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Enlarging the Place of Human Rights and Development in International Trade Regulation: An Evaluation of the Problems and Prospects of Incorporating a Social Clause in the Legal Framework of the World Trade Organization

A thesis submitted in fulfilment of the requirements for the award of the

DOCTOR OF LAWS DEGREE

BY

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in the

FACULTY OF LAW

2012

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Declaration

I, the undersigned, hereby declare that except for references indicated as such in the text, and any other assistance as has been acknowledged, the work contained in this thesis for the degree of Doctor of Laws at the University of Fort Hare is my own independent study that has not been previously submitted in part or in its entirety at any university for degree purposes or otherwise.

Signed at Alice on the 12th day of December 2012.

…….

Tapiwa Victor Warikandwa

Abstract

An agreement on the inclusion of a social clause in the World Trade Organization's (WTO) multilateral trade agreements largely depends on reassuring objecting member states that such inclusion will contribute to an improved recognition of core labour standards in trade, without altering the competitive advantage of one trading partner over another. Reassurance must be given to the effect that incorporating a social clause in the WTO legal framework would not be used as a trade restricting mechanism which might have direct, negative effects on the development of countries worldwide. Such an argument may not be won easily from a legal and economic perspective. There is an omnipresent conflict at the international level between the basic values underlying multilateral trade agreements and principles governing the protection of core labour standards. On the one hand, supporting the stance of free trade is the fundamental force of profit maximization while on the other hand, and in direct opposition to this market driven value system, are human rights-based calls for recognising core labour standards in employment matters related to trade. Increased international trade is a powerful tool for tackling poverty and social misery worldwide. It could thus be important to adopt a legal framework in the multilateral trade system to harness potential opportunities a trade-labour linkage could provide. In that case, the legal questions of whether or not there should be a tradeoff between the right to trade and compliance with core labour standards and whether a social clause in the WTO would achieve this purpose had to be addressed.

However, without a compatible underpinning legal framework of universally accepted trade-labour standards, incorporating a social clause in the WTO would be a misplaced legal objective which is unachievable as it could lead to a conflict between the WTO and the International Labour Organisation (ILO) and at most could create a legal fiction whose results may not be positively measurable. Setting two international legal norms at conflict with each other is systematically studied as a conflict in which the values of the global market economy are in a supposed confrontation with those protecting core labour standards as human rights. Therefore, this study undertook a contemporary legal analysis of the possibilities and challenges of incorporating a social clause in the WTO for purposes of entrenching the protection of core labour standards. It put forward arguments and tentative proposals for a trade-labour linkage legal framework which could dispel calls for excluding a social clause in the WTO.

Acknowledgements

I would like to thank God Almighty for watching over me and my family throughout my research and permitting that I have a resourceful and supportive supervisor in the form of Professor Patrick Osode who worked with me amidst unprecedented trials and potential setbacks. To God be glory for he is worthy of all honour and praise for in him I can do all things.

Special mention and appreciation goes to Professor Patrick Osode who selflessly and professionally mentored me in this research and nominated me for a University of Fort Hare Doctoral bursary which greatly aided me in my studies. His constant guidance, support and patience as my supervisor in this study facilitated the production of this work.

Special mention also goes to the University of Fort Hare for granting me the Govan-Mbeki supervisor linked Doctoral busary. The busary played a significant role in ensuring the completion of this study.

I would also like to recognise the efforts which both the World Trade Organisation and International Labour Organisation have made in trying to promote sustainable development in the world. It is evident that no organisation is perfect and where flaws are observed reforms are necessary to carry forward the good work the institutions have been doing.

Lastly, special mention goes to the Warikandwa family (especially my sister Talent Warikandwa who was operated three times in the year 2012), my wife Nkosinothando Mpofu, our lovely daughters Hazel and Ashley Warikandwa, Dr. Portia Ndou, Clement Bell, Nyika Machenjedze, Terrence Ndhlovu, Tawanda Manai, Fabrice Endo, Advocate Pumza Mnonopi, Tamara Fali, Rashmi Scott, Leo Mafuso, Festus Maganga and Tinashe Nyatoro for their support during the course of writing this thesis. God bless you all.

Dedication

I dedicate this work to the entire Warikandwa family. Thank you so much for your constant support through prayer and general encouragement when this thesis was being written. I also dedicate this work to victims of unfair labour and trade practices worldwide. Special dedication also goes to the International Labour Organisation for offering me a fellowship in the year 2007 to pursue labour law making courses, at its prestigious International Labour Training Centre in Turin, Italy. My experiences during the course of attending the courses evoked a need in me to make a difference in the world through advocacy for the rights of the marginalized and poor people of the world. Further, special dedication also goes to the World Trade Organisation (WTO) for continuously promoting trade growth in a harsh global economic environment amidst never ending criticism added to conflicting views from its Member States.

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Acronyms and abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AFLICIO	American Federation of Labour and Confederation of Industrial Organizations
AGOA	Africa Growth and Opportunity Act
AMCU	Association of Mineworkers and Construction Union
ANC	African National Congress
AU	African Union
AWG-LCA	Ad Hoc Working Group on Long Term Cooperative Action
BCEA	Basic Conditions of Employment Act
BFDA	Burmese Freedom and Democracy Act
BIAC	Business and Industry Advisory Committee
BTPAA	Bipartisan Trade Promotion Authority Act
BUSA	Business Unity South Africa
CAC	Competition Appeal Court
CAFTA	Central America Free Trade Agreement
CAN	Canada
CCS	Chambishi Copper Smelter
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEO	Chief Executive Officer
CIPPEC	Center for the Implementation of Public Policies Promoting Equity and Growth/ Centro de Implementación de Políticas Publicas para la Equidad y el Crecimiento
CITES	Convention on International Trade in Endangered Species

CLC	Congo Labour Centre
COIDA	Compensation for Occupational Injuries and Diseases Act
COMESA	Common Market for East African States
COP	Conferences of the Parties
COSATU	Congress of South African Trade Unions
CPS	Country Partnership Strategy
CRC	Convention on the Rights of the Child
CREC	China Railway Engineering Corporation
CSCE	Conference on Security and Co-operation in Europe
CSPP	Civil Society Partnerships Programme
CSVR	Centre for the Study of Violence and Reconciliation
CTE	Committee on Trade and Environment
DA	Democratic Alliance
DB	Doing Business
DDA	Doha Development Agenda
DFID	Department for International Development
DRC	Democratic Republic of Congo
DRD	Declaration on the Right to Development
DTI	Department of Trade and Industry
EAC	East African Community
EC	European Communities
ECE	Evaluation Committee of Experts

ECJ	European Court of Justice
ECOSOC	Economic and Social Council of the United Nations
EPZs	Export Processing Zones
EU	European Union
EWI	Employing Workers Index
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GETS	Global Environment and Trade Study
GHG	Greenhouse Gas
GIBS	Gordon Institute of Business Science
GSP	Generalized System of Preferences
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDS	International Development Studies
IFC	International Finance Corporation
IHL	International Humanitarian Law

ILO	International Labour Organisation
IMF	International Monetary Fund
INEGI	National Institute of Statistics and Geography
IOE	International Organisation for Employers
IPEC	International Programme on the Elimination of Child Labour
ISI	Import Substitution Industrialization
ITO	International Trade Organization
ITUC	International Trade Union Confederation
KD	Kadoma Declaration
LDC	Least Developed Country
LRA	Labour Relations Act
LRS	Labour Research Service
MEA	Malawi Employment Act
MEAs	Multilateral Environmental Agreements
MEX	Mexico
MFN	Most Favoured Nation
MIRA	Mauritian Industrial Relations Act
MLRA	Malawi Labour Relations Act
MNCs	Multinational Corporations
MoU	Memorandum of Understanding
NAALC	North American Agreement on Labour Cooperation
NACs	National Advisory Committees

NAFTA	North American Free Trade Agreement
NAMAs	Nationally Appropriate Mitigation Actions
NAO	National Administrative Office
NCCC	Newcastle Chinese Chamber of Commerce
NCLC	National Child Labour Committee
NEDLAC	National Economic Development and Labour Council
NEPAD	New Economic Partnership for Africa's Development
NGO	Non-Governmental Organisations
NICs	Newly Industrializing Countries
NIEO	New International Economic Order
NIRA	National Recovery Act
NUM	National Union for Mineworkers
NUMAW	National Union of Miners and Allied Workers
NUNW	National Union of Namibian Workers
OECD	Organisation for Economic Co-operation and Development
OHSA	Occupational Health and Safety Act
OTAI	Office of Trade Agreement Implementation
OTLA	Office of Trade and Labour Affairs
OTM	Mozambique Workers' Organisation
RIA	Regulatory Impact Assessment
RISDP	Regional Indicative Strategic Plan
RTD	Right to Development

S & D	Special and Differential Treatment
SA	South Africa
SACCAWU	South African Commercial, Catering and Allied Workers Union
SACM	South African Chamber of Mines
SACTWU	South African Clothing and Textile Workers' Union
SADC	Southern African Development Community
SCM	Agreement on Subsidies and Countervailing Measures
SEZs	Special Economic Zones
Siforco	Société industrielle et forestière du Congo
SLSA	Sustainable Livelihoods in Southern Africa
SNCC	National Railway Company of Congo
SPHRE	Society for the Promotion of Human Rights in Employment
TAA	Trade Adjustment Assistance
TAFTA	Tripartite African Free Trade Area
TBT	Technical Barriers to Trade
TNCs	Transnational Companies
TNCs	Transnational Corporations
TNF	Tripartite Negotiating Forum
TOTAWUM	Tobacco Tenants and Allied Workers Union of Malawi
TPRG	Trade Policy Review Group
TPSC	Trade Policy Staff Committee
TRIMS	Trade-Related Investment Measures

TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UIF	Unemployment Insurance Fund
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNFCCC	UN Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UNIDO	United Nations Industrial Development Organization
US	United States
USD	United States Dollar
USTR	United States Trade Representative
VDPA	Vienna Declaration and Programme of Action
WTO	World Trade Organisation
ZANU PF	Zimbabwe African National Union Patriotic Front
ZCTU	Zimbabwe Congress of Trade Unions
ZEPZA	Zimbabwe Export Processing Zones Act

CHAPTER ONE

Introduction and Overview of the Study

1 1 INTRODUCTION

Linking the right to engage in international trade to respect for human rights has emerged as one of the most controversial debates in contemporary international law discourses.[1] In an era in which countries are vigorously competing for investment by multinational corporations, there is a growing fear that a "race to the bottom" is occurring in the logic that labour standards are being lowered to attract investors.[2] This argument is important if one considers that a region like Southern Africa stands as one of the impoverished regions in the world, and therefore unquestionably requires investment to fight poverty and unemployment. Southern African countries like any other developing countries may be persuaded to neglect labour rights as human rights in order to lure investors.[3] However, it must be observed that workers should not be viewed as mere economic interests, but rather as bearers of fundamental human rights.[4]

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[1] See Griffin, Nyland and O'Rourke "Trade Unions and the Social Clause: A North-South Divide" http://council.labor.net.au/labor_review/100/update1002.html (accessed 31-08-2011).

