

**International Labour Standards and International Trade:
Can the two be linked?**

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ABSTRACT

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LLM minithesis, Faculty of Law, University of the Western Cape.

In this paper I delve into the connection between trade policy and labour rights as probably one of the most controversial issues, which the international trading system is faced with today. Labour laws differ from country to country and of course it is a cause for concern where some countries have higher standards than others, it becomes problematic for these countries with high standards to compete with countries with lower standards. Even though there is a definite link between trade and labour, my argument is that incorporating labour standards into the international trading system is not the best way forward to deal with the problem of abuse of labour standards.

I further investigate the two organizations at the forefront of this debate, being the WTO and the ILO. In an attempt to ascertain which of the two is the best forum to deal with the issue I further look at the relationship between these two organizations.

Compliance with international labour standards is a growing concern as world-wide standards are deteriorating and nothing is being done to alleviate the problem. Accordingly, I explore the causes for the abuse of labour standards and

seek to find the better alternative, by looking at the respective positions of the parties who are for and against the linkage of trade with labour standards. Here the views and concerns of the developed world are weighed up against those of the developing world and looking at possible alternatives concludes the paper.

November 2005



DECLARATION

I declare that *International Labour Standards and International Trade: Can the two be linked?* is my own work, that it has not been submitted before any degree or examination in any other university, and that all the sources used or quoted have been indicated and acknowledged as complete references.

Student

date



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1. INTRODUCTION

1.1 Background to the study

In recent years it has been noted that not many topics inspire vibrant debating like the issue of linking trade with core labour standards. Moreover, this question has become a significant one in the World Trade Organization (WTO) and the International Labour Organization (ILO). This issue has a long history dating back to 1919, when the ILO was formed¹. There were in total over sixty attempts made to link labour standards and trade during the period from 1919 to 1991². The United States (US) pushed for the addition of a labour standards article to GATT in 1953 and again at the Tokyo and Uruguay Rounds³. At the Uruguay Round the US and France proposed that the relationship between labour standards, social justice and trade concerns should be included in the WTO Agenda⁴. The US implementing statute for the Uruguay Round called for the establishment of a working group within the WTO “to examine the relationship of internationally recognised worker rights to the articles, objectives and related instruments of GATT.”⁵

After the completion of the Uruguay Round, connecting international trade with core labour standards became significant to the policy agenda of the WTO.⁶ The majority of WTO members, i.e. most developing countries, are against a trade and labour

¹ Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

² *Ibid.*

³ Lawrence, Robert Z (1996) 119.

⁴ Cleveland, S H “Human rights sanctions and the WTO” *Environment, Human Rights and Free Trade* edited by Francioni, Francesco (2002) 202.

⁵ *Ibid.*

⁶ Mansoor, Farkhanda “The WTO versus the ILO and the case of child labour” <http://webjcli.ncl.ac.uk/2004/issue2/mansoor2.html>. [accessed on 24/02/2005].

relation at the WTO⁷. They believe that such an association is a mere disguise for protectionism, and because the issue is mostly pursued by developed nations, the developing countries are of the opinion that the standards, which will be set, will not be relevant for developing countries⁸. On the other hand those in favour of a trade and labour connection contend that it will provide a compelling motivation for member countries to improve their own workplace circumstances⁹.

Besides the developed world, there are many organizations, especially trade unions and non- governmental organizations that want the WTO to deal with core labour standards. In addition, many non –governmental organizations advocating labour standards and human rights, also want this issue to be brought into the framework of the WTO¹⁰. They of course have the welfare of workers at heart and they believe that placing labour in the WTO would further their cause and provide for a better enforcement mechanism than provided by the ILO¹¹. This argument is based on moral considerations, which take into account labour rights in the exporting industry as a whole.

However, there is also an economic argument for the inclusion of labour standards into the international trading system¹². One accordingly needs to distinguish between the moral and economic arguments. This distinction is important since one has to be aware of the fact that the most flagrant cases of exploitation of workers are generally

⁷ Brewster, G “In Focus: WTO Trade And Labor Standards”
<http://www.lightparty.com/ForeignPolicy/FPIP-5-15.html> [accessed on 28/10/04]

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

¹¹ *Ibid.*

¹² Hocking & Mcguire (1999) 115.

not found in the export sector¹³. The most blatant abuse occurs in the informal markets like farms, mines, construction industries and small businesses that mostly produce goods for the domestic market. This does not mean that labour abuses do not take place in the export industry, but this usually shows that the violations in the other sectors are even worse¹⁴.

Trade and labour are interrelated, since production is needed before trade can take place. Proponents', for bringing the issue under the purview of the WTO, arguments are based on this fact and thus they believe that labour ought to be enforced through the trading system. By bringing the matter to the WTO, governments would be forced to maintain respect for core labour standards as the WTO has the ammunition to enforce compliance through its dispute settlement system¹⁵.



Proponents against such a link on the other hand believe that compliance with labour standards is subject to a country's growth and the spread of national wealth and that it is not a matter of international trade¹⁶. Developing countries are able to compete in the international economy because of their lower standards and this is, whether you approve or disapprove, their comparative advantage¹⁷.

At present, not any of the WTO agreements deal with any of the core labour standards and this has become a matter of great concern for some member governments¹⁸. We

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Cleveland, S H "Human rights sanctions and the WTO" *Environment, Human Rights and Free Trade* edited by Francioni, Francesco (2002) 202.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Doha 4th Ministerial Briefing Notes: Trade and Labour Standards, A Difficult Issue For Many WTO Member Governments. Found at the WTO's official website at http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm [accessed on 28/10/04].

are therefore made aware of the fact that international trade and labour standards should not be seen as a discrete, isolated, contextual or even a moral dilemma, but it must be seen giving cognisance to all the various circumstances surrounding the issue. We will only be able to achieve a common ground on the issue when we look at all the circumstances surrounding poor labour standards. One must never lose sight of the long- and short - term effects that such a change in conditions might bring about and the interests of the parties involved must also be kept in mind. The question as to whether core labour standards play an important role in shaping trade performance will be important to the outcome of this debate.

1.2 Purpose of the study

The anti-globalisation protests in Seattle uttered concerns about the consequences of trade when workers in developing countries are working under atrocious and une ven circumstances¹⁹. Labour conditions across the world are deteriorating. War and civil unrest have expatriated millions of people and the collapse of family structures has increased single-parent families²⁰.

These WTO Trade Talks in Seattle brought unparalleled attention to the relationship between trade issues and human rights concerns especially labour concerns. There was an outcry for the development of a new agenda on environmental and labour standards.

¹⁹ Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

²⁰ Wolf, T “International labour standards and the WTO”
<http://www.stud.unisg.ch/~oikos/ModelWTO/modelWTO2000/labourstandards.htm>

The international community has a duty to promote basic worker's rights and help the eradication of child labour²¹. This study thus aims to assess whether a trade and labour link at the WTO would be feasible, effective and whether the WTO is the proper venue to discuss labour issues. In other words, this paper examines the merits of linking trade with labour by exploring various issues. This will in turn, hopefully, lead to finding a middle ground where the concerns of the developed world are balanced out with the concerns of the developing nations in an effort to eradicate deteriorating labour standards in the market place. Other alternatives will also be examined in the attempt to discover the best way in which labour standards can gain the magnitude it deserves.

1.3 Contents of the study



This study is divided into six parts. Part one is of course the introduction and gives an overall framework of the study. Part two gives an overview of the international labour law regime and the instruments in place dealing with the rights of workers. It further investigates the work of the ILO, currently the only international body tasked with dealing with labour issues.

Part three deals with the international trade law regime (WTO) and focuses on the WTO Trade Conferences where the subject of core labour standards was discussed. Part four investigates the effects of trade liberalisation and globalisation on labour rights and we also look at the opposing views of the developed world against the

[accessed on 24/02/2005].

²¹ Van Liemt, G "International trade and workers' rights: More than a conditional link?" *Trade Politics International, Domestic and Regional Perspectives* edited by Hocking, B *et al* (1999) 111.

developing world with emphasis being placed on the issue of child labour and the reasons for it.

Part five discusses the relationship between the WTO and the ILO and the feasibility and effectiveness of incorporating labour standards into the multilateral trade framework. Part six is the conclusion and possible solutions and recommendations are discussed.



2. OVERVIEW OF INTERNATIONAL LABOUR LAW

2.1 Origin of International Labour Law / (Creation of the ILO)

Movements toward the establishment of an international labour convention date back to the beginning of the 19th century. In the mid 19th century, private associations took up the idea of an international labour convention²². Subsequently, many proposals were made to promote international regulation of labour matters, especially in the French and German parliaments²³. In May 1890, the Swiss government suggested the convening of a conference on this matter²⁴. This led to the adoption of the first two international labour conventions in 1905 and 1906²⁵ respectively. The first one prohibiting night work for women in industrial employment and the second prohibiting the use of white phosphorus in manufacturing matches²⁶.



During World War I, trade unions from across the globe insisted that peace treaties contain clauses for improving conditions for workers²⁷. A special commission namely the Commission on International Labour Legislation was established to deal with the matter²⁸. The work of the Commission accordingly led to the inclusion of the Treaty of Versailles and other peace treaties, which dealt with core labour standards²⁹.

²² ILO Bureau for Worker's Activities International Labour Law, found on the ILO's Official website at: <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm> [accessed on 24/11/04].

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Brown, Drusilla Labor Standards: Where do they belong on the International trade Agenda? <http://web35.epnet.com/citation.asp?tb=1& ug=sid+22BC6DC2%2DAAB8%2D4297%2DA557%2D.htm> [accessed on 24/11/04].

²⁸ *Ibid.*

²⁹ *Ibid.*

At the end of World War I the International Labour Organization (ILO) was created³⁰. The ILO was a derivative of the League of Nations and initially had 44 member countries from Europe, Asia, Africa and South America.³¹ Originally ILO discussions focused on the abolition of slavery and all forms of forced labour³². Nevertheless a broader labour rights agenda also included the rights to freedom of association and collective bargaining, non-discrimination in employment and the elimination of child labour³³.

With the creation of the ILO labour law was no longer constrained to single countries and confined by national borders, but it became international law, thus comparative law had to play an essential role in this respect³⁴.

