case and it would constitute interference in the internal affairs of the country.⁷⁴ The Commission prepared a report establishing the facts according to article 28. The conclusion was clearly formulated:

There is abundant evidence before the Commission showing the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military for portering, the construction, maintenance and servicing of military camps, other work in support of the military, work on agriculture, logging and other production projects undertaken by the authorities or the military, sometimes for the profit of private individuals, the construction and maintenance of roads, railways and bridges, other infrastructure work and a range of other tasks, none of which comes under any of the exceptions listed in Article 2(2) of the Convention.⁷⁵

The Commission formulated recommendations regarding measures to eliminate the violations. These included changing the present legislation as well as ensuring that no forced labour be imposed by the authorities.⁷⁶ The government should report on the changes made according to article 22 of the Constitution. After having received the Commission's report, the government of Myanmar replied that the authorities would do their utmost to complete the recommendations. However, no further explanation or communication was made. As a consequence of the inaction of the government of Myanmar the Governing Body decided to recommend action under article 33 to the 88th Session of the International Labour Conference in 2000. The Conference adopted a resolution recommending to the governments, employers and workers of the ILO that they:

(i) review, in the light of the conclusions of the Commission of Inquiry, the relations that they may have with the member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry, and to contribute as far as

⁷³ See Part 1(1) of the *Report of the Commission of Inquiry* of 2 July 1998, available via the ILO homepage,

www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm#N_1_>

⁷⁴ See the 88th session of the International Labour Conference, 2000, the provisional record 4, p. 1, available via the ILO homepage,

www.ilo.org/public/english/standards/relm/ilc/ilc88/pdf/pr-4.pdf, last visited 11 February 2005.

⁷⁵ *Ibid.*, p. 2.

⁷⁶ *Ibid.*, p. 3.

possible to the implementation of its recommendations; and (ii) report back in due course and at appropriate intervals to the Governing Body⁷⁷

International organizations were also asked to review their contacts with Myanmar. This was the first and so far only time that the ILO has recommended measures under article 33. After Myanmar agreed to cooperate with the ILO and allow presence of the organization in the country many members suspended their actions under the resolution.⁷⁸ The issue of forced labour in Myanmar is discussed every year at the International Labour Conference and the Governing Body might decide to make full use of article 33 if Myanmar continues to disregard its obligations under the Forced Labour Convention.⁷⁹

2.6 Conclusion

The combination of the regular work of the ILO in assisting member countries to comply with the labour standards and its multifaceted supervising system described above has made ILO a successful organization in developing and implementing the human rights of workers. The supervising organs, especially the Committee of Experts, the Conference Committee and the Committee on Freedom of Association, has made a big impact not only by developing the content of international labour legislation but also by assisting and continuously striving towards compliance of the member states of the organization.⁸⁰ The Myanmar case also demonstrates the willingness of the organization to make use of punitive measures in exceptional cases. The article 33 procedure used in the Myanmar case is highly politically sensitive as it depends on country representatives to instigate the procedure and subsequently the support of the majority of the representatives in the Governing Body and the International Labour Conference. This explains the fact that article 33 only has been used in one resolution during the 85-year existence of the provision. The main channels of enforcement of the organization are thus the moral and diplomatic, or 'name-and-shame', procedures common to many human rights instruments. These enforcement mechanisms are not punitive and the ILO has therefore been described as 'toothless'.⁸¹

If the normal supervising system of the ILO can be described as mainly toothless the human rights protection of the organization is even weaker, as

⁷⁷ See 88th session of the General Conference, 2000, Resolution I, available via the ILO homepage, <www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#I>, last visited 11 February 2005.

⁷⁸ Interview with Lee Swepston the 22 February 2005. See also Philip Alston and James Heenan, 'Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration of Fundamental Principles and Rights at Work?', p. 240.

⁷⁹ Interview with Lee Swepston the 22 February 2005.

⁸⁰ See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labour Organization*, pp. 31, 36 and 106.

⁸¹ See e.g. George Tsogas, *Labour Regulation in a Global Economy*, 2001, M. E. Sharpe, New York, p. 54.

the ILO Declaration on the Fundamental Principles and Rights at Work is a mere promotional tool. The Follow-Up does not include any enforcement mechanism. This leads to a somewhat contradictory statement by the ILO, as the 'core' human rights obligations are promoted by an even softer tool than the other conventions of the organization. This is of course connected to the fact that the Follow-Up is aimed at countries that have not legally undertaken to respect the rights of the conventions protected by the Declaration. However, the signal this method of promotion sends is somewhat illogical, as the human rights obligations in the core conventions are only to be promoted and not enforced. A multilateral social clause inserted in the WTO would reverse this situation and enforce the rights of the Declaration in a more firm manner than the rest of the international labour code.

3 The World Trade Organization

3.1 Introduction

The WTO was established in 1995 and today it has 148 member states.⁸² The WTO can be described as the outcome of longstanding efforts to regulate international trade. In this chapter I will outline the events and reasoning behind the creation of the WTO and its connection to the trade labour law linkage, as well as its principles and working methods. I will also describe the main elements of the Dispute Settlement Mechanism and assess the effectiveness of this system.

3.2 History - the GATT System

At the end of the Second World War the United States and its allies started cooperating on creating a system for the regulation of international trade. The major reason for their actions was the catastrophic economic policies during the interwar period leading up to the Great Depression, which was seen as a major economic cause for the outbreak of the Second World War. The economic policies of the interwar period mainly consisted of gradually upgraded protectionist measures that put great constraints on international trade.⁸³

The US government invited a number of countries in 1945 to participate in negotiations to form a multilateral agreement for the reduction of tariffs. In 1948 a UN meeting was held in Havana to draft the charter of an International Trade Organization (ITO).⁸⁴ The so-called 'Havana Charter' was divided into three parts, where one part concerned the structure of the organization and the other two the multilateral agreements to reduce tariffs and the general rules regulating this agreement. The Havana Charter was also an early attempt to create a link between trade and labour law. Article 7 of the Charter stated:

The members recognise that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognise that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement

⁸² See the WTO homepage, available on www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, last visited 17 February 2005.

⁸³ See John H. Jackson, *The World Trade Organization*, 1998, Wellington House, London, p. 15.

⁸⁴ *Ibid.*, p. 16.

of wages and working conditions as productivity may permit. The members recognise that unfair labour conditions, particularly in product for export, create difficulties in international trade, and accordingly, each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

The text also stated that the ITO should consult and co-operate with the ILO on all matters regarding labour standards. The Havana Charter never came into force, due to the resistance in the US Congress against the creation of an international trade organization⁸⁵, but it demonstrates that international trade regulations have long been regarded to have an intimate connection with labour standards. However, even though no international trade organization was created, the agreements in the charter concerning the reduction of tariffs were applied as the GATT. These rules formed the basis for international trade regulation from 1947 to 1996.⁸⁶

The GATT's work in reducing trade tariffs was conducted through eight so-called trade rounds, beginning with the first in Geneva 1947 and finishing with the one establishing the WTO, which began in Uruguay in 1986. The trade rounds lowered the level of tariffs in international trade but there were several problems with the process, many of which originated in the flawed structure of the GATT system. Firstly, the loopholes in the GATT system were many and therefore the system had great troubles restricting measures imposed for protectionist reasons, so-called Non-Tariff Measures (NTM). Secondly, trade measures on agriculture were not adequately dealt with. Thirdly, the GATT was not able to establish an effective system for disciplining state trading activities. These defects sparked the interest for the creation of an organization that would be able to handle international trade issues in a more coherent way, as well as disciplining countries into abiding by the agreed standards.⁸⁷ After several years of discussion the 'Marrakech Agreement' establishing the WTO was signed on 15 April 1994 and it came into force the following year.⁸⁸

At the meeting establishing the WTO a workers' rights clause was on the agenda and the topic was heavily debated, but there was no concrete outcome of the debate.⁸⁹ In the first Ministerial Conference of the WTO in Singapore, in 1996, the social clause issue was discussed once again. The proponents of the social clause were mainly the US, France and other industrialized countries whilst a substantial amount of developing countries heavily opposed the suggestion and claimed that the linkage was hidden protectionism aimed at reducing the comparative advantages of the developing countries.⁹⁰ The outcome of the debate was the following

⁸⁵ *Ibid.* p. 17.

⁸⁶ *Ibid.* p. 12.

⁸⁷ *Ibid.* p. 24.

⁸⁸ *Ibid.* p. 1.

⁸⁹ ICFTU, *Building workers' human rights into the global trading system*, 1999, p. 51.