[2] See Trebilcock and Howse *The Regulation of International Trade* (2005) 561. Trebilcock and Howse represent a class of academics who do not submit to the "race to the bottom" concept and do not see any need for the protection of core labour standards as human rights in the multilateral trade system. They have argued that: "…there is little reason to suppose that liberal trade and investment regimes will precipitate a race to the bottom. Moreover, the empirical evidence provides no support for the claim that liberal international trade and investment regimes are leading developed countries to relax their core labour standards or labour standards generally or that foreign direct investors are investing with weak core labour standards." Trebilcock and Howse's views represent the differences in opinions amongst Members of the World Trade Organisation (WTO) on whether or not there is a need to recognise the protection of core labour standards in the WTO legal framework. This study will examine such views with a view to establishing whether or not there could be a need in the global era for a trade-labour linkage in multilateral trade arrangements.

[3] As current developments already indicate, South Africa which is generally regarded as the possible example for countries in the region concerning the adoption of sound labour legislation has seen its Minister of Finance calling for a relaxation of labour standards to attract investors in the face of threats by foreign investors in Newcastle, Kwa-Zulu Natal to relocate to Botswana or Lesotho should they be compelled to pay workers a minimum wage. However Trebilcock observed that there is, "…an entirely cogent basis for collective global action to ensure that core labour standards in all countries, conceived of as universal human rights, and other international human rights are respected. Basic universal human rights, while defying precise definition, have increasingly come to be viewed as a fundamental element of customary international law (*Jus Cogens*), and to the extent that they extend beyond particular treaty obligations, are viewed as obligations *Erga Omnes* which are owed to the international community at large and hence are enforceable by all members of that community." See Trebilcock *Understanding Trade Law* (2011) 172-173. From Trebilcock's observation, the need to protect core labour standards in trade must not be regarded as an after thought or a secondary objective to trade but rather a complementary objective of free trade likely to lead to sustainable development.

Workers' rights have come to be viewed as a fundamental element of customary international law and are known as core labour standards.[5] That core labour standards are human rights is uncontroversial.[6] This could imply that if core labour standards are human rights then there is a need to protect them by way of incorporation into the legal framework of the World Trade Organisation (WTO).[7] The basis of such a proposal rests in the argument that the collective supply of public goods, such as the global division of labour, may not be politically feasible without comprehensive package deals including solitary responses to market failures and redistributive justice.[8] Liberal trade rules must be supplemented by competition and social rules promoting fair opportunities and the equitable distribution of gains from trade.[9] This conceptual framework would thus require that global trade integration law must pursue not only economic efficiency but also democratic legitimacy and social justice as defined by human rights.[10] An evaluation of the distributive justice, law and economy, natural law, sociology of law and utilitarian law theories, in this study, will establish whether or not there is any basis to proposals aiming at incorporating a social clause into legal framework of the WTO.

It has become apparent in a world driven by the globalisation agenda that as long as human beings trade, the subject of human rights must be struggled with.[11] Human rights are seen

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4 See Lester, Mercurio and Davies *World Trade Law: Text Materials and Commentary* (2012) 878-879. Lester *et al* opined that: "The fact that core labour standards are human rights is uncontroversial…any comparative advantage gained by non-compliance with these standards is not an advantage that should be shielded or trumped by liberalized trade…It is therefore, extremely rare (if not completely unheard of) for a trade representative to publicly state that their country's competitive advantage is in child labour and the prohibition of unionization."

5 Core labour standards were outlined in the 1998 International Labour Organisation Declaration of Fundamental Principles and Rights at Work as well as the United Nations (UN) Universal Declaration of Human Rights and the UN Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. They are as follows: 1) Freedom of association and the right to engage in collective bargaining; 2) the elimination of forced labour; 3) the elimination of child labour; and 4) the elimination of discrimination in employment.

6 Lester *et al* 878.

7 Petersmann "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration" 2002 *European Journal of International Law* 621.

8 Lester *et al* 883.

9 Ibid.

10 Ibid.

11 See Hafner-Burton *Forced to be Good: Why Trade Agreements Boost Human Rights* (2009) 1. There are however divergent views on the need to incorporate human rights into the legal framework of international trade law. See Alston "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann" 2002 *European Journal of International Law* 815. Alston argued that: "The proposed agenda is in fact a revolutionary and radical one which, if adopted, would have far-reaching consequences for the international human rights regime as well as for the balance of values reflected in the vast majority of existing constitutional orders. The most fundamental change is that human rights would...become detached from their foundations in

as obligatory and supportive of development,[12] whilst trade is regarded as a vital element of any development strategy.[13] The contemporary idea of human rights originates from the late eighteenth century in the French and American revolutions.[14] The "rights of man" were declared and defended by allusion to liberty and equality as the core underlying principles.[15] Despite the fact that human rights as a concept is occasionally misrepresented, it can be seen in the liberation movement and the abolition of slave trade through to the founding of the United Nations and the formulation of global legal standards founded on principles set out in the Universal Declaration of Human Rights of 1948.[16] In the twentieth century, the expansion of universal human rights was driven by two major issues: the atrocities perpetrated against civilians and non-combatants in the two World Wars, more so in the Holocaust; and the maltreatment and brutal repression of challengers of dictatorial or colonial governments.[17] Loss or denials of liberty and democratic expression have been a common feature of both, as has discrimination; a denial of equality in the form of political, social and economic marginalisation.[18] It is assumed that the current developments in the twenty-first century, especially in the world of work, may perhaps further strengthen the concept of human rights in international law.[19]

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human dignity and would instead be viewed primarily as instrumental means for the achievement of economic policy objectives." Alston's views echo the arguments held by trade purists to the effect that core labour standards as human rights do not have a place in the trade agenda. This is an issue which this study will explore as regards its merits and demerits in a world in which free trade is growing in the face of increased poverty in developing countries.

12 The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. (Article 1.1, Declaration on the Right to Development). The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources." (Article 1.2)

13 See Gandhi "International Trade and Right to Development" http://works.bepress.com/preeti_gandhi/1 (accessed 11-03-2011).

14 See Cmiel "The Recent History of Human Rights" 2004 *The American Historical Review* 122.

15 See Desan "Reconstituting the Social after the Terror: Family, Property and the Law in Popular Politics" 1999 *Oxford University Journal* 84.

16 The Universal Declaration of Human Rights (UDHR) was adopted and proclaimed by the General Assembly of the United Nations in resolution 217 A (lll) of 10 December 1948. See also Darcy "Human Rights and International Legal Standards: What do Relief Workers need to know" http://www.oneworld.org/odi/rrn/index.html (accessed 04-10-2011).

17 Darcy 10.

18 Ibid.

19 See Trebilcock and Howse 652. Trebilcock and Howse argue that: "…the linkage of international trade policy, including trade or other economic sanctions, with core labour standards that reflect basic or universal human rights is a cogent one…it is sufficient…to restate the point that to the extent that core labour standards are

Defining and giving global acceptance to human rights has involved, to a certain degree, limiting the extent of the concept of sovereignty.[20] It is accepted that the previous basis on which international relations rested, absolute respect for national sovereignty and a reluctance to question a state's behaviour towards individuals within its territory, provided insufficient safeguards.[21] The recognition of individuals as 'subjects' of international law, and so of global interest, was a ground-breaking step which can be viewed as recognition that state sovereignty, the foundation of international law and relations, has two features.[22] It carries with it both rights and duties. The duties of the state include, as a minimum, the protection of the human rights of those within its jurisdiction.[23] Inability to do so may bring into question a state's sovereign rights, and resultantly its legitimacy.

Human rights can be expressed as claims that all persons have purely by virtue of their humanity.[24] They are essentially moral claims. In legal terms, they are framed as claims against the state; and (crucially) most states have recognised the validity of those claims by ratifying human rights treaties and so formally accepting their obligation to respect and ensure the rights in question to all within their territory and subject to their jurisdiction. In moral terms, human rights are claims we all have against everyone else; that is, they are not restricted to the relationship between state and individual.

Although a large part of what follows is related to the legal structure in which those rights have been codified, the law did not create the rights: it recognises that individuals have such (moral) rights and involves formal (legal) undertakings by states to ensure that those rights are respected.[25] Human rights remain comparatively broad principles, and it is imperative to appreciate that they comprise a set of fundamental minimum safeguards that should not be

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appropriately characterised as basic or universal human rights, a linkage between trade policy and such labour standards is not only defensible but arguably imperative…"

[20] See Lenzerini "Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples" 2006 *Texas International Law Journal* 155.

[21] Darcy 10. See also Nagan "The Changing Character of Sovereignty in International Law" http://milestonesforlife.com/thetaxistand/sov.pdf (accessed 04-10-2011).

[22] See Jackson "Sovereignty-Modern: A New Approach to an Outdated Concept" http://www.asil.org/ajil/jackson.pdf (accessed 04-10-2011).

[23] See Caplan "State Immunity, Human Rights and Jus Cogens" www.asil.org/ajil/caplan.pdf (accessed 03-10-2011).

[24] See the Preamble to the UDHR.