2.2 Purpose of International Labour Law



Ranges of opinions have been advanced over the years in support of international labour law. International Competition is one argument used throughout the 19th and early 20th centuries, the claim was that international labour law would help international competition take place not to the disadvantage of workers³⁵. Today,

³⁰ Berenstein, Alexander Origin and development of the International Society for Labour Law and Social Security, found on the ILO's official website at: http://www-ilo-mirror.cornell.edu/public/english/dialogue/ifpdial/isliss/isliss_1.htm [accessed on 24/11/04].

³¹ *Ibid.*

³² ILO Bureau for Worker's Activities International Labour Law, found on the ILO's Official website at: <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm> [accessed on 24/11/04].

³³ Brown, Drusilla Labor Standards: Where do they belong on the International trade Agenda? <http://web35.epnet.com/citation.asp?tb=1& ug=sid+22BC6DC2%2DAAB8%2D4297%2DA557%2D.htm> [accessed on 24/11/04].

³⁴ Berenstein, Alexander Origin and development of the International Society for Labour Law and Social Security, found on the ILO's official website at: http://www-ilo-mirror.cornell.edu/public/english/dialogue/ifpdial/isliss/isliss_1.htm [accessed on 24/11/04].

³⁵ ILO Bureau for Worker's Activities International Labour Law, found on the ILO's Official website at: <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm> [accessed on 24/11/04].

³⁶ *Ibid.*

globalisation has again brought attention to the relationship between competition and substandard labour conditions.

Moreover, after World War I (WW I), it was argued that unfairness in the social field endangered world peace, thus action had to be taken against injustices in the workplace to ensure peace³⁶. It was believed that international labour standards created international unity and encouraged mutual cooperation and understanding between nations.³⁷

International labour law aims to secure social justice and consolidation of national labour legislation. It strives to serve as a source of inspiration for national action by governments, in giving guidance on the basis of their authority as texts and ultimately fulfilling the purpose of becoming “international common law”³⁸.



2.3 Objectives of the ILO

The ILO is the main body regulating international labour standards and aims to build an international consensus on labour standards through its Conventions and Recommendations³⁹. The ILO aspires to improve living standards and to relieve inequality and injustice experienced by workers, by means of gradual reform⁴⁰.

³⁷ *Ibid.*

³⁸ Berenstein, Alexander Origin and development of the International Society for Labour Law and Social Security, found on the ILO's official website at: http://www-ilo-mirror.cornell.edu/public/english/dialogue/ifpdial/isliss/isliss_1.htm [accessed on 24/11/04].

³⁹ Brown, Drusilla Labor Standards: Where do they belong on the International trade Agenda? http://web35.epnet.com/citation.asp?tb=1&_ug=sid+22BC6DC2%2DAAB8%2D4297%2DA557%2D.htm [accessed on 24/11/04].

⁴⁰ Castle, R *et al* 'Labour Clauses, The World Trade Organization and Child Labour in India' *The Global Economy, National States and the Regulation of Labour* edited by Edwards, P & Elger, T (1999) 183.

In May 1944, the objectives of the ILO were defined in the Philadelphia Declaration.

“The Declaration reiterated the following:

- ◆ labour is not a commodity,
- ◆ freedom of expression and of association are essential to sustained progress,
- ◆ poverty anywhere constitutes a danger to prosperity everywhere and
- ◆ the war against want requires to be carried on with unrelenting vigour 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 them in free discussion and democratic decision with a view to the promotion of the common welfare.”⁴¹

“The Declaration further defined a number of objectives of the ILO, namely

- ◆ full employment and the raising of standards,
- ◆ facilities of training policies in regard to wages, hours of work and other conditions of work calculated to ensure a just share of the fruits of progress to all,
- ◆ the effective recognition of the right to collective bargaining,
- ◆ the co-operation of management and labour in the continuous improvement
- ◆ of productive efficiency, and
- ◆ the collaboration of workers and employer in the preparation and application of social and economic measures, the extension of social security measures

⁴¹ ILO Bureau for Worker’s Activities International Labour Law, found on the ILO’s Official website at: <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm> [accessed on 24/11/04].

to provide a basic income to all in need of such protection, and comprehensive medical care, etc.”⁴²

From the above it becomes evident that the ILO seeks to level out the playing field between workers, employers and governments. Looking at international workplace conditions, we need to discern whether the ILO has succeeded in achieving these goals and present times will be crucial for the protection of workers.

2.4 Instruments of International Labour Law

2.4.1 ILO Instruments

ILO sources of international labour law can be found in the Constitution of the organization and in its Conventions and Recommendations. ILO Conventions create obligations for the states that ratify them, whereas Recommendations serve as guidelines for action⁴³. In this study our main focus will be on the Core Conventions of the ILO especially the Convention relating to the elimination of child labour. These Core Conventions were given distinction at the conclusion of the World Summit for Social Development in 1995.

The Core Conventions are the following:

1. Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87)

⁴² The Aims and Purposes of the ILO can be found in the Preamble of the Constitution of the Organization and in the Philadelphia Declaration, which was adopted in 1944 and incorporated into the ILO Constitution in 1946.

⁴³ ILO Bureau for Worker's Activities International Labour Law, found on the ILO's Official website at: <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm> [accessed on 24/11/04].

This convention provides for workers and employees to form and join organizations of their choice and protects these organizations from interference by government.

2. Right to Organize and Collective Bargaining Convention, 1949 (No 98)

Affords protection against anti-union discrimination and interference by workers' and employers' organizations and it also promotes and provides measures for collective bargaining.

3. Forced Labour Convention, 1930 (No 29)

Calls for the suppression of forced labour in all its forms, however certain exceptions are allowed, for example military service, emergencies such as wars, fires, earthquakes, etc.



4. Abolition of Forced Labour Convention, 1957 (No 105)

Prohibits forced labour as a form of punishment for expressing political views or for participation in strikes. It also provides that forced labour may not be used as a means of political coercion or as discrimination.

5. Discrimination (Employment and Occupation) Convention, 1958 (No 111)

Calls for the implementation of national policies to help eliminate discrimination in the workplace based on race, sex, religion etc, and to promote equality of opportunity and treatment.

6. Equal Remuneration Convention, 1951 (No 100)

Promotes equal pay for men and women alike.

7. Minimum Age Convention, 1973 (No138)

Promotes the elimination of child labour and lays down the minimum age for admission to employment, which shall not be less than the age of completion of compulsory schooling, and in any event not less than 15(fifteen) years (14 for developing countries).

Member states have a choice whether to ratify these Conventions and at present not more than 70% of ILO member governments have ratified these Core Conventions⁴⁴. In 1998, at the 86th International Labour Conference the ILO Declaration on Fundamental Principles and Rights at Work was adopted⁴⁵. This Declaration states that all member countries are obligated to respect the fundamental principles of freedom of association, collective bargaining, elimination of child labour and the elimination of discrimination, irrespective of whether they have ratified the relevant conventions or not.⁴⁶

In essence the ILO Declaration on Fundamental Principles and Rights at work seeks to maintain the connection between social progress and economic growth. It is significant in that it enables workers to claim freely and equally their share of the wealth, which they have helped to generate.

⁴⁴ Castle, R *et al* 'Labour Clauses, The World Trade Organization and Child Labour in India' *The Global Economy, National States and the Regulation of Labour* edited by Edwards, P & Elger, T (1999) 184.

⁴⁵ ILO Bureau for Worker's Activities International Labour Law, found on the ILO's Official website at: <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm> [accessed on 24/11/04].

⁴⁶ Part 1, ILO Declaration on Fundamental Principles and Rights at Work.

Countries that have ratified the ILO's conventions are obliged to report regularly as to their compliance with the conventions they have ratified⁴⁷. In addition, employers' and workers' organizations are allowed to report to the ILO as to the state's compliance and furthermore, any other member of the ILO can bring evidence to the ILO of a country's failure to comply with ratified conventions⁴⁸. Freedom of association complaints can also be brought against countries even when a country has not ratified any convention relating to the issue.⁴⁹ Where problems exist regarding compliance, the ILO starts up a consultative process with member governments, providing technical support and drawing press attention to the matter⁵⁰.

2.4.2 United Nations Instruments

The United Nations (UN) recognizes the ILO as the specialized agency responsible for the accomplishment of the aims set out in the ILO's Constitution. However, some UN instruments cover labour matters generally⁵¹. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights are legally binding agreements that contain provisions relating to labour matters⁵².

The General assembly of the UN has also adopted a number of Conventions relating to labour⁵³. The Convention on the Elimination of All Forms of Racial Discrimination

⁴⁷ Berenstein, Alexander Origin and development of the International Society for Labour Law and Social Security, found on the ILO's official website at: http://www-ilo-mirror.cornell.edu/public/english/dialogue/ifpdial/isliss/isliss_1.htm [accessed on 24/11/04].

⁴⁸ See ILO Articles 24 and 26 respectively

⁴⁹ ILO Conventions 87 and 98.

⁵⁰ Rejano, L, The Philippines, 26/11/99-MNC's and Trade Unions <http://www.ilo.org/public/english/bureau/inst/project/network/global.htm> [accessed on 24/11/04].

⁵¹ ILO Bureau for Worker's Activities International Labour Law, found on the ILO's Official website at: <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm> [accessed on 24/11/04].

⁵² *Ibid.*

⁵³ *Ibid.*

(1969), Elimination of All Forms of discrimination Against Women (1979), Rights of the Child (1989), Status of the Refugees (1954) and Status of Stateless Persons (1960), are the most important international human rights Conventions dealing with labour matters⁵⁴.

2.4.3 Regional Instruments

In the mid 1940's, after the end of World War II, numerous regional organizations in Europe adopted legal instruments on labour matters⁵⁵. For example, the European Social Charter (1961) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) were adopted by the Council of Europe. In South America only a few of the newly created regional organizations have adopted labour instruments⁵⁶.



In North America, the North American Free Trade Area (NAFTA) has the American Agreement on Labor Cooperation⁵⁷. The Caribbean Community and Common Market (CARICOM) has an Agreement on Social Security, but the Organization of American states (OAS) is the major source of international labour law in the North American region⁵⁸.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Castle, R *et al* 'Labour Clauses, The World Trade Organization and Child Labour in India' *The Global Economy, National States and the Regulation of Labour* edited by Edwards, P & Elger, T (1999) 184.