⁹⁰ Virginia A. Leary, 'The WTO and the Social Clause: Post-Singapore', 8:1, *E.J.I.L.*, (1997), p. 118.

paragraph in the Final Declaration of the Conference, known as the ‘Singapore Declaration’:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.⁹¹

The ‘existing collaboration’ mentioned in the statement has this far meant no collaboration at all.⁹² The paragraph in the Final Declaration was clearly a victory for the countries opposing a social clause as it removed the question from the agenda by naming the ILO as the organization with the exclusive competence to deal with labour issues. However, even if the social clause discussion has not formally been reintroduced on the WTO agenda the efforts to link labour standards to trade were not stopped by the Singapore Declaration.⁹³

3.3 Principles of the WTO

The WTO differs from the GATT in that it is an independent organization with its own legal personality and that it in regard to membership and substantive content extends much beyond the GATT.⁹⁴ The more coherent rules-based approach in the WTO system is formulated in the ‘single undertaking’ in article II:2 that expresses the legally binding obligation of all member states to abide by the international trade agreements. The WTO’s function is outlined in article II:1:

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

The WTO system thus comprises organizational rules as well as substantive trade rules. The organization aims at legally converging State performance to promote the common purposes of the organization. The common purposes are the conduct of trade and economic endeavours with a view to raising standards of living and ensuring full employment whilst using the

⁹¹ The Ministerial Declaration of Singapore, 1996, para. 4, available via the WTO homepage, <www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>.

⁹² The collaboration consists of a lunch between the legal directors of the WTO and the ILO every two weeks, *see* interview with Lee Swepton.

⁹³ *See* Virginia A. Leary, ‘The WTO and the Social Clause: Post-Singapore’, p. 119.

⁹⁴ *See* Celso Lafer, *The Role of the WTO in International Trade Regulation*, in Philip Ruttley, Iain Macvay and Carol George (Ed.), *The WTO and International Trade Regulation*, 1998, Cameron May, London, p. 35.

world's recourses in accordance with the objective of sustainable development.⁹⁵ Furthermore, the least developed countries shall secure a share in the growth of international trade. The means for achieving these objectives are substantively pointed out as:

reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.⁹⁶

The reduction of tariffs coupled with a more integrated and viable trading system is the model for the improvement of multilateral trade. Apart from upholding the current rules-based international trading system, the WTO is meant to function as a negotiating forum for the creation of new rules.⁹⁷

3.4 Organizational Structure

The Ministerial Conference is the organ that carries out the functions of the WTO and it has the authority to take decisions on all matters relating to the multilateral trade agreements.⁹⁸ The Conference, which shall meet at least every two years, also appoints the Director-General who is the head of the Secretariat.⁹⁹ The General Council, composed of all the members of the WTO, performs the functions of the Ministerial Conference between the meetings.

Consensus is the guiding principle in the decision-making process as established in article IX:1 of the Marrakech Agreement. If voting should be necessary each member has one vote. The size of the WTO means that consensus building normally takes the form of negotiations between different groups of member countries. However, the groups are not rigid but can change depending on the topic of discussion.¹⁰⁰

3.5 International Trade Law

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

⁹⁵ The Marrakech Agreement, Preamble para. 1.

⁹⁶ The Marrakech Agreement, Preamble para. 3.

⁹⁷ The Marrakech Agreement article III:2.

⁹⁸ The Marrakech Agreement article IV:1.

⁹⁹ The Marrakech Agreement article VI:1-2.

¹⁰⁰ See Celso Lafer, *The Role of the WTO in International Trade Regulation*, in Philip Ruttley, Iain Macvay and Carol George (Ed.), *The WTO and International Trade Regulation*, p. 42.

discourage trade. The GATT also contains the Most Favoured Nation (MFN) principle, which states that governments export and import regulations should not discriminate between other countries' products.¹⁰¹ In short, the GATS and TRIPS agreements are aimed at establishing similar rules for their respective areas of trade.

3.6 The Dispute Settlement Mechanism

The Dispute Settlement Mechanism lies at the heart of the WTO and have been lauded both for its effectiveness at securing predictable outcomes and for its ability to solve disputes at the consultation stage.¹⁰²

When a dispute arises between two members of the WTO the aggrieved member should request consultation with the offending member. This request should be sent to the Dispute Settlement Body (DSB), which is the main dispute resolution organ of the WTO and consists of one representative of each member of the organization.¹⁰³ If the offending state does not reply to the request or if consultation fails, the DSB will establish a Dispute Panel (DP). There needs to be consensus in the DSB to hinder the establishment of a DP.¹⁰⁴ The panel shall consist of three to five independent panellists with a sufficient background and experience in the field. Depending on the urgency of the case the panel will produce a final report within 6 to 9 months. During this time it shall meet with the parties and it may also seek assistance from any source. The DP will distribute a number of interim reports for the parties to comment. The final report will be submitted to the DSB for adoption. If no appeal is lodged against the report, and there is no consensus against it, the report will be adopted by the DSB. Appeals can be made to the Appellate Body, which is composed of seven independent experts in the field of law and international trade.¹⁰⁵ The Appellate Body is restricted to the issues of law in the report and legal interpretations by the DP. The decision of the Appellate Body is final and will be adopted by the DSB, unless there is a consensus against it. A reasonable time of implementation, normally not exceeding 15 months, will be accorded to the offending party. If the offending party fails to comply within the accorded time it will have to enter into negotiations with the injured party on compensation. If the negotiations do not succeed, the complainant may request authorization from the DSB to suspend concessions or obligations due to the offending party. These measures will foremost be applicable to the relevant agreement but they can also apply to other agreements, if the violation is serious. This is the major punitive measure of the WTO system and its effectiveness depends on the economic power of the offended state. The DSB will grant the concessions within 30

¹⁰¹ GATT article I.

¹⁰² See John H. Jackson, *The World Trade Organization*, p. 59.

¹⁰³ See Konstantinos Adamantopoulos, *An Anatomy of the World Trade Organization*, 1997, Kluwer Law International Lmt., London, p. 61.

¹⁰⁴ *Ibid.*, p. 59.

¹⁰⁵ *Ibid.*, p. 64.

days of the expiration of the reasonable time unless there is consensus against it. If the offending party objects to the level of suspension it can appeal to an arbitration board consisting of the members of the DP or, if that is impossible, to an arbitrator appointed by the Director-General.¹⁰⁶

3.7 Recent Developments

So far, there have been five Ministerial Conferences and a sixth is scheduled in Hong Kong for the year 2005. Heavy critic against the WTO and the international trading system has been widely manifested on several occasions in connection with the meetings, especially memorable are the violent protests of the Seattle meeting in 1999. The critic of the organization is based on several factors: the lack of transparency, the lack of opportunity for broad participation of citizens and Non Governmental Organizations (NGO's) as well as lack of democratic legitimacy for the decisions.¹⁰⁷ Much of the critic also stems from the perceived lack of interest in the social and environmental dimensions of world trade. At the last meeting in Cancún the Conference failed to reach a consensus in the negotiations.¹⁰⁸ There were several reasons for this failure, but they evolved around that a number of developing countries felt that the developed countries were unwilling to open up their agricultural markets, in particular through the reduction of subsidies.¹⁰⁹

There seems to be an increased interest in the Dispute Settlement Mechanism by countries outside the 'Quad' countries (The US, the EC, Japan and Canada) that were the main users of the old GATT settlement system. Of the 325 disputes brought to the WTO as of March 2005, 138 were brought exclusively by countries outside the 'Quad' group.¹¹⁰ Many of the complaints have been brought by smaller and developing countries and this demonstrates that these countries are taking their rights and obligations seriously.¹¹¹

¹⁰⁶ *Ibid.*, p. 68.

¹⁰⁷ See John H. Jackson, *The World Trade Organization*, p. 58.

¹⁰⁸ See the Ministerial Declaration of Cancún, 2003, available via the WTO homepage, <www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm#top>, last visited the 18 February 2005.

¹⁰⁹ See Kipkorir Aly Azad Rana, *The multilateral trading system: Why East Africa must remain engaged*, Second East African Business Summit, Key Note Address, 2003. Available via the WTO homepage, <www.wto.org/english/news_e/news03_e/speech_rana_19sep03_e.htm>, last visited the 18 February 2005.

¹¹⁰ See overview of the disputes at the WTO homepage, available on <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2004>, last visited the 2 March 2005.

¹¹¹ See Debra P. Steger, *WTO Dispute Settlement*, in Philip Ruttley, Iain Macvay and Carol George (Ed.), *The WTO and International Trade Regulation*, p. 58.

3.8 Conclusion

The WTO system is a major development in international trade law. The organization was created to come to terms with the weaknesses in the old GATT system. The WTO has a constitution which clearly gives the organization a legal character of its own. The Dispute Settlement Mechanism further emphasises the rules-based ideology of international trade. The member states have agreed to a system that solves disputes in a way more resembling a legal arbitration than a traditional diplomatic negotiation. The strict time frames and automaticity in key stages of the process promotes confidence and predictability in the system. This has important effects at the negotiating stages of a dispute where an increase in mutually agreed settlements has been noticed.¹¹²

The power of the WTO Dispute Settlement Mechanism has led many commentators to conclude that there is a discrepancy between the enforcement of economic and social rules at the international level. The ILO enforcement mechanism has by comparison been described as weak, as the possibilities of sanctioning violations of standards are not at all as developed and automatic as the rules of the WTO. As the Commission of the European Union expressed it in 2001:

Existing international economic and social rules and structures are unbalanced at the global level. Global market governance has developed more quickly than global *social* governance. The ILO enforcement mechanism, being limited to ratified conventions, has limited effectiveness. By comparison, the World Trade Organization (WTO), with its rules-based system and binding dispute settlement mechanism, is a strong and relatively effective organization. This relative strength of the WTO has led to calls that it take upon itself to act in areas outside the trade field, thus using its instruments to reinforce governance in other policy areas, such as labour standards and the environment. However, the ILO is, and must remain, the organisation competent to set and deal with labour standards, and a rebalancing of the global system should seek to strengthen the social pillar by taking its starting point in the ILO mechanisms, not in the WTO.¹¹³

The social clause that will be discussed in this thesis aims at balancing the power between economic and social rules at the global level by giving the ILO access to the WTO system.