[25] Ibid.

extended outside their core import.[26] They are not always unlimited rights. The limits set on human rights and freedoms are those essential to guarantee that the rights of others are not themselves infringed, or to ensure the security of society and the state.[27]

Human rights can be classified into three categories: the first generation, second generation and third generation.[28] The first generation rights address the issue of threats to liberty and are called the civil and political rights.[29] They create generally three sorts of claims. First, they make 'liberty' claims: to be left alone, not to be interfered with, to be allowed to act as one wishes, individually and in community.[30] Second, they make claims to recognition of civil, legal and political status from which flow certain safeguards and rights of political and legal access.[31] Third, and crucially, are various prohibitions mostly framed as 'freedoms from' and these include the right of freedom from torture.[32]

The second generation deals with the economic, social and cultural rights.[33] These include a number of claims that are of a different type: they are claims to social security and a

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[26] Darcy 11.

[27] Ibid.

[28] The division of human rights into three generations was initially proposed in 1979 by the Czech jurist Karel Vasak at the International Institute of Human Rights in Strasbourg. He used the term at least as early as November 1977. Vasak's theories have primarily taken root in European law. His divisions follow the three watchwords of the French Revolution: Liberty, Equality and Fraternity. The three generations are reflected in some of the rubrics of the Charter of Fundamental Rights of the European Union.

[29] First-generation rights include, among other things, freedom of speech, the right to a fair trial, freedom of religion, and voting rights. They were pioneered by the United States Bill of Rights and in France by the Declaration of the Rights of Man and of the Citizen in the 18th century, though the right to a due process goes back to the Magna Carta of 1297. They were first enshrined at the global level by the 1948 UDHR and given status in international law in Articles 3 to 21 of the UDHR, and the International Covenant on Civil and Political Rights (ICCPR).

[30] See for example, the rights to freedom of speech, Article 19, freedom of movement, Article 13 and freedom of association, Article 20 in the UDHR.

[31] See for example the right to a fair trial, Article 10 of the UDHR.

[32] Article 5 of the UDHR.

[33] The second generation of human rights is based on the principles of social justice and public obligation. They tend to be "positive" rights, based on continental European conceptions of liberty as equality. This generation of human rights developed through those who had a strong desire for the state to provide protection for its neediest inhabitants through providing relief to the less fortunate. This second generation of rights has since evolved into what are now known as "social" or "economic" rights. Important examples of second generation rights include: the right to just and favorable conditions of work, the right of protection against unemployment, the right to equal work for equal pay all in Article 23 of the UDHR, the right to rest and leisure as an employee, the right to reasonable limitation of working hours and periodic paid holidays in Article 24 of the UDHR, the right to free elementary education, the right to higher education equally accessible to all via merit, the right to education which promotes tolerance and understanding all in Article 26 of the UDHR. See also Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted and opened for signature,

certain standard of living, including claims to adequate food, clothing, housing, health care, and education.[34] This set of rights addresses the issue of poverty. The failure to make progress on the fulfilment of these rights, and indeed the lack of international commitment to their fulfilment, has been one of the chief failings of the human rights movement. Denial or neglect, accompanied by discrimination, is the cause of amongst other things chronic suffering and its humanitarian consequences. Some of these negative effects emanate from characterising this second set of rights as merely welfare claims.[35] Second generation rights do indeed imply certain welfare entitlements where individuals and communities lack the ability to secure subsistence needs for themselves. However, just as significantly, they are about equitable access and the creation of conditions where people (individually and collectively) can pursue viable livelihoods and satisfy their own needs.[36] It is in this respect that they are most obviously linked to the first generation rights, and why the two sets are rightly said to be indivisible.

Third-generation human rights are those rights that go beyond the mere civil and social aspects, as expressed in many progressive documents of international law.[37] Due to the present-day shift towards national sovereignty and the preponderance of would-be offender nations, these rights have been hard to enact in legally binding documents. The term "third-generation human rights" remains largely unofficial, and thus houses an extremely broad spectrum of rights.[38] The global human rights agenda embraces the view that human rights are a function of one's humanity. It proceeds to provide that human rights are not reliant on law or social

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ratification and accession by the United Nations General Assembly resolution 2200A (XXl) of 16 December 1966.

[34] Second-generation human rights are related to equality and began to be recognized by governments after World War I. They are fundamentally economic, social and cultural rights in nature. They ensure different members of the citizenry equal conditions and treatment. Secondary rights would include a right to be employed, rights to housing and health care, as well as social security and unemployment benefits. Like first-generation rights, they were also covered by the UDHR, and further embodied in Articles 22 to 27 of the UDHR, and the ICESCR.

[35] For an analysis of the significance of not confusing human welfare and human rights, see Howard-Hassmann "Human Security: Undermining Human Rights?" http://www.du.edu/korbel/hrhw/workingpapers/2011/63-hassmann-2011.pdf (accessed 05-10-2011).

[36] Darcy 11.

[37] See the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment and the 1992 Rio Declaration on Environment and Development.

[38] Examples are the Group and collective rights, right to self-determination, right to economic and social development, right to a healthy environment, right to natural resources, right to communicate and communication rights, right to participation in cultural heritage, and rights to intergenerational equity and sustainability. All these rights are embodied in principles 1 to 26 of the Stockholm Declaration and principles 1 to 27 of the Rio Declaration.

custom.[39] All human rights must be regarded as equal, and with comparable importance. It is on this basis that the UDHR was adopted with the intent of putting in motion legal and cultural forces which made it clear that the global community would no longer accept the outrages in previous decades, in particular any events which mirrored the inhuman behaviour that characterised the holocaust.[40] Furthermore, fundamental principles of labour rights and human rights were set out in the International Labour Organisation's (ILO) Constitution of 1919 and in the ILO Declaration of Philadelphia of 1944. The later has since been appended to the ILO Constitution. Of note, is the preamble to the ILO Constitution which mentions the "recognition of the principle of freedom of association" to confront injustice, hardship and deprivation.[41] This is a central principle to the elevation of labour rights as human rights.

Provoked yet again with questions as to the significance and universality of fundamental labour rights and human rights, the ILO International Labour Conference of 1998 affirmed that all member States have the duty "to respect, to promote and to realize, in good faith the fundamental rights which are the subject of those advanced in fundamental ILO Conventions.[42] If it is accepted that essentially all countries and territories are members of the ILO, and that the number of independent States is much larger now than in 1919, this affirmation is very important particularly in the framework of recognising labour rights as human rights.

Through negotiating trade liberalisation agreements countries seek to be competitive so as to sell their products and improve the added value of their goods and services.[43] This contributes to economic growth with a positive impact on employment.[44] However, development

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[39] As stated in the Vienna Declaration issued by the United Nations' Global Conference on Human Rights, they are "universal, indivisible and interdependent and interrelated."

[40] The UDHR was positively aspirational. It envisioned and aspired to a world in which the dignity and worth of every human being was honoured and secured. Many of the issues declared to be human rights in the declaration were relevant to the world of work including freedom from slavery, child labour and discrimination at work and freedom of association. See also Articles 23 and 24 of the UDHR and Article 7 of the ICESCR.

[41] See Article I (b) of the Declaration of Philadelphia reaffirms that "freedom of expression and association are essential to sustained progress" and constitute a fundamental principle on which the ILO is based.

[42] See Article 2 of the Declaration of Philadelphia. Such rights include the freedom of association and the effective recognition of the right to collective bargaining".

[43] See Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" 2009 *International Centre for Trade and Sustainable Development* 42.

[44] Ibid.

frequently involves conditions adverse to human rights protection with governments often limiting the enjoyment of these rights in the interest of economic development.[45]

The WTO[46] regardless of its crucial role in controlling the international trade and investment regime does little to protect human rights, especially labour rights.[47] The WTO's rules make no explicit mention of human rights though one of its key objectives is to enhance human welfare.[48] Core labour standards are considered to be enabling human rights; they set standards concerning the content and protection of rights such as freedom of association.[49] Bal[50] has argued that making labour standards compliance a proviso for availing products to the market constitutes a non-tariff barrier to trade and goes against the requirements of the WTO to liberalise trade and eradicate barriers to trade.[51] However, it is worth noting that Article XX of the General Agreement on Tariffs and Trade (GATT)[52] provides exceptions to the non-discrimination principle, so long as the measures taken are 'necessary to protect public morals and to protect human, animal or plant life or health.'[53] Labour rights are assumed to fall under

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[45] See WTO, Ministerial Declaration, adopted on 14 November 2001 WTO Doc. WT/MIN(01)/DEC/1 http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (11-03-2011). See also Lester *et al* 872. Lester *et al* whilst acknowledging that some countries, especially developed countries and a few developing countries, would like to realise the protection of core labour standards, the larger majority of developing countries believe that the issue of a trade-labour linkage, "…has no place in the WTO framework. They argue that the campaign to bring labour issues into the WTO is actually a bid by industrial nations to undermine the comparative advantage of lower wage trading partners, and could undermine the ability to raise standards through economic development, particularly if it hampers their ability to trade. They also argue that the proposed standards are too high for them to meet at their level of development. These nations argue that efforts to bring labour standards into the arena of multilateral trade negotiations are little more than a smokescreen for protectionism." This study analysed these arguments with a view to establishing whether or not they are plausible.

[46] The WTO came into effect on 1 January 1995. It was created to govern trade relations among member states. It commenced under the Marrakech Agreement signed in 1994 in Morocco. The WTO is the internationally approved institution for negotiating multilateral trade barrier reduction and settling disputes regarding policies that one or more nations observe as distorting trade.

[47] See Bal "International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT" 2001 *Minnesota Journal of Global Trade* 62.

[48] See Bartels "The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third World Countries" 2008a European Union Parliament November. Bartels states that the WTO system is a system of negative regulation; WTO rules provide little guidance on what government officials can do to promote human rights as they work to expand trade.

[49] See Dessing "The Social Clause and Sustainable Development" 2001 *International Centre for Trade and Sustainable Development* Resource 21.

[50] Bal 2001 *Minnesota Journal of Global Trade* 62.

[51] Article I of General Agreement on Tariffs and Trade (GATT) 1947.

[52] The General Agreement on Tariffs and Trade (GATT) formed in 1947 and negotiated during the United Nations conference on Trade and Employment is the only instrument that attempts to deal with labour matters.

[53] See Charnovitz "The Moral Exception in Trade Policy" 1998 *Virginia Journal of International Law* 689.

the above exceptions.[54] Such disparities in views explain the current status quo in which the WTO appears unsure, if not disinterested, in protecting core labour standards as human rights within its multilateral regulatory scheme.