⁵⁸ ILO Bureau for Worker's Activities International Labour Law, found on the ILO's Official website at: <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm> [accessed on 24/11/04].

In Asia, none of the regional organizations have adopted instruments relating to labour matters⁵⁹. In Africa, the Southern African Development Community (SADC), the Common Market of Eastern and Southern Africa (COMESA) and the African Union (AU), all have legal instruments, which deal with labour law⁶⁰.

The question remains, have all these instruments regulating labour law succeeded in their common goal in creating greater respect and awareness of labour standards. Many believe that even with all of these instruments in place, labour standards worldwide have deteriorated to such an extent that there is now an outcry for something to be done. Labour rights activists argue for the incorporation of labour standards into the WTO in order to provide better enforcement power of such standards.

2.5 Critique of International Labour Standards



Enforcement of labour standards is a matter for the country's government. The ILO is a tripartite structure represented by employers, unions and governments from member countries⁶¹. The Conventions promulgated by the organization only have the force of international law if ratified by members. Ratification is voluntary and the ILO does not have a mechanism for acting against breaches of its standards⁶². Accordingly, observance of standards depends on diplomacy, persuasion and governmental policies⁶³. The fact that states can ignore the ILO's Conventions by choosing not to ratify them, limits the organization's capacity to act as an agent advancing social

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

⁶² *Ibid.*

⁶³ *Ibid.*

reform⁶⁴. The ILO does not have a sufficient enforcement mechanism and only monitors and provides members with advice and technical support⁶⁵ on labour issues.

Even though the organization developed over 180 labour standards, many of these standards are not agreed to, or ratified by members and some standards have become outdated and irrelevant⁶⁶. Changing social conditions, for example equal employment opportunities for women, have required countries to de-ratify certain standards⁶⁷. The worldwide decline of labour movements, especially in the United States (US), has turned labour standards from potentially having powerful authority to a force struggling against further decline⁶⁸.

Having regard to the numerous labour standards contemplated by the ILO, critics also indicate the unfairness of having so many standards covering all these areas without regard for the level of economic growth and national standards⁶⁹ of countries. For instance, it is argued that the practice of child labour depends on the economic development level of countries and that the income earned by children is crucial for the survival⁷⁰ of many families.

From a distance the countless standards of the ILO look very impressive, but when we take a closer look it becomes evident that they are not given the respect they ought to

⁶⁴ Rejano, L, The Philippines, 26/11/99-MNC's and Trade Unions

<http://www.ilo.org/public/english/bureau/inst/project/network/global.htm> [accessed on 24/11/04].

⁶⁵ Brown, Drusilla "Labor Standards: Where Do They Belong on the International Trade Agenda?" <http://web35.epnet.com/citation.asp?tb=1& ug=sid+22BC6DC2%2DAAB8%2D4297%2DA557%2D.htm> [accessed on 24/11/04].

⁶⁶ Castle, R *et al* 'Labour Clauses, The World Trade Organization and Child Labour in India' *The Global Economy, National States and the Regulation of Labour* edited by Edwards, P & Elger, T (1999) 183.

⁶⁷ Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

⁶⁸ Rejano, L, The Philippines, 26/11/99-MNC's and Trade Unions

<http://www.ilo.org/public/english/bureau/inst/project/network/global.htm> [accessed on 24/11/04].

receive. Take the United States for instance, they are the leading force behind the drive for an international labour standards framework in the WTO, but not even they have ratified⁷¹ all of the ILO Core Labour Conventions.

Diverse international labour standards are a valid cause for concern, but the appropriate response to this problem remains an enigma. In the next section of this paper we will look at the World Trade Organization (WTO) the other organization at the helm of our debate.



⁶⁹ Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

3. OVERVIEW OF INTERNATIONAL TRADE LAW (WTO)

3.1 The World Trade Organization (WTO)

The World Trade Organization (WTO) is the body, which regulates international trade. It was established on 1 January 1995 after the completion of the Uruguay Round of trade negotiations in 1994. The organization is headed by the Ministerial Conference, which is comprised by member states and meets at least every two years⁷². The General Council regulates the day-to-day running of the organization and reports to the Ministerial Conference and other supplementary bodies⁷³.

As the GATT before it, the WTO forms the corner stone of the multilateral trading system. It furnishes the institutional framework for the system of rights and obligations for trade in goods and services and for certain aspects of intellectual property⁷⁴. It is underpinned by rules and procedures for the settlement of disputes. Members of the organization recognize their commitments and they vary from member to member and are all enforceable through the dispute settlement system of the WTO⁷⁵.

The WTO does not form part of the United Nations (UN) and is not a specialized agency of the UN like the International Monetary Fund (IMF) and the World Bank. It is an inter-governmental forum and contains a framework for the enforcement of its rights and obligations through agreements⁷⁶. The WTO is an institution that is equipped to impose sanctions on violations of its rules; this is what most proponents

⁷² Marrakesh Agreement Establishing the World Trade Organization, *Article IV*

⁷³ *Ibid.*

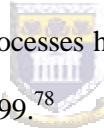
⁷⁴ Lal Das, Bhagirath (2003) 13.

⁷⁵ *Ibid.*

for the link argue is missing from the ILO system and this is what sets the WTO apart from other Human Rights systems⁷⁷.

The WTO is there to ensure that that trade liberalization takes place and it provides the framework for trade liberalization to take place. Ultimately, the goal of the WTO is freer trade, however the organization claims that just as important a free trade is to the agenda of the WTO, so are its key principles that include principles of non-discrimination and equality. Later in this section we will take a closer look at these principles.

The creation of the WTO has changed the position of international trade within the international legal order. International trade has become a subject of great interest and the legitimacy of the organization's processes has become the focus of ruthless protest like the ones demonstrated in Seattle '99.⁷⁸



The issue of linking trade with core labour standards has been with the organization ever since its creation in 1994. In April 1994 at Marrakesh, nearly all representatives expressed their views on this issue. There was no consensus and therefore no basis for agreement on the issue. However, the preamble of the Marrakesh Agreement states “relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living (and) ensuring full employment...”. This shows that the WTO does recognize the rights of workers and also that in essence there does exist a link between trade and labour.

⁷⁶Francioni, Francesco (2002) 1.

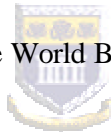
⁷⁷ ILO Bureau for Worker's Activities International Labour Law, found on the ILO's Official website at: <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm>.

⁷⁸ Francioni, Francesco (2002) 1.

3.2 Objectives of the WTO

The goal of the WTO is to promote free and fair trade, economic growth, sustainable development and undistorted competition.⁷⁹ *Article III* of the Marrakesh Agreement sets out the functions of the WTO to realize its objectives. These functions are:

- ◆ to provide a framework for the implementation, administration and operation of the trade agreements,
- ◆ to provide a forum for negotiations among its members’
- ◆ to administer the Understanding on Rules and Procedures Governing the settlement of disputes,
- ◆ to administer the Trade Policy Review Mechanism and
- ◆ to achieve greater coherence in international economic policy-making by cooperating with the IMF and the World Bank.⁸⁰



It is important to note that the WTO is a member driven institution and the decisions are taken by consensus by all its members.⁸¹ These agreements require all members to apply their trade rules consistently, openly and fairly and failure to do so will result in sanctioned retaliation and other disciplinary action.⁸² WTO processes and principles enjoy great envy from other organizations as it sets the bar on how the organization deals with issues within its purview.

⁷⁹ Dunkley (2004) 191.

⁸⁰ *Article III* (1) – (5) of the Marrakesh Agreement Establishing the WTO.

⁸¹ ILO Bureau for Worker’s Activities International Labour Law, found on the ILO’s Official website at: <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm>.

⁸² Lal Das, Bhagirath (2003) 13.

⁸³ *Ibid.*

3.3 Key WTO Principles

The WTO's main principles were put in place with the understanding that members must apply their trade rules in a manner, which is consistent, fair, transparent and equal. Failure to adhere to these principles can have dire consequences for countries that are in breach of them.

The Most- Favoured Nation Principle (MFN)

The 'most-favoured nation' principle prohibits members from discriminating between 'like products' of other members⁸³. When the WTO gives one country a trading privilege, it has to offer the same benefit to other members; in other words, all members are treated as 'most-favoured nations'.

Of course with everything in law, where there is a rule, there is an exception to that rule and this principle is no different. For example, regional trade agreements as for instance, the North American Free Trade Areas (NAFTA), which offers special customs treatment to countries within the region, and the principle of Special and Differential treatment for Developing Countries within the WTO are a few examples of the exceptions to this principle⁸⁴.

National Treatment

In terms of the 'national treatment' principle, once foreign products have entered a country's domestic market, these "foreign" products are to be treated the same as

⁸⁴ Dunkley (2004) 191.

⁸⁵ *Ibid.*

locally produced goods⁸⁵. In other words, imported goods and services should be treated in the same way domestic goods and services are treated.

This principle is found in the three main WTO agreements: trade in goods regulated through the General Agreement on Tariffs and Trade (GATT); trade in services which is regulated through the General Agreement on Trade in Services (GATS) and intellectual property rights which are regulated through the Trade-Related Intellectual Property Rights Agreement (TRIPS)⁸⁶.

This principle therefore only applies to products within a country's borders, in other words, countries are not restricted from charging custom duties on products entering the country and they are not prohibited from exercising other custom procedures⁸⁷.

Critics argue that 'national treatment' restricts developing countries' economic development options. They contend that their growing economies cannot compete in the international market without fostering national economic development by giving preference to locally produced goods and services⁸⁸.

Transparency

Certain notification requirements and the trade Policy Review mechanism are set out in the WTO Agreements. The aim of this is to ensure the fullest transparency possible in the trade policy of members⁸⁹. Article X of GATT '94 deals with the publication

⁸⁶ *Ibid.*

⁸⁷ Mansoor, Farkhanda "The WTO versus the ILO and the case of child labour" <http://webjcli.ncl.ac.uk/2004/issue2/mansoor2.html>. [Accessed on 24/02/2005].

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

and administration of trade regulations and Article II of GATS sets out provisions on transparency as one of the general obligations under the agreement⁹⁰.

Binding of Tariffs

Security and predictability are achieved through “binding of tariffs”. A bound tariff is a tariff in respect of which there is a legal obligation not to raise it beyond the bound level⁹¹.