¹¹² *Ibid.*, p. 57.

¹¹³ Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee: *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation*, COM(2001) 416 final, p. 3, available via the Gateway to the European Union, <http://europa.eu.int>, last visited the 8 April 2005.

4 Current Efforts of Linking Trade and Labour Rights

4.1 Introduction

The efforts to link trade with the human rights of workers have taken many different forms. The current forms of linkage between trade and labour rights will be described and assessed as a background to the discussion on a multilateral social clause in the international trading regime. The most general and coherent systems in this field are the Generalised Systems of Preferences (GSP), which will be the main focus of this chapter. I will also briefly describe the voluntary approaches that have been developed in recent years.

4.2 Generalised Systems of Preferences

The GSPs are arrangement by the US, the EU and other industrialized countries by which developing countries get privileged access to these developed countries' markets by tariff-reductions or duty free access. The rationale for the system is to promote the economic development of developing countries through trade.¹¹⁴ For the GSP systems to be able to operate, a waiver was required from GATT article 1, which contains the Most Favoured Nation principle that prohibits discrimination. The waiver was granted in 1971 (and prolonged indefinitely in 1979) by the creation of the so-called 'enabling clause'.¹¹⁵ This clause enabled the developed countries to give more favourable treatment to developing countries without extending this treatment to all countries. The systems of the US and the EU include references to certain basic labour standards.

4.2.1 The US system

The GSP of the US was adopted in 1974. By the enactment of the Trade and Tariff Act of 1984 the system of preferential treatment is conditioned on the respect for 'internationally recognized workers' rights', defined as the freedom of association, the right to organize and bargain collectively, prohibition of forced or compulsory labour, prevention of child labour, and acceptable conditions with respect to minimum wages, hours of work and

¹¹⁴ George Tsogas, 'Labour Standards in the Generalized Systems of Preferences of the European Union and the United States', 6:3, *European Journal of Industrial Relations*, (2000), p. 351.

¹¹⁵ See Bahgirath Lal Das, *The World Trade Organization a Guide to the Framework of International Trade*, 1999, Zed Books Ltd., London, p. 23.

occupational safety and health.¹¹⁶ These rights are not based on the ILO conventions in the field (the US has only ratified two of the eight core conventions¹¹⁷) and on account of this the standards used in the system are in many cases unclear. The negative effects of not basing the system on the conventions of the ILO are significant as countries through this can be held accountable for violations of standards they have not signed up for and that does not form part of customary international law.¹¹⁸ Another negative aspect of the US' GSP is the complete discretion invested in the executive power. The failure to uphold the workers' rights standards may not 'prevent the granting of GSP eligibility if the President determines that such a designation would be in the national economic interest of the United States'.¹¹⁹ The President thus has complete discretion over the whole process.¹²⁰

The US' GSP is based on an annual petition and review process. Petitions may be filed by individuals, organizations or any other party with 'a significant economic interest' in the subject of the petition. The United States Trade Representative (USTR) decides whether the petition is rejected or accepted and, if a review is performed, whether to suspend or remove the preferential system with regard to the concerned country. The fairness of the review system is thus dependant on the efforts of petitioners to file claims and the impartiality of the USTR when assessing the claims. The burden of evidence gathering when filing petitions has resulted in the fact that only large organizations can undertake the task of petitioning. The bulk of the petitions have been filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation of unions in the US, and the International Labor Rights Fund (ILRF), a human rights organization. At times, petitions have foremost been aimed at countries that have gained the greatest advantage from the duty-free access rather than countries with the worst labour rights records. This has sparked accusations of protectionist usage of the GSP. As for the impartiality of the USTR, this has been heavily criticized on the ground that the countries suspended from the GSP mainly have been countries disliked by the US or countries that

¹¹⁶ See the Office of the USTR, *the U.S. Generalized System of Preferences Guidebook*, p. 24, available via the Office of the USTR's homepage

www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html, last visited the 21 April 2005.

¹¹⁷ Conventions nr. 105 and 182, see the ILO homepage, webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN, last visited the 14 March 2005.

¹¹⁸ Philip Alston, *Labor Rights Provisions in U.S. Trade Law - Aggressive Unilateralism?*, in Lance A. Compa and Stephen F. Diamond (Ed.), *Human Rights, Labour Rights, and International Trade*, 1996, University of Pennsylvania Press, Philadelphia, p. 79.

¹¹⁹ See the Office of the USTR, *the U.S. Generalized System of Preferences Guidebook*, p. 24

¹²⁰ See Philip Alston, *Labor Rights Provisions in U.S. Trade Law - Aggressive Unilateralism?*, p. 81.

have had minimal trade relations with it.¹²¹ During the eighties the influence of political considerations over the GSP was at its peak. Petitions on El Salvador were consistently denied for review despite the well-known attacks of death squads against labour leaders. As a contrast the socialist Sandinista government of Nicaragua was the first country to be removed from the GSP by the Reagan administration.¹²² The groups fighting for international labour rights were so discontent with the system that a lawsuit was filed against the system in 1992 by ILRF (with the AFL-CIO and other unions and human rights groups as joint plaintiffs). The case was dismissed but the judge noted ‘an apparent lack of standards in the legislation’ as there was only ‘a vague requirement to review from time to time’.¹²³ Even though the excesses of the Reagan years may not be as extreme today the main flaws in the system are intact to this day.

4.2.2 The EU system

The GSP of the EU has been operating since 1971. There was a major reform of the system in 1994-95¹²⁴ and the principles of that system are followed through in the current regulation, which came into force in 2002.¹²⁵ The current regulation produces *incentives* for countries to observe labour rights and *withdraws* GSP privileges from countries that do not observe the standards.

The *incentives* programme creates a possibility for a developing country to gain additional tariff preferences on products if the country can demonstrate that it abides by the standards in the ILO Declaration of Fundamental Rights and Principles at Work.¹²⁶ The process is initiated by a request for a special incentive arrangement from a developing country to the European Commission.¹²⁷ The request shall demonstrate that the country’s legislation is in conformity with the Declaration and that the legislation is properly implemented. However, the country is not obliged to have signed the conventions of the Declaration. The examination is conducted with the participation of the concerned government and within a year the Commission decides on whether to grant the request. However, if a country needs more time to conform to the requirements it may ask for the decision to be postponed.¹²⁸

¹²¹ George Tsogas, ‘Labour Standards in the Generalized Systems of Preferences of the European Union and the United States’, p. 357. See also Philip Alston, *Labor Rights Provisions in U.S. Trade Law - Aggressive Unilateralism?*, p. 82.

¹²² George Tsogas, ‘Labour Standards in the Generalized Systems of Preferences of the European Union and the United States’, p. 358.

¹²³ *Ibid.*

¹²⁴ Council Regulation 3281/94.

¹²⁵ Council Regulation 2501/2001.

¹²⁶ *Ibid.*, article 14(2).

¹²⁷ *Ibid.*, article 15(1).

¹²⁸ *Ibid.*, article 16(4).

The GSP privileges can be *withdrawn* if any of the following practices occur in the concerned country:

(a) practice of any form of slavery or forced labour as defined in the Geneva Conventions of 25 September 1926 and 7 September 1956 and ILO Conventions No 29 and No 105;

(b) serious and systematic violation of the freedom of association, the right to collective bargaining or the principle of non-discrimination in respect of employment and occupation, or use of child labour, as defined in the relevant ILO Conventions;

(c) export of goods made by prison labour;¹²⁹

If the Commission, or a member state, receives information of such violations and considers there being possibilities for an investigation the Committee for the Management of Generalized Preferences shall be informed. This is a body composed of representatives of the EU member states and chaired by a representative of the Commission.¹³⁰ If the consultations in the Committee support the claims the Commission can initiate an investigation. Upon completion of the investigation the Commission decides whether or not it shall recommend temporary withdrawal to the Council of Ministers, which decides on the final outcome by qualified majority.

The EU system has only been running for a few years in its present form and therefore the experience of the system is limited. Following an investigation initiated by trade unions Myanmar was suspended indefinitely from the GSP in March 1997.¹³¹ However, a claim in 1995 posed against Pakistan did not even provoke an investigation from the Commission, despite that no challenge had been made against the facts presented in the claim.¹³² This casts doubts as to the impartiality of the EUs GSP.

4.2.3 Comparing and Assessing the GSPs of the US and the EU

When comparing the GSPs of the US and EU there are several differences of substance. The EU system is based on the ILO core conventions, which is positive as it promotes a coherent development of international labour law. The legal grounds for the decisions regarding the GSP is thus clarified and developing countries are aware of which rules they are to abide by. The incentives programme is another positive feature of the EU approach as it fosters development and co-operation and rewards good practices. The US

¹²⁹ *Ibid.*, article 26(a-c).