1 2 CONTEXTUAL BACKGROUND

In international law discourses, there have been unending calls for including a social clause[55] in the WTO.[56] Central to the social clause debate has been the common view advanced by developing countries that international law has at times been used as a tool to legitimize the actions of conquerors and the dominant.[57] Inequalities in levels of development have been identified as a reason to exclude a social clause in the WTO.[58] As such, the legal responsibilities of the WTO and its developing and developed member states towards curbing the violation of core labour standards globally in trade related practices (whilst promoting the development agenda) are called into question. A consideration of the normative function of the right to development in offering a legal framework with the potential to humanize the global marketplace offers a normative legal basis for this work to explore the issue of incorporating a social clause in the WTO.[59]

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[54] See Howse "The World Trade Organisation and the Protection of Workers' Rights" 1999 *Journal of Small and Emerging Business Law* 131.

[55] The legal term of "social clause" is defined as any trade agreement provision that constrains the signatory states to respect core labour standards. The contractual nature of the social clause makes it more binding for contracting parties than a simple moral commitment. The WTO has favoured moral commitments to protect labour rights in trade matters as observed in the Singapore Ministerial Declaration of 13 December 1996.

[56] Howse 1999 *Journal of Small and Emerging Business Law* 2.

[57] See Maskus "Intellectual Property Rights and Economic Development" 2000 *University of Colorado Boulder* 11. Trade promotes important aspects of economic development, including trade related technology transfer, access to new products and product ideas, competition on the global market, and comparative advantage. The international community uses trade concepts to support the idea of development. However including a social clause in the WTO would deprive developing countries of their comparative advantage and hence lead to underdevelopment. It must be considered that developed countries benefited from cheap labour to improve their societies. Perhaps the argument now is not for slack labour standards but to allow for a reasonable construction of fair labour standards which is not prejudicial to developed countries that now have higher levels of development and resultantly improved labour standards.

[58] See Anderson "Agricultural Trade Reform and the Doha Agenda" http://www.uneca.org/ednd/atpc/documents/april/agric%20trade%20reform%20and%20dda.pdf. (accessed 11-03-2011). A practical example of this was noted in Agricultural protectionism, dirty tariffication, and subsidies which appear to be the main reasons that the Doha Development Agenda (DDA) failed and, also proof that developed countries and the WTO may not be serious about the material state of the underdeveloped countries.

[59] See Salomon *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (2007) 17.

The right to development has an important juridical contribution to defining features of the international economic order, with the most salient element of this right being found in its potential challenge to existing global political and economic arrangements.[60] In this era of globalization that seeks to provide for an international environment conducive to the further accumulation of wealth by the wealthy through the expansive tendencies of global capital, the right to development demands international cooperation under law for the creation of a structural environment favourable to the realization of basic human rights for everyone.[61]

Whilst an agreement appears to be present concerning the fundamental values of a suitable development course, a number of diverse interpretations of how human rights and development ought to relate, and what is meant by rights-based approaches still exist.[62] Whether the concept of the right to development, as a matter of fact, shares with the other human rights based approaches to development the emphasis given to elements such as equality, freedom, participation and non-discrimination, remain to be established. However it is imperative to note that the right to development contains a bit more: it not only prescribes definite guidelines according to which development should be realized, but also expresses development itself as a human right.[63] It is this supplementary part which has vital consequences, in a number of ways, both at the academic and everyday levels in trying to analyse the development agenda. To begin with, the definition of development as a human right suggests a unique critical reflection of the development agenda in all its facets, from financial distribution to priorities of global

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[60] The Declaration on the Right to Development (DRD) [DRD, GA res A/RES/41/128, December 4, 1986, annex 41 UN GAOR Supplement. (no 53) 186, UN Doc A/RES/41/53 (1986)] makes a vital contribution in this area with duties of international cooperation informing its logic and shaping its structure: Article 3(1) provides that states have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development; Article 3(3) refers to the duty of all states to cooperate with each other in ensuring development and eliminating obstacles to development. This is followed by Article 4(1) which refers to the duty of all states to take steps individually and collectively to formulate international development policies in order to facilitate the full realization of the right to development. In Article 4(2) the DRD unambiguously accepts that effective international cooperation is essential "[a]s a *complement* to the efforts of developing countries [and] in providing these countries with appropriate means and facilities to foster their comprehensive development."

[61] Salomon 17.

[62] See Barsh "The right to development as a human right: Results of the Global Consultation" 1991 *Human Rights Quarterly* 13.

[63] See Gutto *The Legal Nature of the Right to Development and Enhancement of its Binding Nature* UN Doc. E/CN.4/Sub.2/2004/16.

development collaboration.[64] In addition, it enforces a change, in the dialogue of global development collaboration, from a context of need or charity or aid to a framework of right or responsibility or collaboration, both at the individual and at the collective point of view, with central, practical consequences for all the stakeholders, including Non-Governmental Organisations and non-state actors.[65]

The right to development also has both external and internal dimensions.[66] The external dimension addresses disparities of the international political economy which evidence massive global inequities,[67] and the consequent post cold war growth in social and material inequality between states.[68] This aspect of the right engages the responsibilities of states internationally when acting individually or collectively.[69] The internal dimension of the right to development focuses on the duties of each state to ensure domestic policies that seek to contribute to the realization of the fundamental human rights of all its subjects.[70]

The right to development will be an important legal tool in assessing the levels of human rights protection in bilateral trade agreements, regional trade agreements[71] and the WTO multilateral trade agreements concerning the protection of core labour standards. Bilateral and regional trade agreements incorporate social clauses regardless of the levels of development of the contracting parties as opposed to the WTO's approach of excluding them. Regional trade agreements in particular co-exist with the multilateral trade system and impact it in manners that are still to be fully understood. Regional trade rules often replicate multilateral trade rules, but

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64 See Azzam *The Right to Development and Practical Strategies for the Implementation of the Millennium Development Goals* UN Doc. E/CN.4/2005/WG.18/TF/CRP.1.

65 See Alston "Making Space for New Human Rights: The Case of the Right to Development" 1988 *Human Rights Yearbook* I.

66 Salomon 17.

67 See World Bank "*World* Development Report 2006: Equity and Development" *2006 World Bank/Oxford University Press* 16.

68 See United Nations Development Programme "Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World" (2005) 36-37.

69 Orford "Globalization and the Right to Development" in Alston (ed) *Peoples' Rights* (2001) 127.

70 Salomon 18.

71 Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" http://ictsd.org/downloads/2011/12/trade-agreements-and-their-relation-to-labour-standards.pdf (accessed 09-12-2012). Regional Trade Agreements have become a distinctive feature of the international trading landscape. They are already an integral part of the international trade framework, and influence the behavior of governments and traders.

sometimes go beyond them by incorporating some commitments that have implications for sustainable development such as labour related obligations.[72]

The integration process which brings together Southern African states through the Southern African Development Community (SADC) is critical to this work.[73] Perhaps SADC may offer a sample best practices legal framework for incorporating a social clause in trade agreements. Apart from incorporating labour provisions in its instruments, SADC is currently a party to a unique Tripartite African Free Trade Area (TAFTA) whose objectives will be to remove trade barriers.[74] The TAFTA's objectives do not only seek to remove trade barriers but to also improve levels of development and the welfare of people in the two regions.[75] It will be significant to this study to consider the importance (if any) to be placed on a social clause by SADC. This may provide clarity on whether or not resistance to the inclusion of a social clause in the WTO is justified on grounds of inequalities in levels of development or whether this can be plausibly dismissed as a flimsy excuse for effectively allowing a race to the bottom in order to maximize profits at the expense of human rights.[76] Furthermore, an appraisal of the efforts being made to link trade with non-trade matters such as the environment will be done with a view to establishing whether or not there may be any lessons which can be drawn in efforts to develop a framework to link trade and labour in the WTO. The analyses will also address concerns as to whether or not inequalities in levels of development render a social clause impractical for the WTO.

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[72] Ibid.

[73] The SADC was founded in 1992 and is an association agreement with broad political and development aims, rather than a trade agreement, although it includes a trade component. The agreement contains a section on work and employment and a tripartite commission for labour and social affairs which in 2001 adopted a Social Charter on Fundamental Labour Rights in Southern Africa.

[74] See BuaNews "Plans for African Free Trade Agreement" http://www.africagoodnews.com/business/trade-and-investment/2461-plans-for-african-free-trade-agreement.html (accessed 14-06-2011). South Africa pushed to secure a free trade agreement between the SADC, the East African Community (EAC) and the Common Market for East African States (COMESA). The free trade agreement has been adopted and is known as the Tripartite Free Trade Area (TAFTA). A more detailed discussion regarding this free trade agreement will be done in chapter seven of this thesis.

[75] Ibid.

[76] See Hudec "International Agricultural Trade Research Consortium: Does the Agreement on Agriculture Work?" http://purl.umn.edu/14612 (accessed 26-11-2012). Hudec whilst characterizing the situation in agriculture before the Uruguay Round once stated "…if governments lack the political will to obey rules, the rules will not work, no matter how well they are crafted."

1 3 STATEMENT OF THE PROBLEM

The WTO excludes core labour standards from its instruments. This may be viewed by some as academically inexcusable and has the potential to eventually weaken public support for international trade. The proposal to establish a trade-labour linkage in the WTO legal framework has been controversial in the past decade and has been one of concern in relations between advanced industrialised and developing countries.[77] Advocates of a trade-labour linkage argue that a risk exists if countries competitively lower their labour standards in order to preserve their comparative advantage relative to other countries.[78] Similarly, countries with higher levels of labour protection may be discouraged from raising their standards, the so called "regulatory chill".[79] These arguments are credible if one considers that trade openness in some (if not most) developing countries has not been accompanied by an improvement in labour standards but rather by a rapid decline.[80] Those who oppose a trade-labour linkage in the WTO legal framework regard it as a largely incoherent agenda.[81] Trebilcock and Howse observed that:

> "...From the perspective of importing countries, generically lower labour costs in exporting countries enhance consumer welfare in importing countries, and by more than reductions in producer welfare in the latter. From the perspective of exporting countries, particularly developing countries, the latter rightly argue that in the early stages of industrialization, entailing mass production of low-technology products (e.g. textiles, clothing, footwear, processed agricultural products), low-cost and low-skilled labour is one of the principal sources of their competitive advantage, and to deny them the ability to exploit this is to consign them forever to low-value added commodity production for developed-country markets ('hewers of wood and drawers of water')."[82]

However, in a world which places value in human rights protection, maintaining or adopting an approach to industrialisation employed during the industrialisation era by western countries

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[77] See Stem "Labour Standards and Trade Agreements" http://www.spp.umich.edu/rsie/workingpapers/wp.html. (accessed 12 February 2011). See also Trebilcock and Howse 557. Trebilcock and Howse have opined that the trade-labour linkage debate is "...one of the most contentious contemporary issues in trade and labour policy circles..."