As it was previously mentioned, the WTO maintains that these principles are key to the realization of its main objectives. However in the end though, bargaining in the WTO depends on what countries are willing to sacrifice. As the maxim *quid pro quo* expresses, some sacrifices need to be made in order to gain something in return. In other words the negotiating process comes down to who is willing to give in order to receive.



3.4 Dispute Settlement Understanding (DSU)

The main feature of the WTO, which sets it apart from other organizations, is its process of dispute settlement and enforcement. Rights and obligations of the WTO are enforced through the Dispute Settlement Understanding⁹². The DSU is a central element of the organization and provides security and predictability to the multilateral trading system.

⁹¹ Raghavan, Chakravarthi “All aboard on the WTO ship?” < <http://www.twinside.org.sg/title/ship-cn.htm> > [accessed on 18/04/05].

⁹² *Ibid.*

The procedure is initiated through a request for consultations made by one member to another relating to a specific issue. If consultations fail to solve a dispute, a member may ask the Dispute Settlement Body (DSB) to form a panel, which usually consists of three independent trade experts to rule on the issue⁹³. After the hearing of the parties, the panel issues a report to the DSB. There is a possibility of appealing and any such appeal must be limited to the issues of law covered in the panel report and to the legal interpretation developed by the panel⁹⁴. Appeals are heard by the Appellate Body, which consists of seven members appointed by the DSB. The members of the Appellate Body are appointed for four-year terms⁹⁵. The parties to the dispute must unconditionally accept the report of the Appellate Body and the report is to be adopted by the DSB unless there exists a consensus against the adoption (negative consensus) of the report.



The DSB keeps close watch over the implementation of the adopted recommendations and any outstanding issue remains in its agenda until it is resolved⁹⁶. Time limits are imposed for the implementation of recommendations and if a party cannot implement them within the specified time, it is obliged to enter into negotiations with the aggrieved party in order to determine acceptable terms⁹⁷. When all else fails, the DSB may authorize the aggrieved party to suspend concessions in the interim until the infringing party implements the recommendations of the DSB.

⁹³ Berry, T 'Foreign Policy in Focus-What's This Organization (WTO): WTO Structure' http://www.fpi.org/wto/structure_body.html [accessed on 18/04/05].

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

Most critics of the DSU contend that if the WTO acknowledges a connection between the worldwide economy and social issues, it will open the flood - gates to trade – related sanctions approved by the DSU process⁹⁸. In other words developed countries would take action against smaller countries that’s labour and environmental standards would be seen as “trade distorting” as counties with lower standards seemingly will have a greater competitive advantage⁹⁹. Moreover they contend that poorer nations will rarely challenge more powerful countries for fear of retaliation with non-tariff barriers and reduced market access¹⁰⁰.

However, it is submitted that, in principle, an impartial dispute settlement process based on the rule of law may help level the playing field with wealthier countries since all countries will be obliged to respect the rules and regulations they agreed to.



3.5 Ministerial Conferences

The Ministerial Conference is the highest decision-making body of the organization and convenes at least once in every two years.¹⁰¹ The Ministerial Conference has the responsibility of executing the functions of the WTO.¹⁰² New agendas and issues are introduced at these Conferences. The Conferences, which are to be discussed, are Singapore, Seattle and Doha, where the issue of labour standards was brought to the fore.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Lal Das, Bhagirath (2003) 169.

¹⁰² *Ibid.*

¹⁰³ *Ibid* at 170.

¹⁰⁴ Director of the Third World Network.

¹⁰⁵ Lal Das, Bhagirath (2003) 171.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

3.5.1 Singapore Ministerial Conference (December 1996)

At the Singapore Ministerial Meeting in 1996, an informal group of about 20-30 countries was created by the Chairman of the Conference, the Singapore Trade Minister and the WTO Director General¹⁰³. This group was created to negotiate whether the proposals on labour standards and other issues could be brought into the Conference.

It is unclear how the group was selected, but as Martin Khor¹⁰⁴ wrote about the Singapore Ministerial, the developed countries were well represented and only a few developing countries were included¹⁰⁵. This was of course a source of discontent for the developing countries, because they were being shut out of the negotiating process. The delegations that were being excluded from the process expressed their discontent at being kept in the dark.¹⁰⁶ A day before the closing of the Conference, all the WTO delegates were assembled and provided with texts relating to the contentious issues.¹⁰⁷

After five days of meetings and negotiations, the WTO reached a concession. It recognized the importance of core labour standards, but maintained that the ILO was the most appropriate forum to deal with the issue of labour standards.¹⁰⁸ The section dealing with core labour standards in the Singapore declaration states the following:

¹⁰⁸ Mansoor, Farkhanda "The WTO versus the ILO and the case of child labour" <http://webjcli.ncl.ac.uk/2004/issue2/mansoor2.html>. [Accessed on 24/02/2005].

*“We renew our commitment to the observance of internationally recognized core labour standards. The 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 liberalisation 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.”*¹⁰⁹

This part of the declaration opens the possibility for labour standards to still find its way into the WTO agenda in future. The text left delegates with mixed views and opinions. Some countries felt that this text should not have been placed in the declaration, as they believe that it leaves the door open for a future link¹¹⁰. Other countries, on the other hand, believe that the inclusion of this clause in the declaration settles the way in which the WTO looks at the question of labour standards permanently¹¹¹.

Yeo Cheow Tong’s, Singapore Trade Minister and Chairman of the Conference, interpretation of this clause is that¹¹², “...there is no authorization in the text for any

¹⁰⁹ The full text of the Singapore Declaration can be found on the WTO’s official website at <http://www.wto.org>

¹¹⁰ Lal Das (2003) 15.

¹¹¹ Virginia A Leary “The WTO and the Social Clause: Post Singapore” <http://ejil.org/journal/vol8/no1/art7.html> [accessed on 11/05/05].

¹¹² *Ibid.*

¹¹³ Raghavan, Chakravarthi “All aboard on the WTO ship?” < <http://www.twinside.org.sg/title/ship-cn.htm> > [accessed on 18/04/05].

new work on this issue...” He further stated that¹¹³, “some delegations had expressed the concern that this text may lead the WTO to acquire a competence to undertake further work in the relationship between trade and core labour standards. I want to assure these delegations that this text will not permit such a development.”¹¹⁴

It is submitted that this part of the declaration is significant, in that, it is the very first time that labour standards are mentioned in an official WTO text. Moreover, it is a clear statement by WTO members of their support for labour standards. This text does not authorize new work on the issue; however¹¹⁵, the debate will continue to be an issue at the WTO as developed countries will continue to push for new work on the issue.

3.5.2 Seattle Ministerial Conference (November-December 1999)



The Seattle conference held in 1999 was a disaster from the start. The Conference was met by protests coming from human rights activists, NGO's and anti-globalisation activists¹¹⁶. The Conference ended in chaos and failed to launch the intended Millennium Round of the first WTO trade negotiations. Another cause for the failure of Seattle '99 was of course the dissent between the developed world and the developing world concerning subjects like labour and the environment¹¹⁷.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Virginia A Leary “The WTO and the Social Clause: Post Singapore” <http://ejil.org/journal/vol8/no1/art7.html> [accessed on 11/05/05].

¹¹⁷ Lal Das, Bhagirath (2003) 173.

¹¹⁸ *Ibid.*

The decision-making process of the WTO was hit hard by the failure in Seattle¹¹⁸. The major developed countries, namely the US and the European Union (EU) put up a convincing argument for including labour standards in the WTO. However, these proposals were entirely rejected by the developing world¹¹⁹. The Conference ended in complete disarray, without even formally closing the Conference. However, Seattle was a useful learning experience. It gave the organization the initiative to prevent such a mishap from happening at consequent Conferences by being better prepared. No decision was taken in Seattle.

3.5.3 Doha Ministerial Conference (November 2001)

Developed countries still pushed for the inclusion of a labour clause into the WTO framework at the Doha Ministerial Meeting of 2001. Moreover, trade union representatives wanted the WTO to commit itself to collaboration with the ILO¹²⁰. However, this proposal was rejected by a number of developing countries in Africa and Asia¹²¹. They argued that further discussion on this issue would disrupt the Doha Ministerial Meeting in the same way the meeting in Seattle was disrupted.¹²² Thus, the Doha Declaration sustained the Singapore declaration, maintaining that the ILO was the appropriate body to deal with labour issues.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Panagariya, Arvind "The return of labour standards in the WTO?"

<http://www.bsos.umd.edu/econ/panagariya/apecon/ET/et-06-nov99.htm> [accessed on 24/02/2005].

¹²² *Ibid.*

¹²³ *Ibid.*

Doha did produce an agreed Work Programme also being called the Doha Development Agenda¹²³. Many developing countries find this ironic; because it created the illusion that the decisions implemented are in favour of the developing world, whereas in reality, the content is astoundingly in favour of the developed world¹²⁴. This fact has impacted negatively on the WTO's credibility, especially in the eyes of developing countries (125).

One can denote from the outcomes of these Conferences that the developed nations are given more scope than developing nations. It is also evident that the developing countries have taken a firm stance against the issue of the inclusion of a labour clause, where they have been prone to compromise on other issues like the environment. How long they will stand firm against such an inclusion, only time will tell.



¹²⁴Lal Das (2003) 16.

4. TRADE, LABOUR AND GLOBALIZATION

4.1 Globalisation

Globalization is a modern day wonder, which has attracted worldwide attention. It is an occurrence, which has various implications for the regime of international law¹²⁵ and most importantly, for purposes of this study, international trade and labour law. More and more countries take part in the world economy and this is changing the design of international trade and it is progressively becoming fixed in our day-to-day operations¹²⁶. In other words, in daily life we all take part in the worldwide economy whether we are aware of it or not.

The rapid growth in the process of economic globalisation has raised concerns regarding the ability of states and labour organizations to sustain the core labour standards, which are essential in preserving human worth¹²⁷. Globalisation, especially trade liberalization, is seen as the cause for very poor working conditions in developing countries and loss of jobs in developed countries. It is comforting to witness the ILO's attempts to promote labour rights in the present global economy. However, the reality is that it is an uphill battle, because the international economy is not regulated by the universal democratic principles of civil society¹²⁸. Many believe that globalisation jeopardizes both national and local governance and it raises the

¹²⁵ *Ibid.*

¹²⁵ Oloka-Onyango, J & Udagama, D 'The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights'
<<http://www.unhcr.ch/Huridocda/Huridoca...3do425a0cec125693500484d2f?OpenDocument>>
[accessed on 18/12/04].