¹³⁰ *Ibid.*, article 27(1).

¹³¹ George Tsogas, 'Labour Standards in the Generalized Systems of Preferences of the European Union and the United States', p. 362.

¹³² ICFTU, *Building workers' human rights into the global trading system*, p. 60.

system does not contain this type of encouragement and the unclear labour standards casts doubts as to the whole rationale for the system.

The similarities between the systems are greater when it comes to the decision-making processes. Both systems tend to favor a secretive and politicized system of supervision with no accountability or transparency. This is troubling for several reasons. Firstly, there are strong indicators that the mere labour rights performance is not the only aspect that weighs into the calculation of whether a country is to be punished in the system. Political considerations will form part of the system as long as politically composed bodies decide whether to investigate a claim. The history of the US GSP stands as a stark reminder of the unfair and politically biased outcome such a system may have.¹³³ The EU system also seems to suffer from an influence of political, rather than legal, considerations over the decisions as the experience of the claims against Pakistan demonstrates.

As for the positive sides of both programmes the scrutiny of foreign countries' labour regulation has had certain positive effects. The GSPs seem to have increased the awareness of international labour law violations and improved international labour networking, co-operation and solidarity.¹³⁴ The mere threat of being placed under scrutiny also seems to have positive effects on the labour codes in the certain countries. However, the politicized processes encourage the countries in question to spend more energy on diplomatic efforts, to refute the allegations, than on improvement of their labour rights record.¹³⁵

4.3 The North American Agreement on Labour Cooperation

The North American Free Trade Agreement (NAFTA) came into force in 1994 as a regulation of trade in goods and services between Canada, the US and Mexico. Labour issues formed an important part of the trade negotiations leading up to the establishment of the NAFTA and a side agreement on labour issues, called the North American Agreement on Labour Cooperation (NAALC), was established. The NAALC contains an obligation to promote a broad set of labour principles.¹³⁶ However, there is no obligation to conform the national legislation to these principles. Instead, the NAALC explicitly states the rights of the countries to legislate their own

¹³³ George Tsogas, 'Labour Standards in the Generalized Systems of Preferences of the European Union and the United States', p. 357.

¹³⁴ *Ibid.*, p. 360.

¹³⁵ *Ibid.*, p. 359.

¹³⁶ Mary Cornish and Veena Verma, *Enforcing International Labour Standards In the America in an Era of Free Trade*, presentation to The Canadian Bar Association's 3rd Annual International Law Conference 'Few Barriers or No Barriers? Directions in International Law and Practice', 2002, Ottawa, Ontario, p. 7, available on www.cavalluzzo.com/publications/newsletters/labour%20paper%20may31-02.pdf, last visited the 24 March 2005.

domestic standards. The NAALC is thus primarily designed to encourage governments to enforce their own labour laws. Differences between the parties are foremost to be resolved by co-operative and consultative procedures. The enforcement regime, through which sanctions can be applied, is only applicable to some of the labour standards, namely child labour, minimum wage requirements and work safety and health issues. Complaints cannot be brought on the freedom of association, the right to collective bargaining or forced labour.¹³⁷

Generally most commentators, and indeed the international trade organizations, are quite sceptical as to the effectiveness of the NAALC.¹³⁸ A major flaw is that the system only focuses on the enforcement of each countries labour laws instead of internationally recognised labour standards. There are no requirement to meet the ILO minimum labour standards and thus no requirement to strengthen labour standards in case the countries' legislation falls below these standards. The failure to include the freedom of association in the enforcement regime is another disappointment of the system.¹³⁹ Moreover, the enforcement regime has also been very disappointing when it comes to handling the submitted claims.¹⁴⁰

4.4 The Cotonou Agreement

The EU has included human rights observance as a social clause type mechanism in the preferential trade agreements that have been established with the African, Caribbean and Pacific Group.¹⁴¹ The current agreement, signed in June 2000, creates a framework for aid, trade and political cooperation. The preamble acknowledges the connection between human rights observance and development and it contains explicit references to universal human rights conventions, for example ICCPR and the ICESCR, which contain labour rights.¹⁴²

The main human rights enforcement mechanism in the agreement is contained in article 96. According to this provision a party to the agreement can request an examination of another party's behaviour as regards human rights, democratic principles and the rule of law. If the following consultations do not result in an acceptable solution the complaining party

¹³⁷ *Ibid.*, p. 11.

¹³⁸ See for example see *ibid*, p. 14, Hoe Lim, *The Social Clause: Issues and Challenges*, ILO, Bureau for Workers' Activities, Turin, chapter 5.1.2 and ICFTU, *Building workers' human rights into the global trading system*, p. 61.

¹³⁹ ICFTU, *Building workers' human rights into the global trading system*, p. 61.

¹⁴⁰ See Mary Cornish and Veena Verma, *Enforcing International Labour Standards In the America in an Era of Free Trade*, p. 15.

¹⁴¹ Currently 79 developing countries. See the EU Commission's homepage, <europa.eu.int/comm/development/body/country/country_en.cfm>, last visited the 24 March 2005.

¹⁴² See the Cotonou Agreement Preamble, paras. 5, 7-8.

may take ‘appropriate measures’.¹⁴³ These measures may as a last resort amount to the suspension of the agreement.¹⁴⁴

4.5 International Guidelines

A number of international commodity agreements, such as the 1981 Tin Agreement, the 1986 Cocoa Agreement and the 1987 International Rubber Agreement, refer to core labour standards. These labour clauses are mainly statements of intent with no attached control mechanisms or sanctions.¹⁴⁵

In the 1970s several initiatives were taken to establish a framework for the conduct of multinational enterprises. In 1976 the Organisation for Economic Development and Co-operation (OECD) adopted its Guidelines for Multinational Enterprises and the following year the ILO adopted its Tripartite Declaration of Principles Concerning Multinationals and Social Policy. These instruments sought to define the social responsibility of multinationals but none of them were legally enforceable. Their value has thus been questioned.¹⁴⁶

In recent years the interest of ‘Codes of Conduct’ for private corporations and social responsibility issues has augmented considerably. A wide range of multinationals have formulated codes of conduct, which often include labour issues. The mounting public interest in ethically produced products has urged the international corporations to create mechanisms to ensure that their products are produced in a ‘fair’ environment.¹⁴⁷ However, since the codes are voluntary they are not legally enforceable. There are also often deficiencies in the monitoring and enforcement procedures. Despite these problems the codes can definitely have a positive impact on the behaviour of business in developing countries.

4.6 Conclusion

The mechanisms examined in this chapter clearly demonstrate that there is nothing unprecedented about linking trade and labour rights. The linkage has already been established in a number of different forms in trade agreements. However, the negative aspects of the current mechanisms are numerous; they are often not legally enforceable and when they are, the mechanisms are often politicized and inadequate. This has led to misuse of these systems for protectionist reasons. Furthermore, the standards applied are often not based on the ILO standards. This damages the coherency of international labour law and makes it difficult for countries to comprehend which standards they are to abide by.

¹⁴³ The Cotonou Agreement, article 2(a).

¹⁴⁴ *Ibid.*, article 2(c).

¹⁴⁵ ICFTU, *Building workers’ human rights into the global trading system*, p. 61.

¹⁴⁶ See Hoe Lim, *The Social Clause: Issues and Challenges*, chapter 5.1.4.

¹⁴⁷ *Ibid.*, chapter 5.1.5.

In the private sector most TNCs today have acquired a voluntary Code of Conduct and/or signed up for the general codes that cover the specific business sector. It is now up to the business sector to demonstrate that their commitment is serious and not just window-dressing to fend off criticism. In any case, the current development is positive in that it focuses attention on the international labour standards and their importance to the workers of the world.

5 A Social Clause in the Multilateral Trading Regime

5.1 Introduction

A social clause is in this thesis defined as a clause in the multilateral trade agreements containing an obligation to uphold basic labour rights. As oppose to the clauses described in the previous chapter a multilateral social clause is to be inserted directly into the trade agreements of the WTO and subordinated impartial adjudication. In this chapter I will explain the content of the trade union proposal for a social clause. I will then describe the discussion surrounding the social clause and the positions taken by different actors. To reach a conclusion as to the justification for the social clause I will lastly analyze the arguments put forward in the debate against the background of the specific trade union proposal and the current trade and labour rights regimes.

5.2 The ICFTU Proposal for a Social Clause

The International Confederation of Free Trade Unions (ICFTU) is the largest organization of trade unions in the world. It has 233 affiliated organizations in 154 countries, with a total membership of over 145 million workers.¹⁴⁸ This makes it an important actor in the labour rights movement and I will therefore examine this organization's proposal for a social clause in the international trading regime. Other proposals for a social clause normally share much in common with the ICFTU proposal.¹⁴⁹

The contents of and rationale for the ICFTU proposal are laid out in the 1999 report 'Building workers' human rights into the global trading system'.¹⁵⁰ Even though the report is a few years old the ICFTU has since then on numerous occasions stressed the importance of incorporating workers' rights into the WTO system.¹⁵¹

¹⁴⁸ See the ICFTU homepage, <www.icftu.org/displaydocument.asp?DocType=Overview&Index=990916422&Language=EN>, last visited on the 15 March 2005.