[78] In the United States and some industrialised countries such as Britain and France, labour interests and social activists have argued that "unfair" labour practices and conditions exist in developing country trading partners and need to be offset by appropriate trade policy measures in order to level the playing field.

[79] See Staiger "The International Organization and Enforcement of Labor Standards" in Basu, Horn, Roman and Shapiro (eds) *International Labor Standards* (2003) 271.

[80] See Granger and Siroen "Core Labour Standards in Trade Agreements: From Multilateralism to Bilateralism" Universite Paris Dauphine Departement d'Economie Applique Place du Marechal da Tassigny 75775 Paris Cedex 16 France 1.

[81] Trebilcock and Howse 560.

[82] Ibid.

might be inconsistent with the human rights agenda. In spite of the comments made by Trebilcock and Howse above, they have also observed that:

> "...core labour standards viewed as basic or universal human rights, by promoting human freedom of choice, are entirely consistent with a liberal trading regime that seeks to ensure other human freedoms, in particular the right of individuals to engage in market transactions with other individuals without discrimination on the basis of country of location."[83]

If core labour standards as human rights are consistent with a free trade regime it would be correct to conclude that the WTO founding Agreement should include a social clause in order to promote fair trade. Although efforts were made during the 20th century to link trade and labour matters, no policy or legislative position has been taken within the WTO to address the continual violation of core labour standards in trade related matters.[84] Emphasis has been placed on promoting the WTO as an institution for "free trade" with the proposals to incorporate a social clause in the legal framework of the multilateral trade system being viewed as an impediment to free trade. However, the perception that the WTO is purely a "free trade" institution might not, on the whole, be accurate as rules of fair trade have been extended by the WTO into non-trade areas.[85] This raises the question as to why the same multilateral arrangement cannot be adopted to protect core labour standards as human rights in trade.[86]

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[83] Trebilcock and Howse 563.

[84] See World Trade Organisation 2007a *Informe Sobre el Comercio Mundial* 2007 Geneva 380. See also Hoekman and Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* (2009) 626. Hoekman and Kostecki have observed that: "Trade policy is an efficient tool to enforce labour standards, assuming agreement could be reached on what the relevant standards should be." However, Hoekman and Kostecki also observed that: "Trade restrictions will generally have a detrimental effect on the realization of the non-economic objectives that are pursued by pro-labour standards groups. Trade restrictions raise the prices of imports, thus importing a welfare cost at home, while at the same time worsening the labour situation in the target country. Demand for labour services will fall, and plants will downsize."

[85] See Lester *et al* 67. Lester *et al* have observed that: "The system does allow tariffs and, in limited circumstances, other forms of protection. More accurately, it is a system of rules dedicated to open, fair and undistorted competition. The rules on non-discrimination-MFN and national treatment-are designed to secure fair conditions of trade. So too are those on dumping (exporting at below cost to gain market share) and subsidies. The issues are complex, and the rules try to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated to compensate for damage caused by unfair trade. Many other WTO agreements aim to support fair competition: in agriculture, intellectual property, services, for example..."

[86] See Trebilcock 173. Trebilcock critiques the incorporation of core labour standards, as human rights, into the multilateral trade framework when their precise content is subject to debate. He questions "what forms of child labour are acceptable; what limits on collective bargaining and the right to strike are acceptable?" He further opined that: "In addition, adopting a human rights perspective on core labour standards, the trade policy-labour standards linkage is problematic to the extent that it is triggered by the importation of goods from countries where the goods are produced in violation of core labour standards. Many violations of core labour standards

Statistics from ILO reports[87] and other official reports[88] reveal the persistence or deterioration of the worst forms of exploitation such as child and forced labour. Child labour is also excluded from the current WTO instruments. Only products of prison labour are currently prohibited by the WTO.[89] An ILO paper released in 2003 indicated that discrimination in hiring, wages, benefits, and career development, lack of accommodation, and issues of working hours, pregnancy, maternity leave and child care have all been identified as problems characteristic of trade oriented zones.[90] Faced with these facts, a demand for respect of minimum labour standards in global, regional and national trade agreements has arisen. Increased imports from countries in which labour standards are ostensibly not enforced vigorously may be detrimental to wages and working conditions in the industrialised importing countries.[91] Workers in developing countries appear consigned to exploitative and abusive conditions, and their wages are suppressed.[92] With no action being taken by the WTO, regional pacts containing obligations that go beyond existing multilateral commitments and others dealing with areas not yet included in the WTO such as the social clause have been concluded.[93] This leads to the problematic perception that instead of actively pursuing a resolution of the negative impact of excluding core labour standards from its multilateral trade agreements, the WTO becomes part of the problem contributing to an endless controversy concerning the trade-labour linkage debate.[94]

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occur in non-traded goods sectors (e.g., use of child labour) hence they are likely to escape the reach of trade sanctions by importing countries." However, contrary to Trebilcock's views, this study will show that child labour in some Southern African countries, especially Malawi is actually being used in traded goods, such as tobacco, which are key drivers of the world economy.

87 See the International Labour Office *Every Child Counts-New Global Estimates on Child Labour* Geneva April 2002; International Labour Office *Application of International Labour Standards* 2004 (1) Report 92 III Part IA Geneva 2004. The ILO estimates that more than 12 % of the world's children aged between 5 and 9 are at work. The percentage rises to 23 % for children from 10 to 14. One hundred and seventy-nine (179) million children are subject to the "worst forms" of labour such as hazardous work, forced and bonded labour.

88 See the series of the United States (US) Department of Labour *By the Sweat and Toil of Children* 6 Volumes issued since 1994; US Department of Labour Report Series Foreign Labour Trends, The Department of Labour's 2004 Findings on the Worst Forms of Child Labour Washington DC (annual series).

89 Child labour is one of the most critical issues in trade which must be considered in the same length as prison labour. A couple of international instruments have been adopted to curb the abuse of children in employment matters. These include the ILO Minimum Age Convention No. 138 of 1973 (See Articles 2, 3 and 7) and the Worst Forms of Child Labour Recommendation No. 190 of 1999 (Article II). Child labour is a key area of concern in countries such as India and China where minors are used as cheap labour.

90 See ILO "Employment and Social Policy in Respect of Export Processing Zones" 2003 ILO Geneva 9.

91 Stem 1.

92 Ibid.

93 Grandi V.

94 In the Singapore Declaration, the WTO distanced itself from labour matters, regardless of whether they are trade related or not. The WTO chose to allow the ILO to deal with all labour matters. What is disturbing though is that

No study has proposed a social clause which could be incorporated into the WTO legal framework without undermining the gains from trade for WTO Member States. The international community is yet to develop a legal framework for managing a trade-labour linkage in the WTO which is acceptable to developed and developing countries as well as human rights advocates. The failure to establish a legal framework which ensures a fair, effective and equitable means of managing the inclusion of a social clause in the WTO justifies the fears of developing countries that a social clause will undermine their trade gains. Equally, it could strengthen the developed countries' controversial argument that "…it is unfair for firms and workers in developed countries to have to compete with firms and workers in developing countries where labour standards and labour costs are much lower, and hence risk losing market share and jobs to these countries."[95] Perhaps adopting a legal framework for a trade-labour linkage which balances the interests of WTO Member States, placing emphasis on compliance with a social clause subject to countries' levels of development could be a plausible proposal for protecting core labour standards in trade. However, no such framework has been developed hence there is still no consensus regarding an acceptable approach to establishing a trade-labour linkage in the WTO legal framework. This is the most critical contribution this study seeks to make.

1 4 JUSTIFICATION FOR THE STUDY

The Havana Charter, which was the foundation for the unsuccessful International Trade Organization (ITO),[96] contained a stipulation that members were to take measures against "unfair labour conditions." The GATT contains no explicit provision permitting or requiring trade action against violations of core labour standards. At most, Article XX (e) permits otherwise the GATT inconsistent measures "relating to the products of prison labour." However the GATT permits members to impose compensatory duties, under certain circumstances, against imports associated with two kinds of "unfair" trade practices: dumping and subsidization by the exporting country.

As defined in GATT Article VI, dumping is the export of a product for a price lower than that for which it is sold in the market of the country of origin or, alternately, export sales below

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there are instances where trade and labour matters overlap. Such areas require the WTO to be involved through promoting the recognition of core labour standards in its instruments. This position is yet to be adopted by the WTO.

95 Trebilcock 172.

96 The Bretton Woods Conference of 1944 recognized the need for a comparable institution for trade, the proposed International Trade Organization, to complement the International Monetary fund and the World Bank.

the cost of production. Unfair subsidization is defined in a complex manner in the WTO Agreement on Subsidies and Countervailing Measures.[97] Although the export of products manufactured with "unfair" labour practices is sometimes described rhetorically as "social dumping" or a "negative" subsidy, there is little question that the existing law on dumping and subsidization fails to provide legal justification for imposition of duties on products from countries with low labour standards on the basis of commercial unfairness.[98]

The discussion of and debate on "social issues" during the Uruguay Round of the GATT/WTO negotiations highlighted the potential impact of trade liberalisation on certain human rights, for example labour standards and environmental protection.[99] However while the concept of trade-labour linkage may seem straight forward, interpretation and conversion into enforceable measures remain hotly disputed and often generates counter arguments of protectionism.[100] Trade liberalisation and the protection of human rights are based on two fundamentally different philosophies, the one of the free market, and the other of state intervention, at least in relation to economic and social rights,[101] as well as "third generation" rights.[102] Not surprisingly, the two concepts have been difficult to align and each of the concepts has taken a rather different path and pace in development. The re-union of the two is a more

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[97] WTO "Agreement on Subsidies and Countervailing Measures ("SCM Agreement")" http://www.wto.org/english/tratop_e/scm_e/subs_e.htm (accessed 09-12-2012). The SCM Agreement addresses two separate but closely related topics: multilateral disciplines regulating the provision of subsidies, and the use of countervailing measures to offset injury caused by subsidized imports.