¹²⁶ European Union Publication's Office 'Making Globalization Work For Everyone: The European Union and World Trade' <http://www.eu.org.html> [accessed on 18/12/04].

¹²⁷ Rejano, L, The Philippines, 26/11/99-MNC's and Trade Unions
<http://www.ilo.org/public/english/bureau/inst/project/network/global.htm>.

¹²⁸ *Ibid.*

question as to who will be in command of the new global, national and local economies¹²⁹.

The impact of globalisation on employment is a broader question than the impact of trade on employment. The trade element is an important one though, but it is not the only deciding factor. Statistics show that technology poses more of a threat to employment than trade. The spread of globalisation and its effect on trade and competition has struck fear into the hearts of many workers in developed economies, as they believe that companies will move production to a different country¹³⁰ with seemingly lower standards.

4.1.1 Globalisation and the WTO



The WTO is relatively still a very young organization, but it has become the organization that is most frequently associated with globalisation. Free trade, open markets and tariff reductions are principles of the organization that have provided the foundation for modern developments related to globalisation. The WTO has often been described as “the practical manifestation of globalisation in its trade and commercial aspects”.¹³¹

The globalizations of markets and production have led to national economies becoming more integrated and trade to become freer flowing. As Thomas Friedman, a

⁵*Ibid.*

⁶ CUTS Briefing Paper “Trade, labour global competition and the social clause” <http://www.cuts-international.org/1998-5.htm> [accessed on 05/11/04].

⁷ Mohiddin, Ahmed “Partnership: A new buzz-word or realistic relationship?” *Development*, vol 41, No 4 (1997) 7.

supporter of globalization, says, “globalization is the spread of free market capitalism to virtually every country in the world” and the WTO is one of the international institutions, which is at the forefront of the globalization of the world economy.

However, the WTO is not free from criticism on this issue, as the anti globalization protests in Seattle proved. The organization is afflicted with procedural and substantive problems, in that on the face of it, the organization seems to be democratic in its decision making process (one member one vote), thus the outcomes of decisions ought to be equitable, but they are not. After Seattle, the leadership of the organization created the impression that they would attempt to make reforms. The Ministerial Meeting in Cancun 2003 proved otherwise. The meetings were deadlocked again and just as at Seattle, the talks ended in failure.



4.1.2 Globalisation and the ILO

The ILO has long occupied itself with the occurrence of globalization in a critical fashion. The adverse impact of globalization has resulted in the violation of countless rights guaranteed by the ILO conventions¹³². Especially the right to work coupled by the right to just, equitable and fair conditions of employment, freedom of association and assembly and also the right to collective bargaining¹³³. These are just a few, but the most notable rights, which have been impaired through the processes of globalization. The ILO convention concerning the Prohibition and Immediate Action

¹³² Oloka-Onyango & Deepika Udagama “The realization of economic, social and cultural rights: Globalization and its impact on the full enjoyment of human rights”
<<http://www.unhchr.ch/Hundocda/Hundoca...3d0425a0cec125693500484d2f?OpenDocument>>
[accessed on 18/12/01].

¹³³ *Ibid.*

for the Elimination of the Worst Forms of Child Labour (No182) came about as a response to the effects of the policies of economic liberation that has led to children being subjected to all forms of harmful labour practices¹³⁴. ILO members generally agree that the ILO should contribute to the international policy framework on the question of globalization.

Michael Hensen, then Director General of the ILO wrote about international labour law and globalization, in the ILO Report of 1997, that¹³⁵:

“lifting restrictions on international trade lays the foundations for social progress as the ILO has always implicitly acknowledged, even during the worst years of economic depression. but, at the same time, this liberalization carries the risk, as the Preamble to the Constitution of the ILO warns us, that international competition, by inhibiting the will of certain Members to introduce progress, might be an obstacle in the way of other nations, which desire to improve the conditions in their own countries.

...globalisation has forced many states to carry out legislative reforms to be able to cope with international competition as best as they can. It is likely ...that the relative decline in the ratification rate of Conventions might, at least in some cases, be due to a reticence to make long-term international commitments in these circumstances. The aim is not for the International Labour Organization to achieve uniformity in the level of social protection in order to ensure a proper international competition. Rather the idea is simply to place social progress into a relationship with the economic progress expected from the liberalization of trade and globalisation.

¹³⁴ *Ibid.*

Differences in conditions and levels of protection are linked to a certain extent to differences in levels of development. Denying developing countries the advantages, which ensue from these differences would be tantamount to denying them a share in the profits of globalisation and, by extension, the possibility of subsequent social development...”

ILO members agreed to respect and promote core labour standards and the ILO issues annual reports in which the organization obtains information from governments that have not ratified all conventions on the changes that might have taken place in national laws that might affect the fundamental labour principles¹³⁶.

At the 86th International Labour Conference held in 1998, in his address to the conference the Director general said that, “...it was high time for the ILO to give itself the means to address the social consequences of the globalization of the economy.”¹³⁷ The ILO Declaration on Fundamental Principles and Rights at Work is the one ILO instrument that truly places the ILO in a better position to deal with the challenges of globalization.

Only time will tell whether the 1998 Declaration and its 2001 Follow Up will prove to be effective as we can see from the current state of affairs that many gaps still need to be filled before the ILO can truly call itself one of the major players in the globalization of the world today.

¹³⁵ See ILO, *The ILO, Standard Setting and Globalization*, 1997 <http://www.ilo.org> [accessed on 28/10/04].

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

4.2 ARGUMENTS IN FAVOUR AND AGAINST POSSIBLE LINKAGE

The renewed effort of developed countries, especially the US, to raise the issue at Seattle was a source of great concern for developing countries¹³⁸. However, developing countries were able to put their foot down and insisted on compliance with the Singapore mandate.

Developed countries are of the opinion that refusing to discuss labour standards at the WTO would lead to developing countries missing out on the opportunity to “take the high moral ground” on the issue and as a result they would be depriving themselves of the possibility of negotiating reciprocal concessions from developed countries.¹³⁹ On the other hand, developing countries maintain that the WTO is not the proper forum for discussions on the labour issue. Discussions should be in the ILO and developing countries must keep away from talks in the WTO. Furthermore, developing countries are cautious, because rich countries are in a position to threaten developing countries with retaliation or buying-off countries individually until those left standing are too few, weak and powerless to refuse not to go along,¹⁴⁰ we all of course remember the circumstances surrounding the TRIPS agreement.

The premise for the developed countries’ call for the inclusion of a labour framework in international trade is founded on the idea that unequal labour standards constitute unfair trade. It has become second nature for developed countries to claim unfair trade

¹³⁸ CUTS Briefing Paper “Trade, labour global competition and the social clause” <http://www.cuts-international.org/1998-5.htm> [accessed on 05/11/04].

¹³⁹ Panagariya, Arvind “The return of labour standards in the WTO?” <http://www.bsos.umd.edu/econ/panagariya/apecon/ET/et-06-nov99.htm> [accessed on 24/02/2005].

¹⁴⁰ *Ibid.*

where other countries have lower labour standards¹⁴¹. This manifestation is regarded as “social dumping” and the developed world believes that if it is not countervailed, these differences in standards will result in a ‘race to the bottom’¹⁴² which will undermine their alleged “higher” standards.

4.2.1 Social Dumping

Social dumping can be described as the introduction of products into other markets, which are produced under circumstances, which do not conform to the minimum international legal standards relating to labour, human rights and environmental protection¹⁴³. In other words it entails the production of goods by means that violate international laws, for example exporting goods produced through slave labour. Accordingly, the question is asked whether one should be allowed to benefit from his or her unlawful actions. However, the answer is never an easy one or as clear-cut. One must always bear in mind the circumstances surrounding such actions, because most of the time the situation is not as clear, as for instance in the case of slave labour.

The legal consequences of social dumping will also depend on the role that customary international law and other treaties play. Take for instance Article 3(2) of the WTO Dispute Settlement Understanding, in which it is stated that WTO agreements must be clarified in accordance with customary rules of interpretation of public international law¹⁴⁴. Furthermore, Article VI of GATT expressly states that anti-dumping measures

¹⁴¹ Bhagwati (2002) 57.

¹⁴² *Ibid.*

¹⁴³ Leary, Virginia “The WTO and the social clause: Post Singapore”

<http://www.ejil.org/journal/Vol8/No1/art7.html>.

¹⁴⁴ Booyesen (2003) 402.

can only be provided under circumstances expressly provided for in the agreement¹⁴⁵. Here we are faced with a double edged sword, since it can be stated that core labour rights are recognized as customary international law, but there is no agreement in the WTO relating to them.

On the other hand one can argue that the Vienna Convention on the Law of Treaties creates the concept of *ius cogens*.¹⁴⁶ It is an absolute norm from which no deviation is possible. The WTO therefore cannot constitute an exception to the principle of *ius cogens*.¹⁴⁷ Thus, in principle the WTO ought to adhere to customary international law, but does it?

4.2.2 Social Clause



The issue of social dumping has as a result led to the subject of a “social clause” knocking at the door of the WTO¹⁴⁸. The idea of a social clause was brought forward at the Singapore Ministerial. The idea was sponsored by the major developed countries, but vehemently opposed by developing countries¹⁴⁹.

The developed nations proposed connecting trade with a social clause, in particular, in relation to labour standards¹⁵⁰. It was argued that the benefits of international trade should be shared by labour too and as such there ought to be an obligation on countries to abide by labour standards.¹⁵¹

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid* at 403.

¹⁴⁷ *Ibid.*

¹⁴⁸ Collingsworth, Terry “An enforceable social clause”

http://www.fpif.org/briefs/vol3/v3n28soc_body.html [accessed on 11/05/2005].

¹⁴⁹ Lal Das (2003) 139.

¹⁵⁰ Kurien, CT “The social clause and the globalization of capital”

<http://www.aidc.org.za/?q=book/view/72> [accessed on 11/05/05].