¹⁴⁹ Daniel S. Ehrenberg proposes a similar social clause, based on the co-operation of ILO and the WTO in a joint Dispute Panel, in chapter 8 of Lance A. Compa and Stephen F. Diamond (Ed.), *Human Rights, Labour Rights, and International Trade*.

¹⁵⁰ ICFTU, *Building workers' human rights into the global trading system*, 1999, available via the ICFTU homepage <www.icftu.org/list.asp?Language=EN&Order=Date&Type=Publication&Subject=ILS>, last visited the 15 March 2005.

¹⁵¹ See e.g. para. 10 of the ICFTU statement in 2003 at the 5th Ministerial Meeting in Cancún. Available via the ICFTU homepage,

An important point of the ICFTU proposal for a social clause is that it does not create any new rights but strengthens the enforcement of already existing rights. The social clause is to enforce the standards adopted in the ILO Declaration on Fundamental Rights and Principles at Work.¹⁵² As has been described above, these basic human rights are based on the eight core conventions of the ILO.

5.2.1 The Procedure

The ICFTU proposal for a social clause is based on co-operation between the WTO and the ILO. A joint WTO/ILO Advisory Body should be set up to oversee the implementation of the workers' rights clause.¹⁵³ The Advisory Body would undertake periodic reviews of how countries were applying the principles in the clause and it would also entertain complaints.¹⁵⁴ The ILO team of the Advisory Body would have particular responsibility for this part of the procedure, as it is normal part of ILO work. The Advisory Body's conclusion would be published in a report. If a country was found in breach of its obligations, recommendations should be made to the country on how to change and, if necessary, technical assistance and additional recourses should be made available. The government would then have a period of time, two years is suggested in the report, to undertake the necessary changes. After this period of time the Advisory Body would file another report to assess the actions of the government. Typically this report would reach one out of three conclusions:

- i) The country was applying the standards.
- ii) The country was heading in the right direction.
- iii) The country was failing to co-operate and therefore not respecting the standards.

The enforcement measures to use on countries that fail to fulfil its obligations should be numerous as well as escalating.¹⁵⁵ A first step could be to suspend the country's right to access to the WTO Dispute Settlement Mechanism. The procedure should emphasise on helping countries to improve rather than to punish them on every failure. Therefore trade measures should only be used as a last resort when all other measures have failed, and even then they should be mild at first. This step-by-step procedure should promote clarity, predictability and objectivity. The ILO would bring competence and authority to the system and enough time should be provided to solve the problems by constructive dialogue. The WTO system generally works by trying to suggest changes in country

www.icftu.org/displaydocument.asp?Index=991217396&Language=EN, last visited on 15 March 2005.

¹⁵² ICFTU, *Building workers' human rights into the global trading system*, p. 43.

¹⁵³ *Ibid.*, p. 44.

¹⁵⁴ *Ibid.*, p. 45. Trade unions would have a right to file complaints and I assume that the same would be the case for the member countries of the WTO.

¹⁵⁵ *Ibid.*, p. 46.

behaviour rather than sanctioning it directly and the same type of procedure should be used in the social clause mechanism.¹⁵⁶

The ICFTU proposal is designed to combine the authority and impartiality of the ILO with the power of the WTO. The purpose appears to be both to provide strength for the international human rights protection of the ILO and to highlight the pressure the present trade system puts on the human rights of workers.

A crucial question in the proposal is that the whole process is open and transparent and that the rules are strictly and fairly enforced. This is to counter any suspicion that countries would use the process to attack commercial opponents for protectionist reasons.¹⁵⁷

5.3 The Discussion Surrounding the Social Clause

5.3.1 The North-South Division

The countries most fiercely opposing a social clause are developing countries who argue that a social clause would diminish their comparative advantage, the low labour costs, and thereby hinder them from developing like the western world once could develop. This reaction is clearly understandable against the background of their heavy reliance on cheap labour to compete on the world market. Their scepticism towards the good will of the developed nations may also be well founded; the GSP's labour rights protection has often been misused and aimed at political adversaries rather than the worst labour rights violators.¹⁵⁸

5.3.1.1 Are the developing countries united in their opposition to the Social Clause?

There is clearly a strong opposition to a social clause in the South but the situation is not as clear as it first may seem. The organized labour movement is found on both sides of the debate as well as NGO's and unorganized labour. African trade unions have supported the social clause on a number of occasions and at the 1997 Congress of the ICFTU, the African Regional Organization adopted a strong statement calling for a workers' rights clause in the WTO.¹⁵⁹ This demand has been repeated and elaborated later in pan-African Conferences in 1998 and 1999. This campaign also resulted in governmental support and at the ILO Conference seven African governments supported the proposal to advance the debate on

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ See above chapter 4.2.

¹⁵⁹ ICFTU, *Building workers' human rights into the global trading system*, p. 39.

international labour standards and trade.¹⁶⁰ The governments and trade unions of Asia have been the strongest opponents of a social clause but also here there are differences of opinion. For example, the Korean Confederation of Trade Unions, which estimated its total membership to 573,490 workers in some 1,226 individual unions in 1999¹⁶¹, has supported a social clause and the Malaysian Union Congress supports some form of trade labour linkage.¹⁶²

5.3.1.2 Who speaks for Whom?

In the WTO the governments represents their countries. As oppose to the system of the ILO, trade unions do not form part of the international trading regime. Traditionally the voice of the government is synonymous with the voice of the country in international affairs but as we get more orientated towards human rights this perspective will be challenged.¹⁶³ In other words, can these governments, sometimes not democratically elected, really be trusted to speak the voice of their people? As a matter of fact an un-democratic regime will have great troubles accepting a true implementation of the freedom of association, as the creation of independent trade unions might prove to be a serious threat to its powers. Here we slide into the general questions of the universality of human rights and cultural relativism. I do not in this thesis have the possibility of elaborating further on these complex questions but as regards the social clause debate the following needs to be mentioned. The human rights in the 1998 ILO Declaration on Fundamental Rights and Principles at Work are protected not only in the relevant ILO conventions but also in the International Bill of Human Rights, which is the UNDHR, the ICCPR and the ICESCR. The universal status of these particular rights are thus not contested. The social clause is not intended to extend the already existing human rights but only strengthen the enforcement of them.

5.4 Is The Social Clause Justified?

5.4.1 The WTO Position

When addressing the question of a social clause WTO officials usually recall the statement from the Singapore meeting where the countries affirmed their respect of core labour standards. They also argue that the ILO

¹⁶⁰ The supporting countries were South Africa, Mauritius, Malawi, Tunisia, Madagascar, Gabon and Senegal, *see ibid.*

¹⁶¹ *See* the Korean Confederation of Trade Unions' homepage on <www.kctu.org/2003/>, last visited the 18 March 2005.

¹⁶² *See* Anita Chan and Robert J. R. Ross, 'Racing to the Bottom: International Trade Without a Social Clause', 24:6, *Third World Quarterly*, (2003), pp. 1013-1014.

¹⁶³ *See* Christopher McCrudden and Anne Davies, *A Perspective on Trade and Labour Rights*, in Francesco Francioni (Ed.), *Environment, Human Rights and International Trade*, 2001, Hart Publishing, Oxford, p. 196.

is the relevant body to address labour rights.¹⁶⁴ I do not find these arguments convincing as these assertions are the basis for the social clause. At the Singapore meeting the members of the WTO affirmed their respect for core labour standards, but this should in no way hinder the linking of trade and labour rights. On the contrary, it appears to be a statement clarifying the common grounds of the WTO and the ILO. As for the designation of the ILO as the relevant organization to deal with labour rights, this is undisputed. The social clause is construed to strengthen the ILO's authority over the core labour standards by linking the standards to the international trading regime's major authority, the WTO.

Another line of argumentation, utilized by WTO officials, is the often-used assertion that human rights and the rights of workers are best promoted by growth and development.¹⁶⁵ This argument is clearly valid but it ignores a number of facts. The rights enjoyed in the Western world were often won by hard struggle using exactly the means that a social clause would protect, for example trade unions. The current era of globalization, with an increase of the international trade and financial flows, also poses different challenges for the struggle of trade unions than did the time of trade union establishment in Europe. The global competition of today's world puts great restraints on the possibilities of conducting national union campaigns as the employer and buyer counterparts often have a great deal of geographic mobility. Another aspect is that the unions of Europe formed an important part of the democratization process in many western countries and regretfully many unions in the developing world do not have that possibility. The most disturbing part of the later WTO argument is that it implicitly assumes that there is a contradiction between human rights norms and economic growth. However, there is no such contradiction.¹⁶⁶

The trade union demand to incorporate labour rights in the WTO was addressed in 1999 by the WTO Director-General Mike Moore. He stated that the debate was destructive as it targeted globalization and trade as a bad thing when it was in fact the catalyst for development.¹⁶⁷ However, his address missed the point, the ICFTU fully agrees on the importance of international trade and there is no demand for reducing trade or shutting down the WTO.¹⁶⁸ The demand is solely for the current international economic co-operation to integrate a social dimension.