[98] See Adams and Turner "The Social Dimension of Freer Trade" in Cook and Katz (eds) *Regional Integration and Industrial Relations in North America* (1994) 82.

[99] See Charnovitz "The World Trade Organisation and Social Issues" 1994 *Journal of World Trade* 17.

[100] See Tsogas "Labour Standards in International Trade Agreements: An Assessment of the Arguments" 1999 *The International Journal of Human Resource Management* 354.

[101] Economic, social and cultural rights are socio-economic human rights, such as the right to education, the right to housing, and the right to health. Economic, social and cultural rights are recognized and protected in international and regional human rights instruments. Member states have a legal obligation to respect, protect and fulfill economic, social and cultural rights and are expected to take progressive action towards their fulfillment. The UDHR is one of the most important sources of economic, social and cultural rights. It recognizes the right to social security in Article 22, the right to work in Article 23, the right to rest and leisure in Article 24, the right to an adequate standard of living in Article 25, the right to education in Article 26, and the right to benefits of science and culture in Article 27. The ICESCR is the primary international legal source of economic, social and cultural rights.

[102] Third-generation human rights are those rights that go beyond the mere civil and social concepts. They include Group and collective rights, Right to self-determination, Right to economic and social development, Right to a healthy environment, Right to natural resources, Right to communicate and communication rights, Right to participation in cultural heritage and Rights to intergenerational equity and sustainability.

recent event, but the union has hardly been a happy or harmonious one. Resultantly the violation of core labour standards in trade practices persists with no solution in sight.

1 5 RESEARCH AIMS AND OBJECTIVES

1 5 1 Aims

The discussion concerning the inclusion of core labour standards in multilateral trade agreements was excluded from the Doha agenda.[103] At the inception of the WTO, labour supporters argued that the WTO would accelerate the headlong rush to laissez-faire by dismantling national regulations.[104] They further argued that the WTO would overwhelm attempts by nations (mostly developing countries) to defend living standards and the ability of unions to fight for wages and health and safety laws and it would make it harder for nations to defend the rights of workers to join unions.[105] Labour therefore lobbied hard against the WTO.[106] This study engages the debate on the inclusion of a social clause in the WTO. Focus will be placed on arguments that a social clause in the WTO may diminish the comparative advantage of nations, in particular, developing countries. Labour's best hope for mitigating the effects of competition from low-wage countries will thus be decided under the aegis of the WTO, where the battle lines have been drawn between a handful of industrial countries that seek to link trade rules with labour rights and an alliance of Third World countries with their corporate patrons who are opposed.[107] The study will show that the WTO might well be a suitable forum for advancing workers' rights worldwide as the WTO has the power to review nations' domestic laws that create unfair trade advantages including, potentially, labour laws. The WTO could define fair trade to include compliance with labour standards. Such linkage would be a historic change in the world's trading regime, and labour's stake in it considering that regional trade agreements already include social clauses.

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[103] See Fergusson "World Trade Organisation Negotiations: The Doha Development Agenda" 2008 *CRS Report for Congress* 2.

[104] See Watchel "Labour's Stake in the WTO" http://www.wto.org/english/tratop_e/invest_e/invest_e.htm (accessed 31-07-2011).

[105] Ibid 1.

[106] See Asna "Pakistan, the WTO, and Labour Reform" http://www.laborstandards.org/show.asp?subjectId=13 (accessed 31-07-2011).

[107] Watchel 1.

1 5 2 Research objectives

Improving compliance with labour standards in conjunction with trade openness might speed up development and possibly the stability of international trade relations. Accordingly, the following are the specific research objectives of this study:

- To propose or develop a legal framework which could assist the WTO to equitably enforce a social clause amongst its Member States without undermining their gains from trade or derailing their development plans.
- To evaluate views surrounding proposals to incorporate a social clause into the WTO legal framework and draw lessons from the failed International Trade Organisation (ITO) regarding the importance of a trade-labour linkage.
- To evaluate the legal significance of including social clauses in bilateral as well as regional trade agreements which often replicate multilateral trade agreements, and the necessity of making separate rules for protecting core labour rights in the WTO borrowing from a similar approach adopted in the trade and environment context, in order to impose some discipline on trade practices which impact negatively on core labour standards.
- To evaluate the outcomes of relying on low labour standards as a comparative advantage in trade amongst selected Southern African countries and establish the basis of such an approach.
- To assess the potential and prospects of using trade restrictions as enforcement mechanisms for resolving the violation of core labour standards in trade practices.

1 6 RESEARCH QUESTIONS

The fundamental questions this thesis seeks to address are as follows:

- What is the place for core labour standards in the international trade regime and to what extent does the WTO legal and policy framework recognise human rights?
- Is it possible to adopt a social clause in the WTO legal framework and if so, how?
- Does the violation of core labour standards in trade-related matters amount to an unfair competitive advantage in international trade where unequal trade partners are involved?

- Does a lowered compliance with labour standards during industrialization in the western countries justify the reliance upon a lowered compliance with core labour standards in today's world?
- Does a lowered compliance with core labour standards in trade lead to development or industrialisation?
- Is free trade related to a lowered compliance with core labour standards?
- Does the incorporation and implementation of a social clause in regional trade agreements provide justification for incorporating a social clause in multilateral trade agreements in future?

1 7 RESEARCH METHODOLOGY

This research is a qualitative study based on literature review and survey of primary sources in the form of soft law as developed by reports of United Nations (UN) Agencies, UN treaty bodies, resolutions of the UN General Assembly as well as regional bodies such as the European Union, SADC and SACU. ILO Conventions, the Havana Charter and the GATT will also be consulted. It will also utilise secondary sources such as books, works of publicists of international law, international human rights, labour law, economics, industrial relations as well as academic materials from the internet. Reports of governments and international organisations, global research and policy institutions as well as works of academics in the fields of economics, human rights, labour and trade law will be consulted. This work is designed to provide tentative recommendations for dealing with the continued exclusion of a social clause in the WTO. The methodology adopted in this study will combine purely legal and socio-legal approaches to the subject of the thesis.

1 8 LITERATURE REVIEW

The concept of a trade-labour linkage has never been an easy concept to articulate from an academic perspective. Whilst an array of literature discussing the trade-labour linkage debate exists, authors are yet to demonstrate the legal implications of the continued exclusion of a social clause from the WTO regime whereas regional trade agreements, which seem to have become a distinctive feature of the international trade landscape, have social clauses incorporated in them.

Lester, Mercurio and Davies[108] have argued that it would be productive to pursue the debate over the appropriate relationship between trade and human rights using two approaches.[109] The first approach would focus on how trade law and human rights laws could be reconciled and made complementary to the greatest extent possible.[110] The second approach would be to focus on the need to strengthen human rights protection in global integration law.[111] Before then, Petersmann had argued that: "In order to remain democratically acceptable, global integration law (e.g. in the WTO) must pursue not only 'economic efficiency' but also 'democratic legitimacy' and 'social justice' as defined by human rights."[112]

Trebilcock has argued that imposing sanctions on importing goods produced in circumstances in which there is a perceived non-compliance with core labour standards risked a protectionist abuse by importing countries rather than placing exclusive focus on the effect of inadequate labour standards on the welfare of citizens in exporting countries.[113] Earlier, Trebilcock and Howse had opined that privileging core labour standards over other human rights by protecting them through hard law such as the multilateral trade legal framework was "…to risk a protectionist rationale for trade or other economic sanctions."[114]

Hoekman and Kostecki have argued that, "…using trade remedies to enforce labour standards would worsen the problems at which they are aimed (by forcing workers in targeted countries into informal or illegal activities)."[115] Further, they opined that, "…unemployment will rise and, given the absence or weakness of social safety nets (unemployment insurance), can be

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[108] See Lester *et al* 886.

[109] Ibid.

[110] Ibid.

[111] See Lester *et al* 882. See also Petersmann "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration" 2002 *European Journal of International Law* 621. Petersmann argued that, "…European integration confirms that the collective supply of public goods (such as the global division of labour) may not be politically feasible without comprehensive 'package deals' including solitary responses to 'market failures' and redistributive 'principles of justice'. Less developed countries, for instance, often perceive market competition as a 'license to kill' for multinational corporations from developed countries as long as liberal trade rules are not supplemented by competition and social rules…promoting fair opportunities and equitable distribution of gains from trade."

[112] Petersmann 621. See also Lester *et al* 885. Lester *et al* have observed that: "The protection of human dignity and human rights across frontiers through global integration law based on mutually coherent legal guarantees of 'state sovereignty', 'popular sovereignty' and 'individual sovereignty' remains the biggest constitutional challenge of law and governance in the twenty-first century."

[113] Trebilcock 173.

[114] Trebilcock and Howse 566.

[115] Hoekman and Kostecki 627.

expected to have a detrimental impact on poverty."[116] Hoekman and Kostecki then conclude that based on the arguments they advanced, it is not surprising that developing countries oppose a trade-labour linkage.

Barnacle[117] has acknowledged that there is little or no express recognition of labour rights in the WTO multilateral agreements and the investment agreements.[118] Charnovitz[119] examined the long history of proposals to link workers rights with international trade. His proposals center around the proposition that core labour standards must be incorporated into international trade agreements through a social clause.

Brown[120] has indicated that the trade-labour linkage debate has engendered ongoing and vigorous debate amongst academics, governments, policy makers, non-governmental organisations (NGOs) and unionists. Brown has further opined that, along with issues such as environmental protection, it ranks among the most contentious issues within the WTO.

Tsogas[121] categorised the various protagonists in this debate into two groupings. The first group consists of neo-classical economists and free traders, major international employers and transnational corporations, third world governments, political and economic elites, and some NGOs. The arguments advanced by this group centre around two themes: that social clauses are a form of disguised protectionism by developed economies and a form of neo-colonialism, imposing western values on other cultures. In the second group Tsogas included neo-Keynesian and neo-institutionalist economists, international employers who have developed "ethical" codes of conduct, national and international trade unions, some developed country governments and a

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[116] Ibid.