¹⁵¹ *Ibid.*

At first glance, this proposal seems reasonable and harmless, but developing countries raised concerns regarding the underlying motives and true intention of developed countries for making this proposal.¹⁵² The developing countries' concerns are related to the history of protectionist policies of the developed world.

The debate dates back to the nineteenth century. In the 1920s European governments called for international labour standards under the Treaty of Versailles¹⁵³. Part XIII of the Treaty dealt with international labour standards and in 1927 the League of Nations held a special conference on the issue of labour standards and its relation to trade¹⁵⁴. Moreover, Article 7 of the International Trade Organization (predecessor of GATT 1947) stated that the existence of unfair working conditions was a problem for international trade¹⁵⁵.



Accordingly, the debate over the social clause is a very unusual one. On the one side you have the developed countries arguing that goods produced in countries where there are lower labour standards are guilty of social dumping, and on the other side the developing countries argue that there is no connection between trade and labour.

Bringing a social clause into the WTO framework would pose serious threats to the economical and social well being of developing countries¹⁵⁶. Linking labour standards to trade could distort free trade flows, because goods manufactured by workers not

¹⁵² *Ibid.*

¹⁵³ CUTS Briefing Paper "Trade, labour global competition and the social clause" <http://www.cuts-international.org/1998-5.htm> [accessed on 05/11/04].

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ Kurien, CT "The social clause and the globalization of capital" <http://www.aidc.org.za/?q=book/view/72> [accessed on 11/05/05].

employed according to international recognized standards will face restrictions¹⁵⁷. In most developing countries such a connection could eliminate the capability of developing countries to attain economic growth¹⁵⁸. Thus all possible chains between trade and labour will have to be balanced out with the concerns of developing countries. It is also important to note that the topic relating to the inclusion of a social clause into the WTO framework has never been properly addressed at the WTO and if developing countries can stand their ground, it never will.

4.2.3 The Race to the Bottom

In an attempt to be more susceptible to foreign investment or in an effort to become more competitive countries might lower their own labour standards. Arguments concerned with the race to the bottom are founded on the basis that governments are sometimes pressured to slacken labour protections in order to assist national or domestic firms to compete in the international arena¹⁵⁹. This train of argument suggests that international trade and labour are insolvably linked to one another and should therefore be discussed in the WTO.

Some countries use lower labour standards to gain a strategic advantage in international trade. For small and developing countries, the prices of goods are fixed on international markets¹⁶⁰. Thus, the domestic producers carry the costs of labour

¹⁵⁷ “Labour standards in the WTO: India, China to plan adopt joint strategy”

<http://www.blonnet.com/2000/10/14.stories/01142b1.htm> [accessed on 24/02/05].

¹⁵⁸ *Ibid.*

¹⁵⁹ Brown, Drusilla “Labor Standards: Where do they belong on the International trade Agenda?”

<http://web35.epnet.com/citation.asp?tb=1& ug=sid+22BC6DC2%2DAAB8%2D4297%2DA557%2D.htm> [accessed on 24/11/2004].

¹⁶⁰ Brecher & Costello (1994) 47.

standards and they possess no authority or power to pass the cost of labour standards to the consumers¹⁶¹.

Competition affects all countries that seek to protect worker's rights and who try to raise standards of living of the poor. The OECD report of 2000 states that: "the empirical literature on this race to the bottom hypothesis is inconclusive."¹⁶² There is little evidence in support of the race to the bottom, but the evidence cannot show to what extent competition to attract Foreign Direct Investment may inhibit raising of labour standards¹⁶³.

In theory, the race to the bottom argument makes sense, however its practical relevance is questionable. The problem is that there is not sufficient evidence to show that governments are in actual fact cutting standards to attract business¹⁶⁴. Daniel Drezner writes: "The race to the bottom hypothesis appears logical. But it is wrong. Indeed, the lack of supporting evidence is startling."¹⁶⁵ This statement only confirms that, for practical purposes, the race to the bottom argument is irrelevant.

We must not lose sight of the fact that the protection of labour standards is essential, but the protection given must take into account different levels of development. Moreover, we must recognize that the race to the bottom theory is just that, it is a theory and not a reality.

¹⁶¹ *Ibid.*

¹⁶² Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

¹⁶³ *Ibid.*

¹⁶⁴ Bhagwati (2002) 59.

¹⁶⁵ Drezner, Daniel, "Bottom Feeders" *Foreign Policy* 121 (November-December 2000) p 70.

4.2.4 Fear of Disguised Protectionism

The 1995 World Bank Development Report stated that there is danger in using trade sanctions as a means to promote basic human rights and labour standards as the trade standards link could become hijacked by protectionist interests in an attempt by developed countries to preserve activities rendered uncompetitive by cheaper imports¹⁶⁶.

Developing countries fear that demands for higher labour standards are motivated by the developing countries' call for raising costs in developing countries to benefit their own workers¹⁶⁷.

This is where the moral and economic debates come to the fore, as it is safe to assume that those who truly seek to protect worker's rights have a moral cause whereas those who have their own economic well being at heart can be seen as using this debate to promote their own protectionist agendas. It therefore is imperative to discern between the two groups. In other words the fact that some favour labour standards does not mean that they all are using standards as a protectionist mechanism. The view of standards as being protectionist might have blinded some countries from recognizing that there is a real demand for proper enforcement of labour standards.

¹⁶⁶World Bank, World Development Report 1995, 79, also see Schott (1996) at p 97.

4.3 CHILD LABOUR

There is conflict of thought relating to the standards that are to be applied to child labour. Child labour is a common feature of most societies that are in the early stages of development. Statistics have shown that the number of children in the labour market becomes lower as a country's per capita income becomes higher.¹⁶⁸ The interaction between poverty and social organization in developing countries perpetuates child labour. Children are induced into work in the informal sector to supplement family incomes, society forces them and law and government do nothing to protect them.¹⁶⁹

The HIV/AIDS epidemic has taken the lives of the working class and has left thousands of children as heads of household.¹⁷⁰ The majority of child workers are found in rural areas where they are isolated from protective labour regulation and investigation. It was globally estimated in the year 2000 that the number of working class children between the ages of 5 and 14 in developing countries were about 250 million with numbers still climbing¹⁷¹.

¹⁶⁷ Schott (1996) 97.

¹⁶⁸ Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

¹⁶⁹ Mansoor, Farkhanda "The WTO versus the ILO and the case of child labour" <http://webjcli.ncl.ac.uk.2004/issue2/mansoor2.html> [accessed on 24/02.05].

¹⁷⁰ *Ibid.*

¹⁷¹ Wolf, T "International labour standards and the WTO" <http://www.stud.unisg.ch/~oikos/ModelWTO/modelWTO2000/labourstandards.htm> [accessed on 24/02/2005].

In 1995, in the United States, the Harkin Bill was recommended to place a ban on the import of goods produced with child labour¹⁷². If a state was identified as allowing child labour, then all its products would be prohibited unless if it could be shown that the products were not made with child labour¹⁷³. However, it was shown that this threat in the export sector led to child labourers engaging in counter activities. In Bangladesh, in 1995 50 000 child workers were dismissed following the threat of the Harkin Bill. Most of these children however did not go back to school and were left destitute, ending up in such activities as prostitution and street work¹⁷⁴.

The introduction of this bill would also have set double standards. The ban would only be imposed on the exporting country that used child labour, but not even the United States has fully eradicated child labour within the informal sector. Human Rights Watch found that the US government failed to protect children working in agriculture¹⁷⁵. Moreover, the US State Department found that in New York City there were child labour violations taking place¹⁷⁶.

In 1996 the Tripartite Working Party on Labour Standards in the Asia-Pacific Region Report said that: "...the bulk of child labour appears to relate to work in the informal sector, and work associated with agriculture. In urban areas, child labour is found in a range of manufacturing and service industries and also in marginal and illegal activities such as drug trade, pornography and prostitution. A major barrier to tracking exploitative child labour is the use of subcontractors, and practices such as trans-

¹⁷² Mansoor, Farkhanda "The WTO versus the ILO and the case of child labour"
<http://webjcli.ncl.ac.uk.2004/issue2/mansoor2.html> [accessed on 24/02.05], See also section 706 of the Child Labour Deterrence Act.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ Human Rights Watch Report, 2000.

¹⁷⁶ Mansoor, Farkhanda "The WTO versus the ILO and the case of child labour"
<http://webjcli.ncl.ac.uk.2004/issue2/mansoor2.html> [accessed on 24/02.05].

shipment and re-labeling, which are often beyond the reach of regulatory mechanisms.”¹⁷⁷

International labour standards do not cover the informal sectors where the majority of children are working¹⁷⁸. Trade linked upgrading of labour standards would therefore be of no use. The occurrence of child labour is happening more and more each day. It is evident that this is a great problem and it means that the next generation of workers will be unskilled and uneducated¹⁷⁹.

ILO members have agreed to prohibit and eliminate the worst forms of child labour. The worst forms of child labour can be defined as slavery, child prostitution and the use of children to traffic in drugs¹⁸⁰. The ILO recognized that child labour is in the most cases caused by poverty and that there should be a gradual elimination of child labour through sustained economic growth.¹⁸¹

¹⁷⁷ See also, Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

¹⁷⁸ *Ibid.*

¹⁷⁹ Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

¹⁸⁰ Doha Ministerial 2001 Briefing Notes “Trade and labour standards: A difficult issue for many WTO member governments” http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm [accessed on 27/10/04].

¹⁸¹ *Ibid.*

4.4 HIV/AIDS AND ITS IMPACT ON LABOUR

HIV/AIDS is a labour issue even though it is not recognized as one. It affects labour and productivity and it is also a workplace issue, because the workplace has an important role in the struggle to limit the spread and effects of the pandemic.¹⁸²

HIV/AIDS affects labour in countless ways. It is depriving the labour market of skilled workers and it has a negative impact on labour supply¹⁸³. The pandemic is also one of the major causes for child labour. It has made many children heads of households, who then have no other choice but to work¹⁸⁴. Worldwide children are losing their parents or guardians and in the same breathe their childhood as well.