¹⁶⁴ Robert J.S. Ross and Anita Chan, *Reframing the Issue of Globalization and Labour Rights*, 2002, Presentation at the Political Economy of World-Systems, p. 7, available on <irows.ucr.edu/conferences/pews02/ppross.doc>, last visited the 18 April 2005.

¹⁶⁵ See Mike Moore addressing the ICFTU in 1999, available on the WTO homepage, <www.wto.org/english/thewto_e/minist_e/min99_e/english/press_e/pres152_e.htm>, last visited the 18 March 2005.

¹⁶⁶ See e.g. Hoe Lim, *The Social Clause: Issues and Challenges*, chapter 4.5. This issue is also further discussed below in chapter 5.4.3.

¹⁶⁷ See Mike Moore addressing the ICFTU in 1999.

¹⁶⁸ ICFTU, *Building workers' human rights into the global trading system*, p. 5.

5.4.2 The Protectionist Argument

The main argument raised against the social clause is the assertion that the clause would be used by developed countries to protect their own industries at the expense of developing countries. This claim often rests on the assumption that the social clause is an attempt to impose an international minimum wage or other substantive labour rights that would be impossible for the developing countries to enforce. However, the ICFTU proposal does not contain any reference to a minimum wage or other fixed, substantive labour rights. Instead a social clause should be used to enforce enabling rights that can be used by workers to protect their own interests. The ICFTU argues that the exact formulation of the minimum wage or other similar rights should never be done in an international setting but in the respective countries and thus taking into account the specific situation of each country.¹⁶⁹ The workers in poor countries will through organisation be able to get a fair share of the profits instead of being oppressed by employers, governments and/or pressured by TNCs into minimizing their demands into a sub-market level.

Even if the misunderstandings concerning the contents of the social clause are clarified, the question remains: Could the social clause proposed by the ICFTU be used for protectionist reasons? I find that the fear of protectionist usage is exaggerated for a number of reasons. Firstly, the rights that are to be protected are human rights set forth in the basic human rights conventions and these rights can be protected or violated in both poor and rich countries. The rights are not dependant on a certain level of development. Secondly, the ILO has vast experience of supervising labour standards and it is beyond doubt that the Advisory Body would act impartially when judging cases. Thirdly, the penal functions would only be set into motion after the ILO have consulted the concerned government and given technical assistance. In the end the whole point of constructing a multilateral social clause is to formalize the system of enforcing labour law protection into an open and transparent process that avoids arbitrary and unilateral action. This has much in common with the WTO that seeks to regulate international trade to ensure open and fair competition. To regulate labour standards in a similar way should only be a natural step in this process.¹⁷⁰

Despite the argumentation above, the fear of the developing countries must be taken seriously. They argue that the real obstacle to their development of fair labour standards is in fact their difficult economic position and that this situation can best be ameliorated if the developing countries lift tariffs and cut down on agricultural subsidies. This argument is definitely valid, even though economic development not alone creates better labour conditions. There is a certain amount of hypocrisy on behalf of the developed countries when demanding better labour standards whilst at the same time not fully

¹⁶⁹ ICFTU, *Building workers' human rights into the global trading system*, p. 34.

¹⁷⁰ See Hoe Lim, *The Social Clause: Issues and Challenges*, chapter 5.2.1.

opening up their markets and giving the developing countries a real opportunity to achieve economic growth. The ICFTU proposal is combined with a number of additional measures to make international trade more equitable.¹⁷¹ Having said that, there are also good reasons for arguing that a better protection of the human rights of workers on global scale would actually in itself be beneficial to the development of the countries of the South.

5.4.3 Economic Arguments

The economic arguments for and against a social clause can be divided into two different schools of economic thought: the *neo-classical* and the *neo-institutional* (or Neo-Keynesianist). The *neo-institutional* school of thought argues that national and international markets have to function within a framework of regulations that enforces rights and establishes equitable dispute procedures. This school argues that without such a framework, market mechanisms can have a potentially destructive impact.¹⁷² High labour standards can according to this school help to increase demand and high wage employment, a development experienced by the industrialized countries after the Second World War.¹⁷³ According to the *neo-classical* approach, which include most economists and ‘free traders’, free trade and an open economy are the main conditions for economic prosperity. The market outcome will always be the most efficient if the competition is left unregulated. Domestic and international regulation of labour standards will interfere with the free market, impede efficiency, deter investments and constrain growth. A social clause would hinder the competition of comparative advantages and by that retard the development of the poorer countries.¹⁷⁴ However, there are problems with this view. Modern globalization has brought an extensive regulation regarding international trade. This regulation has acquired legally binding form in the agreements of the WTO. The proponents of free trade are thus aware of the necessity of legally binding rules to force countries to compete in a fair way. In fact, the so-called ‘free trade agreements’ have brought about the most extensive international regulations ever to be imposed on trade. The neo-classical school is thus incoherent as it opposes binding rules for social causes at the same time as it advocates binding rules for ‘free trade’. Another aspect of the international trade regulation is that it has made capital, goods and services mobile. However, this legally imposed mobility has not affected the workforce or the jurisdiction of countries, which have both remained immobile and thus unable to balance the power of the forces controlling the goods, services and capital.¹⁷⁵

¹⁷¹ ICFTU, *Building workers’ human rights into the global trading system*, p. 23.

¹⁷² See Hoe Lim, *The Social Clause: Issues and Challenges*, chapter 4.1.

¹⁷³ See George Tsogas, *Labour Regulation in a Global Economy*, p. 33.

¹⁷⁴ See T.N. Srinivasan, *International Trade and Labour Standards from an Economic Perspective*, in Pitou van Dijck and Gerrit Faber (Ed.), *Challenges to the New World Trade Organization*, 1996, Kluwer Law International, Hague, p. 239.

¹⁷⁵ See Hoe Lim, *The Social Clause: Issues and Challenges*, chapter 4.1.1.

International competition can drive two countries to compete with each other for foreign capital in a way that has negative effects for both of them. In the search of enhanced foreign investments countries are forced to lower their standards to beat the offers of their neighbours. This ‘beggar-thy-neighbour’ policy would be countered if both countries agreed not to lower their present standards. The underlying thought of this conclusion is the same as the rationale for international trade regulation. By regulating trade, countries are hindered from gaining comparative advantages by raising trade barriers in a way that endangers the global economic development. If legally enforceable regulation is needed for countries not to impede international trade by raising trade barriers, why should not regulation be needed to hinder countries from seeking comparative advantages by dumping their labour standards? The economic objectives of both these types of regulations would be the same, to stop countries from hurting economic growth by seeking relative advantages.¹⁷⁶

International employers have been seen on both sides of the social clause debate. Traditionally their views have been formed by the neo-classical view of international economy. They have been opposed of linking trade with labour standards on cost arguments (the rationale for business should always be to minimize the cost) or cultural arguments (labour standards vary from country to country). The underlying assumption is the neo-classical theory that the only responsibility of business is to maximize their profit for the benefit of their share-holders. However, the last decades have seen great changes in business thinking. Today, international employers are aware of the importance of their brand names and the importance of Corporate Social Responsibility and ‘ethical’ corporate Codes of Conduct have increased greatly. Often under the influence of NGOs and grassroots activism, corporations have been forced to change their way of thinking, or at least the way in which their way of thinking is perceived, to include a larger amount of responsibility for the labour standards used by them and their sub-contractors in the developing world.¹⁷⁷

The OECD produced a report on the economic effects of the core labour standards in 1996.¹⁷⁸ The conclusions of the study were as follows: Employment discrimination was said to in all cases reduce effectiveness as it misallocated the available resources and also reduced the availability of production factors. As for the child labour and forced labour, these practises also misallocated the recourses and thus reduced effectiveness but they did elevate the quantity (this meaning human beings) available for production. However, in the case of child labour this practise undermined the long-term economy of the country as it hampered the education of children. Freedom of association received a more mild appreciation in the study. It was

¹⁷⁶ *Ibid.*

¹⁷⁷ See e.g. George Tsogas, *Labour Regulation in a Global Economy*, pp. 37-38.

¹⁷⁸ OECD, *Trade, Employment and Labour Standards: A Study of Core Workers’ Rights and International Trade*, 1996.

recognized that the organization of unions could ‘upgrade production processes, while also raising workers’ motivation and productivity’ but at the same time the organization of labour could distort the market equilibrium as it could lead to wages above the market level. The overall conclusion of the study was that there was no evidence to prove, or disprove, an empirical link between the observance of core labour rights standards and performance in trade and/or foreign investment.¹⁷⁹ Countries with low labour standards could thus not be said to perform better in the export market. Even if the study was not in full positive as to the economic effects of core labour rights, the labour rights movement saw the study as a positive affirmation by the neo-classical economists of the OECD.¹⁸⁰

5.4.4 Stopping the Race to the Bottom

The debate on international trade and competition is normally centred around the opposition between the North and the South. The protectionist debate illustrates the common conception of the richer countries’ fear of competing with the poorer countries’ low-wage industries. However, there are strong signs that the traditional North-South competition has today changed into a South-South competition. In the labour-intensive industry the South has already captured the main part of the market. According to the World Bank, low- and middle-income countries accounted for 80% of the industrial workforce already in 1995.¹⁸¹ The share of manufacturers in developing country exports augmented from 20% to 60% between 1960 and 1990. The export market in the North is a source of major competition between the developing countries that strive to produce products at the lowest possible price. The competition is thus not primarily between rich and poor countries as the poor countries already produce the majority of products in the low-wage industries. The developing countries are now primarily involved in a competition between themselves, for the export markets in the North. The ICFTU and other commentators are claiming that this competition amongst the developing countries is the source of a strong downward spiral that puts heavy pressure on labour conditions.¹⁸² This is the ‘race to the bottom’ that the social clause is set to counter.