[117] See Barnacle "Promoting Labour Rights in International Financial Institutions and Trade Regimes" 2004 *Saskatchewan Law Review* 629.

[118] WTO "Trade and Investment" http://www.wto.org/english/tratop_e/invest_e/invest_e.htm (accessed 09-12-2012). The WTO stated that, "The Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), one of the Multilateral Agreements on Trade in Goods, prohibits trade-related investment measures, such as local content requirements, that are inconsistent with basic provisions of GATT 1994. The General Agreement on Trade in Services addresses foreign investment in services as one of four modes of supply of services. None of these agreements recognise the need to protect core labour standards in trade related matters."

[119] Charnovitz 1994 *Journal of World Trade* 17.

[120] See Brown "Labour Standards, Where do they belong on the International Trade Agenda?" http://www.ase.tufts.edu/econ/papers/ (accessed 17-02-2011).

[121] See Tsogas G *Labour Regulation in a Global Economy* (2001) 21-22.

plethora of NGOs, including human rights and religious groups.[122] This group advances arguments about human rights, economic efficiency and skills development.

Maitland[123] has pointed out that the trade-labour rights demand enjoys no support amongst the people or the trade unions of the developing nations. Labour, he contends, lobbied hard against the WTO. When seven years of trade negotiations at last gave birth to the WTO in 1995, the labour movement was one of its leading skeptics with their greatest fear being that the WTO would infringe upon the trade unions' ability to organise in the workplace.[124]

Egger and Schumperli[125] have conducted a survey of NGOs, research centres and trade unions of the South and of Eastern Europe in 1996. Of the 82 respondents, 67 were from the South but only 19 of these Southern respondent organisations were trade unions. Whilst the results of their research revealed overwhelming support for the introduction of a social clause in international trade, the findings were representative more of the views of NGOs than of trade unions.

Salazar-Xirinachs[126] and Fields[127] have analysed the single most common reason cited against the inclusion of core labour standards in international trade agreements, protectionism or "disguised protection" by the North designed to undermine developing countries' comparative advantage, namely low wages. Panagariya[128] has argued that cheap labour is viewed as an unfair competitive advantage by developed countries and claims that this is essentially the age-old pauper labour argument that labour unions have repeatedly used to seek protection for labour-intensive industries in developed countries. Panagariya has further indicated that a large number of Northern unions, as well as those from the South, oppose a social clause.[129]

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[122] Ibid.

[123] See Maitland "Corporate Social Responsibility and Sweatshops: On the Road to Opportunity or to Ruin" 1999 Annual Meeting of the Academy of International Business Charleston South Carolina.

[124] Ibid.

[125] See Egger and Schumperli "Clause Sociale, Sondage au pres des ONG et syndicates Europeans et du Sud" 1996 Lausanne Pain pour le prochain et Declaration de Berne (mimeo).

[126] See Salazar-Xirinachs "The Trade-Labour Nexus: Developing Countries' Perspectives" 2000 *Journal of International Economic Law* 377.

[127] See Fields "International Labour Standards and Decent Work: Perspectives from the Developing World" http://www.law.stanford.edu/programs/ils/conference (accessed 20-05-2011).

[128] See Panagariya "Trade-Labour Link: A Post Seattle Analysis" in Z Drabek (ed) (2000a) Globalization Under Threathttp://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20papers/zdenkPANAGARIYA%20(Chapter%203.doc).pdf. (accessed 20-05-2011).

[129] See Pangariya "Failure in Seattle Dampens Free Trade" http://www.capitalresearch.org/LabourWatch/1w-0100a.htm. (accessed 11-05-2011).

Khor[130] has argued that any form of linkage between labour issues and the WTO can only be detrimental to the interests of developing countries and workers in the South. Dubey[131] and Shaffer[132] supported this view with the latter referring to the demand for a trade-labour linkage as a 'western perspective'.

Bhagwati[133] referred to the opposition to a social clause by the Indian trade union movement as if this somehow concludes the issue. Nigam argued that Bhagwati failed to discuss the nuances or differences of opinion within the Indian community on the social clause proposal. Certainly, in 1995, all the major Indian unions attending the 32nd Session of the Standing Labour Committee, endorsed the Indian government's opposition to a trade-labour linkage, support based upon the notion of anti-imperialism and national sovereignty.[134]

Hensman[135] has noted that, on the whole, the proposal for a workers' rights clause in WTO agreements has been greeted in a positive light by informal sector activists as these activists see little hope of securing rights for workers through purely domestic action, a view supported by Nigam.[136] Palo *et al*.[137] have referred to the Commission on Labour Standards and International Trade appointed by the Indian government to examine the issue of linkage. The Commission, headed by Subramanian Swamy, former Minister of Commerce, suggested that:

> "There are some desirable core labour standards which deserve to be uniformly enforced internationally for which trade sanctions are ultimately necessary to obtain serious compliance. India should give up its defensive approach and play a proactive role in global forums, particularly in the World Trade Organisation, in evolving a moderate 'Middle Path' concept of [the] social clause."[138]

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[130] See Khor "Why the WTO should not deal with Labour Standards" http://www.twn.org. (11-05-2011). See also Khor "Martin Khor's Davos Talk" http://lists.essential.org/pipermail/mai-intl/2000-January/000011.html.(accessed 11-05-2011).

[131] See Dubey "Social Clause: The Motive behind the Method" http://www.aidc.org.za/archives/sc2.html. (accessed 13-05-2011).

[132] See Shaffer "WTO Blue-Green Blues: The Impact of US Domestic Politics on Trade-Labour, Trade-Environment Linkages for the WTO's Future" 2000 *Fordham International Law Journal* 608.

[133] See Bhagwati "Afterword: The Question of Linkage" 2002 *The American Journal of International Law*.

[134] See Nigam "Radical Politics in the Times of Globalization: Notes on Recent Indian Experience" http://www.iisg.nl/~sephics/papers.htm 8. (accessed 13-05-2011).

[135] See Hensman "The Impact of Globalisation on Employment in India and responses from the Formal and Informal Sectors" http://www.iisg.nl/~clara/rep hensman.htm. (accessed 15-05-2011).

[136] Nigam 7.

[137] See Palo, Padhi and Panigradhi "Labour Standards in the Aftermath of Structural Adjustment Programme: The Case of India" 2000 *Indian Journal of Industrial Relations* 381.

[138] Palo *et al* 383.

Howse[139] has argued that currently, the WTO's main role with respect to labour standards is, through interpretations of legal provisions, to constrain the use of trade measures as a means of putting economic pressure on countries or firms to comply with such standards. In some existing interpretations of a number of GATT provisions, the kind of obstacles to such measures appears to far exceed what is required to exclude purely protectionist or arbitrarily discriminatory measures. Howse and Trebilcock[140] undertook a survey of the development-related provisions of the GATT. They concluded that the encouragement of developing economies in trade was arguably regarded as a natural side-effect of trade expansion, with a few development-oriented patches added on to trade liberalizing rules.

Broude[141] has critically analyzed the role of development and poverty alleviation in the legal and institutional workings of the WTO. By analogy to Joseph Weiler's[142] analysis of the dynamics of internal and external legitimacy in WTO dispute settlement, Broude suggested the existence of an inconsistency in the evolution of the WTO, between the marked shift in the organizational rhetoric of development, and the virtual standstill in the adaptation of the WTO's functional design to its newly trumpeted development goals.

Irwin[143] undertook a study on the subject of the importance of international trade to development vis-a-vis economic growth, though the debate has never been free of theoretical controversy and political contention.

Frank Garcia[144] has showed that the present development debate is not about global economic expansion as such but rather about the erasure of economic inequities, over the capacity of international trade policy to lift the world's deprived masses from poverty and to promote the economies of developing countries where the vast majority of the impoverished reside.

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[139] Howse 1999 *Journal of Small and Emerging Business Law* 131.
[140] Trebilcock and Howse 472.
[141] See Broude "The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO" (2006) *Columbia Journal of Transnational Law* 4.
[142] See Weiler "The Rule of Lawyers and the Ethos of Diplomats: Some Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" (2001) *Journal of World Trade* 191.
[143] See Irwin *Against the Tide: An Intellectual History of Free Trade* (1996).
[144] See Garcia *Trade, Inequality and Justice: Towards a Liberal Theory of Just Trade* (2005).

Sylvia Ostry[145] has looked at the trend of the so called "developmentification" of the WTO and indicates that it is in fact not so surprising, given the recent history of the WTO.

Rubens Ricupero[146] has analysed the perceptions of the unbalanced rules of the GATT/WTO and concluded that their failure to promote development have fuelled complaints about the legitimacy gap in the WTO.

1 9 LIMITATIONS OF THE STUDY

Certain limitations of this study must be made clear from the outset. The debate over the role of the WTO in international efforts to raise labour, social and human rights standards is a debate about the means to an end, not about the end in itself.[147] The trade-labour linkage debate is also a long standing issue which has been resuscitated by the never-ending effects of globalisation on labour standards in an open trading environment. Strydom[148] has noted with regard to the ever growing nature of public international law that:

> "At the heart of the matter lies the problematic nature of the traditional conceptualization of the sources of international law in view of the impact of several fast developing new fields and uncertainties these developments have brought in the wake with regard to law creating competence of various international law organs and the legal status of the documents they produce."[149]

The WTO has found it difficult to deal with the trade-labour linkage debate. Diverse opinions exist regarding the possible benefits and disadvantages of including a social clause in the WTO where equal compliance is sought from both developed and developing countries. However, there is no clear-cut answer to this complex question as the implications of a social clause may depend largely on its specific content and the extent to which it accommodates the interests of all concerned. Regardless of this position, a solution must be found. To determine how the social clause may affect the WTO regulatory framework in particular, several existing FTAs have to be examined.

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[145] See Ostry "The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations" in *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (2002) 285.

[146] See Ricupero *Rebuilding Confidence in the Multilateral Trading System: Closing the 'Legitimacy Gap'* in The Role of the WTO in Global Governance (2001).