HIV/AIDS has also had an impact on the self-employed division of the labour force, because the people who employ themselves are mostly middle aged and they are the most affected age groups¹⁸⁵. In July 2003, former South African president, Nelson Mandela stated that over 42 million people are living with HIV/AIDS and that we are dealing with the greatest health crisis in human history¹⁸⁶. The effects of HIV/AIDS are very severe. Even though no one is unaffected by the epidemic, it is usually the poor who are most vulnerable to HIV/AIDS¹⁸⁷. The presence of HIV/AIDS strips the household of income earners leading to further poverty to the already poor.

¹⁸² ILO “ILO programme on HIV/AIDS and the world of work”

<http://www.ilo.org/public/english/protection/trav/aids/> [accessed on 11/05/05].

¹⁸³ Fenwick, Colin and Kalula, Evance “Law and labour market regulation in East Asia and Southern Africa: Comparative perspectives” *Development and Labour Monograph Series Occasional Paper 2004* at p12.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ “HIV/AIDS is a labour issue” <http://www.amrc.org.hk/4702.htm> [accessed 11/05/05].

¹⁸⁷ *Ibid.*

The way forward is prevention. Preventing more people from becoming infected with HIV and dying of AIDS in future will mean that fewer children will be orphaned by HIV/AIDS.¹⁸⁸ ILO/AIDS and the OPEC Fund for International Development are involved in a joint project to promote workplace action on HIV/AIDS. Their objective is to “...strengthen the awareness, technical capacity and institutional capabilities of government and the social partners to develop and implement workplace policies and programmes aimed at preventing the spread of HIV and mitigating the impact of AIDS on social and economic development.”¹⁸⁹



¹⁸⁸ “The impact of HIV/AIDS on Africa” <http://www.avert.org/aidsimpact.htm> [accessed 11/05/05].

5. LABOUR AND TRADE RELATIONSHIP

5.1.1 ILO vs WTO

The text of the Singapore declaration dealing with labour standards contains important elements. One of the essential elements is that the WTO and ILO Secretariats will continue their existing collaboration¹⁹⁰. This collaboration fully respects the particular and distinct mandates of the two organizations.

Mike Moore (then Director General of the WTO) explained after the Singapore Ministerial Conference in 1996 that this collaboration takes place through the exchange of information and through WTO staff participating as observers in certain ILO meetings¹⁹¹. This relationship respects each different mandate of the two organizations and the WTO is not permitted to embark on novel subjects or questions¹⁹². In other words, the WTO is the only spectator in this ‘so-called’ collaboration where the ILO is not even an official observer in the WTO.

The reference to “existing collaboration” is confusing. In the 1960’s, the two institutions attempted to work together through studying labour in the textile industry.¹⁹³ The ILO working party has suggested that it would be interesting to explore the labour and trade relationship through ‘interinstitutional’ collaboration, but

¹⁸⁹ ILO “ILO programme on HIV/AIDS and the world of work”

<http://www.ilo.org/public/english/protection/trav/aids/> [accessed on 11/05/05].

¹⁹⁰ Raghavan, Chakravarthi ‘All aboard on the WTO ship?’ < <http://www.twinside.org.sg/title/ship-cn.htm> > [accessed on 18/04/05].

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ Patterson (1966) 306.

this has gone unanswered by the WTO¹⁹⁴. It is also important to take cognisance of the fact that the heads of the United Nations Conference on Trade and Development (UNCTAD), the organization for Economic Cooperation and Development (OECD) and the International Monetary Fund (IMF) all had an opportunity to speak at the Singapore Ministerial, however the ILO did not have an opportunity to say anything.¹⁹⁵

5.1.2 The ILO compared to the WTO

The purpose of the ILO is to improve the condition of labour through regulating-hours of work, labour supply, prevention of unemployment, making provision for adequate living wages, protection of children and women etcetera¹⁹⁶. Whereas the WTO's purpose is to raise standards of living, ensure full employment and by entering into reciprocal and mutually advantageous agreements directed to reduction of tariffs and other barriers to trade and furthermore to eliminate discriminatory treatment.

The ILO has a unique "tripartite" structure. States, labour organizations and employers' organizations each have formal representation at the ILO¹⁹⁷. On the other hand, the WTO's representatives are governments only. However, countries have discretion to include non-governmental organizations into their delegation¹⁹⁸.

¹⁹⁴ Vangrasstek, Craig "Labor rights" *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* Mendoza, Rodriguez et al (1999) 499.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid* at 497.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

Freedom of association and collective bargaining are principles enshrined in the ILO Convention, but countries have a choice as to which ILO conventions they wish to ratify and they are under no obligation to ratify all of the conventions¹⁹⁹. For example, the United States has only ratified 9 of the 181 ILO conventions²⁰⁰. The US is of the opinion that it will not ratify any ILO convention which would require the country to enact and implement new legislation²⁰¹.

When you become a member of the WTO you are required to accept the whole package, as most of the agreements negotiated under the GATT and the WTO are a single undertaking²⁰².

The ILO does not have the status of an official observer in the WTO General Council whereas the WTO is an official observer in the ILO Governing Body and its committees.²⁰³



The ILO does not have an enforcement mechanism to ensure compliance with conventions. There are procedures for the investigation of alleged violations, but the ILO does not have the power to enforce standards through sanctions. The WTO on the other hand does have the power to authorize sanctions through its dispute settlement process.²⁰⁴ Proponents of the trade-labour link envy the WTO's Dispute Settlement Body's enforcement power and even more so its power to authorize trade sanctions.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid* at 498.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

This distinction has become even more apparent after the Uruguay Round after which the WTO's enforcement power became greater than that of the GATT before it²⁰⁵.

5.2 **Feasibility**

There seems to be two ways in which labour standards can be brought into the WTO framework. Firstly there is the Article XX of the GATT approach and secondly through specifying a comprehensive sanctions agreement.²⁰⁶ Thus, the question regarding the feasibility of such incorporation arises.

The Article XX approach would entail an amendment of the Article. Article XX provides exceptions from general trade rules for particular measures. At present products produced through the use of prison labour are exempted from the general trade rules, and accordingly the argument is that if prison labour can be exempted, the exceptions could be extended to cover products produced using labour employed in breach of the ILO's core labour standards.²⁰⁷

Violations of labour rights may be assumed as a relevant factor in justifying trade restrictions in the use of the existing exceptions in Article XX. Take for instance the exception relating to public morals. Public morals are purely subjective though and might vary from country to country. This concept in so far as it reflects national beliefs and values can only then be applied territorially and may not affect production

²⁰⁵ Raghavan, Chakravarthi 'All aboard on the WTO ship?' < <http://www.twinside.org.sg/title/ship-cn.htm> > [accessed on 18/04/05].

²⁰⁶ Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

²⁰⁷ The Art. XX prison labour provision has not been interpreted by the WTO to date.

processes that take place outside that territory. However, some concepts are universally deemed to be international public morals, for example child labour and slavery. Francioni is of the opinion that a satisfactory approach would be to link the idea of public morals to international standards of morality and human dignity and to make those standards an integrated part of the process through which article XX exceptions are applied.²⁰⁸

On the other side of the spectrum there is the proposed sanctions agreement. This seems to be a more extreme option and would entail all WTO members agreeing that general trade sanctions could be imposed on a country found to be in breach of core labour standards, or found not to have made ‘reasonable endeavors’ to enforce such standards²⁰⁹.



In principle, it seems feasible to link Core labour standards into the WTO. However, a key practical stumbling block is the WTO decision-making process, where the majority of members are developing countries, decisions are generally made through consensus and most developing nations are against any form of linkage²¹⁰. Moreover, developing countries are concerned with what exactly are appropriate labour standards and who will have the right to set and enforce them?

The International Confederation of Free Trade Unions 1999 (ICTFU) claimed:

“There is no possibility that a worker’s rights clause would bring about an international minimum wage that will drive the industries of poor countries to

²⁰⁸ Francioni (2002) 20.

²⁰⁹ *Ibid.*

²¹⁰ Golub, S “International labor standards and international trade” *IMF Working Paper* WP/97/37, Washington, April 1997.

bankruptcy; split the world market into two camps and undermine global free trade. ...Developing countries will still be able to enjoy comparative advantages from their abundant labour supply. All that will happen is that governments will not be able to keep these costs down by oppressing their workers; and transnational corporations will not be able to bully countries into competitive repression."²¹¹

It is of course clear that developing countries would vehemently oppose an amendment of Article XX and even more so a comprehensive sanctions agreement. Thus, it will be nearly impossible for WTO members to ever reach consensus on the question of incorporating labour standards into the WTO framework²¹². This could only be possible if the developed nations were to compromise in other areas such as opening up their markets and providing significant financial and technical assistance to developing countries, but this is also a long shot²¹³. At the end of the day, concessions have to be made, there has to be a *quid pro quo*. Who is going to be willing to give in order to get?

5.3 Effectiveness

5.3.1 Article XX Approach

The WTO dispute resolution system possesses enhanced powers and would provide for greater enforcement of core labour standards. The ILO system is voluntary and is not

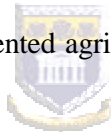
²¹¹ Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

²¹² Freeman, R "A hard-headed look at labour standards" Sengenberger, W & Campbell, D *International Labour Standards and Economic Interdependence* ILO Geneva (1994) 82.

²¹³ Hughes, S and Wilkenson, R "International labour standards and world trade: no role for the WTO?" *New Political Economy* (1998) vol 3(3) 376.

equipped to use measures against members who contravene its principles. Thus, if countries were able to take trade measure against countries that fail to adhere to core labour standards, it would provide incentives for countries to reform their labour practices²¹⁴.

However, if Article XX is amended, it would only address contraventions in export sectors of countries and will have no impact on the domestic sector. Moreover, it is evident that the most breaches of core labour standards take place in the domestic arena, because it is the largest sector.²¹⁵ It will also be difficult to trace breaches in the export sector and therefore a link might not even affect labour conditions significantly. For instance it has been estimated that less than 5 percent of working children are employed worldwide in the export manufacturing and mining sectors and only one to two percent in export-oriented agriculture and are often beyond the reach of regulatory mechanisms.²¹⁶



Accordingly, an article XX amendment would do little to promote labour standards.

²¹⁴ Brown, D *et al* "Trade and labour standards: *Open Economics Review* (1998) vol 9 175.

²¹⁵ Duffy, M 1996 *Report on Labour standards in the Asia-Pacific Region* tripartite Working Group on Labour Standards AGPS February.