There are a number of signs confirming that the South-South competition is resulting in declining labour conditions. The emergence of so-called Export Processing Zones (EPZs), or ‘maquiladoras’, in developing countries is one example. These zones are created for the export industry and designed to fit the needs of multinationals with cheap and unorganized labour and tax reductions as major benefits.¹⁸³ EPZs are established in more than 100

¹⁷⁹ *Ibid.*, p. 230.

¹⁸⁰ See interview with Lee Swepston.

¹⁸¹ See Anita Chan and Robert J. R. Ross, ‘Racing to the Bottom: International Trade Without a Social Clause’, p. 1014.

¹⁸² See e.g. *ibid.* and ICFTU, *Building workers’ human rights into the global trading system*, p. 31.

¹⁸³ ICFTU, *Building workers’ human rights into the global trading system*, p. 31.

developing countries, such as Bangladesh, the Dominican Republic, Haiti, Honduras, Madagascar, Mauritius, Sri Lanka, Mexico and China, and approximately 42 million workers are currently employed in the zones.¹⁸⁴ There are numerous examples of countries restricting basic labour standards, such as the freedom of association, the right to bargain collectively and the right to strike, in EPZs. Even when labour rights officially are recognized government officials, zone administrators and employers have often been found to co-operate to prevent trade union activity in the EPZs.¹⁸⁵ Governments use these special procedures to be able to compete with the country setting the floor of the particular industry. This model of economic development is obviously highly questionable from a human rights standpoint but also from an economic perspective. There is no evidence suggesting that the investments in the EPZs will spill over on the national economies.¹⁸⁶

Another concrete example of the effects of the race to the bottom can be lifted from the study conducted by Anita Chan and Robert J. Ross on the apparel industry in China and Mexico during the nineties. The apparel industries in these countries were competing for a bigger share of the US import-market. The industries in both countries employed a large amount of domestic migrants from the poorer regions of their respective countries. Both countries experienced a remarkable boom in employment in their export industries during the nineties. However, this growth in employment did not translate into higher wages, instead the wages declined due to the heavy global competition.¹⁸⁷ The increase in sales thus did not 'trickle down' to those who made the products. The study points out the absence of properly enforced labour standards, such as the freedom of association and the regulation of working hours, as the major reasons for the lack of positive development of the workers' incomes.¹⁸⁸ China, with its rapidly increasing growth and importance as an economic actor, is today 'setting the floor' and other countries are forced down to the same level. Moreover, even within China the competition is reducing the standards as the different regions are fighting for commerce by granting numerous concessions to investors.¹⁸⁹ For this situation to ameliorate, the authors urge the governments and labour movements of the developing countries to realise that there is a pressing need for linking global labour standards with the international trading regime to counter the present 'race to the bottom'.¹⁹⁰

¹⁸⁴ ICFTU, *Behind the Brand Names- working conditions and labour rights in export processing zones*, 2004, p. 4.

¹⁸⁵ *Ibid.*, p. 9.

¹⁸⁶ See e.g. *ibid.*, p. 6, ICFTU, *Building workers' human rights into the global trading system*, p. 10 and Hoe Lim, *The Social Clause: Issues and Challenges*, chapter 1.2.

¹⁸⁷ See Anita Chan and Robert J. R. Ross, 'Racing to the Bottom: International Trade Without a Social Clause', p. 1017.

¹⁸⁸ *Ibid.*, p. 1019 and 1022.

¹⁸⁹ *Ibid.*, p. 1017.

¹⁹⁰ *Ibid.*, p. 1023.

If proper human rights protection was in place the countries would be competing against a certain level of rights. Instead of competing by lowering their labour standards, countries would compete by increasing productivity and skill level which is a far more rewarding strategy, both from the perspective of the country as a whole and from the perspective of the individual worker.¹⁹¹

5.4.5 Countering Unilateral Action

In the lack of a global social clause a number of different approaches have been taken by foremost the US and the EU to punish countries that they believe violate labour rights. The methods and procedures vary between the different actors and the outcome is far from coherent. The problems with the specific approaches have been described above but a number of additional aspects needs to be high lightened in connection to this discussion. Firstly, the unilateral approaches give the rich nations a very powerful instrument to use whilst the poorer nations do not have any opportunity to act in this way. This way the trade sanctions are a one-sided tool with which the developed world can punish the developing countries. However, difficulties with the implementation of the human rights of workers are equally challenging to the developed world.¹⁹² Moreover, as has been demonstrated above¹⁹³ the developing countries are fully participating in the WTO Dispute Settlement Mechanism and they should have equal opportunities to participate in the labour rights enforcement mechanisms. The enforcement mechanism should therefore be global. Secondly, unilateral sanctions can be used without any form of impartial control. This means that the punished country does not have any possibility to control which rights the sanctions will be imposed for and they do not always have a possibility to refute the evidence that the punishing country is using to back its claims. There is a clear risk that these types of sanctions will be used to satisfy protectionist desires in the home country. Instead of aiming at solving the problems with dialogue and technical assistance, and only threatening with sanctions as a last resort, the sanctions might be the first tool to use.

Unilateral sanctions will most likely continue to be used in the future due to the increase of interest in ‘ethical’ trade in the Western world which fosters heavy media attention on labour rights violations in foreign countries. Unemployment in industrialised countries may be blamed on foreign competition from developing countries, whether or not the foreign competition is the actual cause of the job losses. If this development is not followed by a strengthening of the international human rights safeguards there is a clear risk that certain governments in the developed world will take the opportunity to profit on the public fear of harshening economic conditions and impose sanctions on grounded or ungrounded suspicions of

¹⁹¹ See Hoe Lim, *The Social Clause: Issues and Challenges*, chapter 4.3.

¹⁹² See e.g. George Tsogas, *Labour Regulation in a Global Economy*, p. 55.

¹⁹³ See chapter 3.7.

human rights violations. These randomly imposed sanctions will hurt the ones that they are intended to protect and they will also diminish the respect for the international human rights regime. A multilateral social clause founded on the co-operation between the ILO and the WTO would be a more impartial and equitable way of dealing with human rights violations. Through combined efforts these organizations could analyze the causes of the problems and provide assistance to solve them. Some have claimed that a social clause would in fact increase the use of unilateral sanctions, as powerful countries would not have the patience to wait for tiresome ILO-procedures.¹⁹⁴ However, I do not find this argument convincing. The powerful nations are already using unilateral sanctions and a multilateral social clause would shift the responsibility for these types of actions over to an impartial organization. There would be no need for unilateral action. In any case the country threatened by sanctions would have a possibility to defend itself from the allegations. Banning unilateral sanctions whilst the joint WTO/ILO Advisory Body would handle the matter could also solve this problem.

5.5 Conclusion

When examining the arguments of the opponents of a social clause I found that most arguments were not aimed at the contents of the actual proposal for a social clause as articulated by the ICFTU. Instead of commenting on the features of the actual proposal, opponents were either attacking features that were never meant to be included in a social clause, such as a minimum wage, or describing the benefits of free trade, which the trade union movement does not disagree with.

There is nothing incoherent in demanding labour rights whilst at the same time praising international trade. The examination of the trade union proposal in this chapter demonstrates that the international trade union movement is not aiming at restricting international trade, but at ensuring that the workers of the world have a fair opportunity of demanding their share of the profits. The image of a backwards striving, nationalist and protectionist labour and NGO movement, an ‘anti-globalisation movement’, is to great parts a fiction created by the opponents of international labour standards who believe that international labour rights might be a constraint on the global economy, despite the absence of evidence for this conclusion.

The developing nations’ resistance on this issue is understandable as they feel targeted by the demand for better labour standards. Their experience of the unilateral trade sanctions may also motivate their reluctance to discuss this topic in the WTO. However, the labour rights in the social clause might well work for the benefit of the developing nations. If the human rights of workers are not equally enforced worldwide all countries will have to

¹⁹⁴ See T.N. Srinivasan, *International Trade and Labour Standards from an Economic Perspective*, p. 241.

struggle to compete with the most exploited labour force in the market. The result of this competition can be seen in the explosive growth of the EPZs. This model of economic development is highly questionable not only from a moral perspective but also from an economical perspective. The right of workers in the developing countries to organise and fight for their rights is essential for their possibilities to achieve decent working conditions and a fair share of the profits. The globalised economic competition makes it more important than ever that the rights of workers are equally enforced everywhere.

6 Concluding Remarks

The linkage between trade and labour law has formed a part of the labour rights discussions since the creation of international labour standards. The fact that poor labour conditions in one country, due to international trade, has direct effect for the standards in another country was well-known already at the time of the creation of the ILO. For the trade union movement this effect has been crudely evident from the moment of its creation up until today. When a global uniform trading system with legally enforceable rule was created the international trade union movement, a number of countries, NGO's and other actors, regarded the inclusion of labour standards as a natural step in the process of regulating international trade. There was a widespread fear that the increase of trade that had followed globalization would put heavy pressure on the human rights of workers. The fears of the social clause proponents seem to have come true. Despite the global growth that has characterized the recent years, the enormous growth of EPZs and the appalling labour conditions of millions of workers demonstrate that an increase in international trade and economic growth does not automatically transform into better labour conditions. The ILO has not been able to combat this development. This has fostered the creation and strengthening of numerous uni- and bilateral social clause mechanisms. However, if the ILO-system can be described as fair, honest and impartial but powerless, many of the unilateral sanctions can be said to have demonstrated the reverse characteristics as they often have been powerful but unfair, dishonest and partial.

As for the actual outlook of a social clause being inserted into the WTO in the near future, the chances are slim. The WTO has great troubles reaching consensus on a number of issues where the interests of the North and the South differs, for example the agricultural subsidy question. Despite this negative outlook, there are also positive signs. The labour rights question is now clearly identified as a human rights issue which gives it legitimacy in all parts of the international community, the grass-roots movements that are critical of the present development are demanding labour rights for all, and the business sphere and neo-classical economists are finding it increasingly difficult to ignore the western consumers' demands for 'fair' trade.

The realisation of a social clause, as proposed by the ICFTU, would mean a strengthening of the powers of the ILO and an acknowledgment by the WTO that the human rights of workers form part of the international trading system. A social clause would also mean a firm statement by the governments of the WTO that these rights are to be respected and not violated for commercial gains. The effectiveness of trade sanctions as a tool to enforce human rights is debatable but the alternatives to a social clause are unilateral sanctions that lack impartiality and therefore easily can be used for protectionist purposes. In other words, the issue of trade and

international labour standards is not going away and I believe that it will at some point have to be dealt with in an international forum.

Bibliography

ILO Instruments

Declaration of Philadelphia, 1944.

ILO Constitution, 1919.

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

ILO Convention concerning Freedom of Association and Protection of the Right to Organise, No. 87, 1948.

ILO Convention concerning the Principles of the Right to Organise and to Bargain Collectively, No. 98, 1949.

ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, No. 100, 1951.

ILO Convention concerning the Abolition of Forced Labour, No. 105, 1957.

ILO Convention concerning Discrimination in Respect of Employment and Occupation, No. 111, 1958.

ILO Convention concerning Minimum Age for Admission to Employment, No. 138, 1973.

ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, No. 182, 1999.

ILO Declaration on the Fundamental Principles and Rights at Work, 1998.

WTO Instruments

General Agreement on Trade and Tariffs, 1947.

General Agreement on Trade in Services, 1994.

The Marrakech Agreement, 1994.

Trade-Related Intellectual Property Agreement, 1994.

EU Instruments

Council Regulation 3281/94.

Council Regulation 2501/2001.

The Cotonou Agreement, 2000.

UN Instruments

International Covenant on Civil and Political Rights, United Nations General Assembly resolution 2200A (XXI), 16 December 1966, 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights, United Nations General Assembly resolution 2200A (XXI), 16 December 1966, 999 UNTS 3.

Universal Declaration of Human Rights, General Assembly resolution 217A (III), 10 December 1948, UN doc. A/810 at 71 (1948).

ILO Publications

International Labour Office, *Handbook of procedures relating to international labour Conventions and Recommendations*, Rev. 2, 1998.

ILO resolution I, 88th session of the General Conference, available on www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#I, last visited 11 February 2005.

Lim, Hoe, *The Social Clause: Issues and Challenges*, ILO, Bureau for Workers' Activities, Turin.

Report of the Commission of Inquiry of 2 July 1998, available on www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm#N_1_.

The provisional record 4, the 88th session of the International Labour Conference, available on www.ilo.org/public/english/standards/relm/ilc/ilc88/pdf/pr-4.pdf, last visited 11 February 2005.

Monographs

Adamantopoulos,
Konstantinos

An Anatomy of the World Trade Organization,
1997, Kluwer Law International Lmt., London.

- Jackson, John H. *The World Trade Organization*, 1998, Wellington House, London.
- Joyce, James Avery *World Labour Rights and Their Protection*, 1980, Croom Helm Ltd, London.
- Klein, Naomi *No Logo: Märkena, Marknaden, Motståndet*, 2001, Ordfront Förlag, Stockholm.
- Lal Das, Bahgirath *The World Trade Organization a Guide to the Framework of International Trade*, 1999, Zed Books Ltd., London.
- Osieke, Ebere *Constitutional Law and Practise in the International Labour Organization*, 1985, Martinus Nijhoff Publishers, Dordrecht.
- Tsogas, George *Labour Regulation in a Global Economy*, 2001, M. E. Sharpe, New York.

Collective Works

- Blanpain, Roger, Engels, Chris (Ed.) *The ILO and the Social Challenges of the 21st Century*, 2001, Kluwer Law International, Hague.
- Compa, Lance. A., Diamond Stephen. F. (Ed.) *Human Rights, Labour Rights, and International Trade*, 1996, University of Pennsylvania Press, Philadelphia.
- de la Cruz, Hector B. von Potobsky, Geraldo, Swepston, Lee *The International Labour Organization*, 1996, Westview Press, Colorado.
- van Dijck, Pitou, Faber, Gerrit (Ed.) *Challenges to the New World Trade Organization*, 1996, Kluwer Law International, Hague.
- Fransesco Francioni (Ed.) *Environment, Human Rights and International Trade*, 2001, Hart Publishing, Oxford.
- Ruttley, Philip, Macvay, Iain, George, Carol (Ed.) *The WTO and International Trade Regulation*, 1998, Cameron May, London.
- Sands, Philippe, *Bowett's Law of International Institutions*, 5th

Klein, Pierre ed. 2001, Sweet & Maxwell, London.

Periodicals

- Alston, Philip,
Heenan, James 'Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration of Fundamental Principles and Rights at Work?', 36, *International Law and Politics*, (2004), pp. 221-264.
- Chan, Anita,
Ross, Robert J. R. 'Racing to the Bottom: International Trade Without a Social Clause', 24:6, *Third World Quarterly*, (2003), pp. 1011-1028.
- George Tsogas 'Labour Standards in the Generalized Systems of Preferences of the European Union and the United States', 6:3, *European Journal of Industrial Relations*, (2000).
- Leary, Virginia A. 'The WTO and the Social Clause: Post-Singapore', 8:1, *European Journal of International Law*, (1997), pp. 118-122.

Other Sources

Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee: *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation*, COM (2001) 416 final, p. 3, available via <europa.eu.int>, last visited the 8 April 2005.

ICFTU, *Building workers' human rights into the global trading system*, 1999.

ICFTU, *Behind the Brand Names- working conditions and labour rights in export processing zones*, 2004.

Kipkorir Aly Azad Rana, *The multilateral trading system: Why East Africa must remain engaged*, Second East African Business Summit, Key Note Address, 2003, available on <www.wto.org/english/news_e/news03_e/speech_rana_19sep03_e.htm>, last visited the 18 February 2005.

Lejo Sibbel, *Linking Trade with Labour Rights: the ILO Garment Sector Working Conditions Improvement Project in Cambodia*, 2004, Master thesis at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law.

Mary Cornish and Veena Verma, *Enforcing International Labour Standards In the America in an Era of Free Trade*, presentation to The Canadian Bar Association's 3rd Annual International Law Conference "Few Barriers or No Barriers? Directions in International Law and Practice", 2002, Ottawa, Ontario, available on www.cavalluzzo.com/publications/newsletters/labour%20paper%20may31-02.pdf, last visited the 24 March 2005.

Mike Moore addressing the ICFTU in 1999, available on www.wto.org/english/thewto_e/minist_e/min99_e/english/press_e/pres152_e.htm, last visited the 18 March 2005.

OECD, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, 1996.

Robert J.S. Ross and Anita Chan, *Reframing the Issue of Globalization and Labour Rights*, 2002, Presentation at the Political Economy of World-Systems, available on irows.ucr.edu/conferences/pews02/ppross.doc, last visited the 18 April 2005.

The Gateway to the European Union, europa.eu.int

The Office of the United States Trade Representative, *The U.S. Generalized System of Preferences Guidebook*, p. 24, available on www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html, last visited on the 15 of March 15 2005.

The ILO homepage, available on www.ilo.org.

The WTO homepage available on www.wto.org.

WTO Ministerial Declaration of Singapore, 1996.

WTO Ministerial Declaration of Cancún, 2003.

Interview with Lee Swepston, Chief, Equality and Employment Branch and Human Rights Coordinator, International Labor Office, Geneva, 22 February 2005.