²¹⁶ Fallon, P & Tzannatos, Z 1998 *Child Labour issues and directions for the World Bank*, Social Protection Human Development Network, The World Bank Washington DC.

5.3.2 Comprehensive Sanctions

Under a comprehensive sanctions agreement, non-compliance with core labour standards in the production of any product could result in trade sanctions. This would apply to foreign and domestic consumption and moreover would apply to all imports and exports from a country in breach of core labour standards. The US and The EU have suggested that trade sanctions would only take place after complaints were examined and upheld by a joint ILO/WTO Evaluation Committee of Experts²¹⁷. This would also entail the provision of time to implement rectifying measures and technical assistance towards improving standards.²¹⁸

This approach clearly has a wider coverage than the Article XX approach and could open then door for the imposition of trade sanctions on foreign enterprises that are unrelated to the enterprises involved, thus distorting the incentives to create compliance. Attempts to enforce core labour standards universally could have adverse effects on the welfare of workers in developing countries.²¹⁹ Reason being that only the larger more powerful economies have the ability to impose sanctions. Thus, smaller, weaker economies will always be the target. Even sanctions based on child labour measures may cause unintended problems, for instance, disrupting rural developing economies or shifting child labour to other less easily targeted forms of employment.²²⁰

²¹⁷ Braithwaite & Drahos (2000) 235.

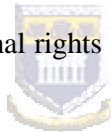
²¹⁸ *Ibid.*

²¹⁹ van Liemt, G “International trade and workers’ rights: More than a conditional link?” *Trade Politics International, Domestic and Regional Perspectives* edited by Hocking, B *et al* (1999) 121.

²²⁰ Betton, (1993) 316.

Sanctions can only be effective if the country involved responds to the threat by eliminating the abusive practice²²¹. Sanctions will be ineffective if the sanctioned country lacks the resources to respond to the threat²²². In enforcing labour rights, one must be aware of the local community conditions. Moreover trade sanctions do nothing to address market failures that in most cases lead to unfair labour practices. For example, when adults do not have access to capital markets, the only mechanism available to them is to send their children out to work²²³.

Traditionally, sanctions have been one of the instruments to promote international rights compliance take for example the economic sanctions against South Africa in the 1980's. However, recent developments in international trade liberalization policy and recent WTO decisions threaten to eliminate many forms of sanctions as an alternative for encouraging international rights compliance.²²⁴



Sarah Cleveland argues that, it is important to realize that sanctions could slow the process of trade liberalization²²⁵. If sanctions were imposed for labour abuses, the likely outcome would be less trade liberalization and tighter labour standards²²⁶. Implementing measures to reduce labour rights abuses will often have various consequences. The realization of core labour standards depends on the amendment of markets and government policies²²⁷. The universal enforcement of core labour standards will definitely have an adverse effect on the welfare of workers in

²²¹ *Ibid.*

²²² *Ibid.*

²²³ Brown, D *et al* "Trade and labour standards: *Open Economics Review* (1998) vol 9 175.

²²⁴ Cleveland, S H "Human rights sanctions and the WTO" *Environment, Human Rights and Free Trade* edited by Francioni, Francesco(2002) 201.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ van Liemt, G "International trade and workers' rights: More than a conditional link?" *Trade Politics International, Domestic and Regional Perspectives* edited by Hocking, B *et al* (1999) 121.

developing countries and therefore a comprehensive sanctions approach would be a turn in the wrong direction in other words if sanctions are used to enforce labour standards, the consequences will be that it will hurt the very people it strives to protect i.e. the workers.

5.4 Other Approaches

There have to be other means through which enforcement of labour standards can be achieved. The 1998 ILO Declaration on Fundamental Principles and rights at Work is a good starting point. Even if a member country has not ratified a convention dealing with core labour standards, the convention is still deemed to represent part of its obligations under the ILO's Constitution²²⁸. In terms of this convention countries will have to address their compliance with the conventions through the annual reporting system²²⁹.



Another approach would be to strengthen the ILO's powers, at the 1998 ILO Conference it was proposed that the Declaration be accompanied by a formal complaints procedure and that decisions are legally binding on members²³⁰. Sad but true, to date there has been no agreement on these proposals, even though these measures would improve the effectiveness of the ILO.²³¹

²²⁸ Maskus, K "Should core labor standards be imposed through international trade policy?" *World Bank Development Research Group Policy Working Paper* no. 1817 August 1997 3-4.

²²⁹ *Ibid.*

²³⁰ Nankivell, T 2002, *Living, Labour and Environmental Standards and the WTO*, Staff Working Paper Productivity Commission, Canberra, January; this paper can also be found at <http://www.pc.gov.au>.

²³¹ Lee, E 1997 'Globalization and Labour standards: a review of the issues' *International Labour Law Review* vol 36(2) Summer 178.

Some believe that the present system is adequate enough and is the best that can be hoped for, given the continued pervasiveness of poverty in developing countries²³². This argument is based on the premise that developing countries are doing the best they can to improve labour standards, having regard for their level of economic development and limited financial and administrative capacity²³³. Accordingly another approach would be to increase financial and other assistance to these developing countries and thereby improving their capacity to improve labour conditions. However, how willing are developed countries to provide this assistance?

Another option might be import restrictions based on process/production methods (PPM). PPM it has been argued could be an effective tool in deterring human rights abuses and thus labour abuses as well²³⁴. Import restrictions based on human rights questions have always been based on the manner in which products are produced. Restrictions of this kind can be related to forms of child labour forced labour and other violations of core labour standards²³⁵. The problem is that the extent to which human rights or labour policies may be incorporated into the trade system has not been adjudicated yet by the WTO²³⁶ and it is not certain whether it ever will be the subject of adjudication within the WTO.

There is no clear- cut answer, but it becomes obvious that somewhere somehow a middle ground has to be found. It is submitted that only when the concerns of the developed world are balanced out with those of developing nations, will we come a step closer to the realization of better respect for core labour standards.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ Maskus, K “Should core labor standards be imposed through international trade policy?” *World Bank Development Research Group Policy Working Paper* no. 1817 August 1997 3-4.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

6. CONCLUSION

From the foregoing analysis it becomes clear that the proposed link between labour and trade rights remains complicated. Core labour standards which seemed only to be the problem of trade unions and human rights groups, now receive attention from a far broader group of viewers for example trade specialists and consumer goods producers²³⁷. However, a multilateral trade labour link might never come into being and both the WTO and ILO have ensured up until now that the issue stays off the discussion table.

Dunkley reiterates that ‘cheap labour can be fair if the low wages are related to low productivity, appropriate indigenous technology and adequate job creation, but exploited labour’ on the other hand ‘can be unfair, especially if accompanied by bad working conditions, deprivation of rights, inhumane treatment of workers and so forth’²³⁸, in which case there has to be better protection of workers.

Labour activists, who have the welfare of workers at heart, believe that placing labour on to the WTO would support their cause. However, this study has shown that labour standards are not a function of trade. It is important to recognize labour rights as a human rights and it is well known that at present the ILO does not have the capacity to effectively impose these rights²³⁹. Taking this issue over to the WTO, on the other hand, will be an enormous mistake. If the WTO is given the power to sanction in terms of violation of labour standards, the position of workers in developing countries will only become worse. Therefore, other alternatives will have to be considered.

²³⁷ Braithwaite & Drahos (2000) 254.

²³⁸ Dunkley (2004) 114.

²³⁹ Tandon, Yash “Quest for labour standards in WTO”

<http://www.globalpolicy.org/soecon/1209labor.htm> [accessed 24/02.2005].

What are the options? The first considerations would be to leave labour standards to the ILO. As it has been noted, the ILO Conventions do strive to ensure economic development of member states through protection of labour rights²⁴⁰. However the problem with the ILO is how can the organization maintain a balance between better enforcement of labour standards (as demanded by developed countries) and limiting its role as an advisor only (as developing countries demand)²⁴¹. Well the answer is clear, the ILO simply does not have the guns to ensure better enforcement of its standards and accordingly, the only way in which the demands of ILO can be met is if it is given the appropriate ammunition to do so.

The second option is to incorporate labour standards into the WTO. This is not feasible at all. The WTO can only entertain disputes, which arise out of the existing agreements of the organization²⁴². At present there is no agreement on labour standards and it is highly unlikely that there will be an agreement on labour standards in the near future, provided that the developing world can stand firm against the demands of the developed world. A WTO social clause will simply not produce the desired results as far as the promotion of labour standards are concerned.

The third option is a hybrid scheme. The ILO would act as the “court of first instance” in relation to labour disputes and if no solution were found, the matter would be referred to the WTO as final resort to investigate the trade related aspects of the labour issue concerned²⁴³. This creates the risk that members might lose interest in the

²⁴⁰ CUTS Briefing Paper “Trade, labour global competition and the social clause” <http://www.cuts-international.org/1998-5.htm> [accessed on 05/11/04].

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ CUTS Briefing Paper “Trade, labour global competition and the social clause” <http://www.cuts-international.org/1998-5.htm> [accessed on 05/11/04].

voluntary approach of the ILO and they will then only rely on the WTO to enforce their demands²⁴⁴. What would the relevance of the ILO then be? This option will only weaken the ILO even further and moreover, only give the WTO more power²⁴⁵. Therefore, it is important to embrace the idea of strengthening the ILO rather than making the organization lose relevance.

Other options are to leave the decision in the hands of the consumer²⁴⁶, for example by placing social labels on products and then letting the consumer decide to purchase or not. Other positive measures can also be implemented like giving better market access, educational programmes, debt reduction and other incentives to help promote labour standards²⁴⁷.

Ad finem, the matter of linking core international labour standards to the WTO is not as clear-cut, as it appears *prima facie*. There is no clear way for workers to attain their rights. The fact remains that decisions and compromises will have to be made and it will have to start at national level.

²⁴⁴ Mansoor, Farkhanda “The WTO versus the ILO and the case of child labour” <http://webjcli.ncl.ac.uk/2004/issue2/mansoor2.html> [accessed on 24/02.05].

²⁴⁵ *Ibid.*

²⁴⁶ CUTS Briefing Paper “Trade, labour global competition and the social clause” <http://www.cuts-international.org/1998-5.htm> [accessed on 05/11/04].

²⁴⁷ *Ibid.*

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