[147] See Eglin "Keeping the 'T' in the WTO: Where to next on Environment and Labour Standards?" 2001 *The North American Journal of Economics and Finance* 2.3.

[148] See Strydom *International Human Rights Standards: Administration of Justice* (1997) 3.

[149] Ibid.

This work explores the significance of incorporating a social clause in FTAs where countries with unequal levels of development are yet to develop dispute settlement structures which give clear indications on resolution of complaints existing in their regions concerning violations of core labour standards. This information is not easily obtainable as countries seek to promote trade over human rights and would go to great lengths to conceal the existence of any such violations. This work also has to cover regional agreements whose significance in international trade law is such that they may influence changes in international trade practices. However, there are so many of these agreements. Therefore, this study will focus on the North American Free Trade Agreement (NAFTA)[150] and the SADC trade agreements. The justification for paying particular attention to these two regions is that the NAFTA has taken the lead role in trying to incorporate core labour standards in bilateral and regional trade agreements whilst the SADC also recognises core labour standards in its regional trade agreement with a more interesting development coming in the form of the TAFTA. The TAFTA may just be a good indication of the developing countries' sincerity in objecting to the inclusion of a social clause in the WTO, if they have it in their own trade instruments. Focus will also be placed on concerns around the impact of a social clause on the comparative advantage of developing countries and enforcement of the proposed social clause in the WTO amongst countries with different levels of development.

1 10 SCOPE OF THE STUDY

This study focuses on the debate on enlarging the place of human rights and development in the WTO with emphasis on the need to include a social clause in its regulatory framework.[151] The study will explore whether including a social clause in the WTO will infringe on the comparative advantage of developing countries or not. The study will also explore the impact of enforcing the WTO's findings concerning nations' violation of core labour standards as human rights in trade related matters, especially where such enforcement is required in instances where nations have

[150] The North American Free Trade Agreement or NAFTA is an agreement signed by the governments of Canada, Mexico, and the United States, creating a trilateral trade bloc in North America. The agreement came into force on January 1, 1994. It superseded the Canada-United States Free Trade Agreement between the U.S. and Canada. In terms of combined GDP of its members, as of 2010 the trade bloc is the largest in the world. The North American Free Trade Agreement (NAFTA) has two supplements, the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC).

[151] See Hoekman and Kostecki 629.

different levels of development. The objective in this instance is to assess whether there is any prejudice which states at the lower echelons of the development chain will suffer if a social clause was to be incorporated into the WTO. The study will pay attention to the legal paradigm underlying the WTO, one of sovereignty that does not permit extra-jurisdictional action to be taken through trade policies. Analysis will also be done on why a prohibition exists concerning trade in products from prison labour as opposed to the critical area of child labour.

The case of an environment and trade linkage[152] will be reviewed to ascertain whether the legal principles employed to deal with disputes in these areas may not be employed in resolving the trade, labour and human rights linkage debate in the WTO. The study will further enquire whether there have been complaints from the implementation of social clauses in regional trade agreements so as to ascertain the dissatisfaction or satisfaction levels regarding the effectiveness of a social clause as a mechanism to improve the protection of core labour standards as human rights in trade.

1 11 OUTLINE AND OVERVIEW OF CHAPTERS

The study consists of nine (9) chapters. Chapter 1 presents a general introduction to the study. The contextual background to the study is presented. It identifies the research problem, gives the justification for the study and articulates the aims, objectives, scope, methodology, research questions, literature review, scope and limitations of the study. It also gives the outline and overview of the chapters in the thesis.

Chapter 2 discusses the historical context of the trade-labour linkage with a view to highlighting the historical antecedents of calls for the incorporation of a social clause in the WTO instruments. It assesses the violations of labour standards in the Pre- and Post World War II eras, highlights the initial inclusion of a social clause in the Havana Charter and its later exclusion from the GATT. The chapter also seeks to establish whether there are any lessons to be learnt from the failed ITO which could inform the contemporary debates regarding proposals to incorporate a social clause into the WTO legal framework.

Chapter 3 discusses the relevance and implications of the right to development and the concept of human rights to the trade-labour linkage debate. An analysis of the legal

[152] See Oxley "WTO and the Environment" http://www.apec.org.au/docs/oxley2001.pdf (accessed 22-06-2011).

characteristics of the right to development as a human right and its intended impact on global trade flows reveals how the duty to protect human rights is an obligation for both developed and developing countries, internally and externally. The chapter also evaluates the scope of a rights-based approach to development vis-à-vis the demands for a New International Economic Order. It examines the legal basis of the WTO's human rights commitments with a view to pointing out that the WTO like any other international organisation has a duty to protect core labour standards as human rights.

Chapter 4 evaluates the theoretical and empirical evidence relevant for understanding the trade-labour linkage debate within the WTO. The chapter examines legal arguments concerning the trade-labour linkage debate and explores the debates regarding the exclusion of the social clause in international trade on the basis of its presumed threat to developing nations' comparative advantage. It proceeded to assess the economic theories concerning labour market functions and trade with a view to establishing their relevance in the global era. The analysis is limited to the most important and representative literature, trends and issues surrounding the contemporary trade-labour linkage debate.

Chapter 5 undertakes a legal analysis of the incorporation of the social clause in bilateral and regional trade agreements. The chapter also explores how the adoption of a social clause in bilateral and regional trade agreements may enlarge the place of human rights and development in the WTO's multilateral trade regulatory framework. By analysing some of the cases heard under the NAALC, the chapter seeks to assess whether the inclusion of a social clause in bilateral or regional trade agreements is mere grandstanding or a genuine attempt to protect core labour standards in trade. The key objective of the analysis in chapter five is to show that it is possible to establish a trade-labour linkage legal framework in the WTO and failure to do so could compromise the legitimacy of the institution.

Chapters 6 and 7 evaluate the protection of core labour standards in selected Southern African countries. Chapter 6 discusses the current developments surrounding a social clause in South Africa. Placing focus on the role of the Chinese in the violation of labour standards in trade, the violation of labour standards to lure investors and the labour unrest in South Africa's farming as well as mining sectors the chapter examines the factors prompting the violation of labour rights in trade. Chapter 7 focuses on the violation of labour standards in selected Southern

African countries, apart from South Africa, in a bid to lure foreign investors. The chapter is the second part of the discussion on a trade-labour linkage from a Southern African perspective. It proceeds from the analysis in chapter 6 and explores the widespread nature of the violations of core labour standards in trade, in the region.

Chapter 8 examines the practicality of incorporating a social clause into the WTO regulatory framework. It uses as it basis the attempts made to link trade with environment. It proceeds to assess the dangers posed to the multilateral trade system by the exclusion of core labour standards from the WTO legal framework. An examination of the legitimacy crisis presently facing the WTO reveals that it may need to recognise the protection of human rights as one of its key objectives to ensuring sustainable development, especially for developing countries.

Chapter 9 offers a synthesis of the study in order to summarise the main findings and draw conclusions to the thesis. Based on contextual factual and legal discussions in the previous chapters, chapter 9 concludes by making practical recommendations for the purposes of combating the continued deterioration in compliance with core labour standards in the face of trade openness. The chapter proposes a legal framework for incorporating a social clause into the WTO system which takes into consideration the different levels of development of the WTO Member States and their developmental interests.

1 11 ETHICAL CONSIDERATIONS

This work is purely a desk top research in which all primary and secondary sources used will be referenced. As such no individual or group interviews/questionnaires will be used as instruments of research with the objective of holding discussions concerning any topics or issues that might be sensitive, embarrassing or upsetting. No criminal or other disclosures requiring legal action and having potential adverse effects, risk or hazards for research participants will be made in the course of the study. There is therefore no need for arrangements to be made in respect of insurance and/or indemnity to meet the potential legal liability of the University of Fort Hare for harm to participants arising from the conduct of the research.

CHAPTER TWO

The Linkage between International Trade and International Labour Standards in Historical Perspective

2 1 INTRODUCTION

Attempts to use international labour standards to protect workers from economic exploitation in trade related matters must not be seen as an exclusively modern-day concept as they have a long history.[1] The violation of labour standards in trade-related practices, predominantly for economic growth, may well be traced to as early as the age of slave trade. This is in spite of the reality that the first genuine proposals to defend workers' rights in trade related practices were only to be advanced by individual social reformers in Europe during the first half of the 19th century in the early stages of the industrial revolution.[2] The proposals were developed by French social reformers and were based upon their views on the advantages of abolishing the weekly day of rest to a state, until its actions were emulated by other states.[3]

This chapter presents a historical account of the trade-labour linkage debate. It proceeds by investigating historical attempts at advancing the position of labour rights as human rights in the multilateral trade system, from the International Trade Organisation (ITO) to the present day World Trade Organisation (WTO). The eras of slave trade, colonialism and industrial revolution which strongly influenced international trade in history will be examined. Importance will be placed on developments relating to the history of trade-labour linkage from the pre-World War I era to the time immediately following World War II, when efforts began in earnest to establish an international trading regime the result of which was the eventual establishment of the WTO in 1995.[4] The aim of such an approach is to ascertain the mischief that gave rise to calls for

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1 See Charnovitz "The Influence of International Labour Standards on the World Trading System: An Historical Overview" 1987 *International Labour Review* 565. See also Leary "Workers' Rights and International Trade: The Social Clause" in Bhagwati and Hudec (eds) *Fair Trade and Harmonization* (1996) 177.

2 Such attempts at linking labour rights with trade policy were to be found in material written in France in 1788. The reason for such writings was to attempt to guard against the evils of lowering labour standards to attract investors for trade purposes. See Sage "The Progressive Era: The Great Age of Reform" http://www.academicamerican.com/progressive/topics/progressive.html (accessed 09-08-2011).

3 See Pablo "Trade Agreements and their Relation to Labour Standards: The Current Situation" http://ictsd.org/downloads/2009/11/lazoweb_final_opt.pdf (accessed 02-07-2011).

including a social clause in multilateral trade agreements and the related challenges. Perhaps finding the mischief underlying the trade-labour linkage debate could assist in advancing the debate in contemporary academic discourse beyond its present state defined by the continual omission of a social clause from multilateral trade agreements. Such a development may influence the somewhat unrestrained infringement of workers' labour rights in the face of persistent growth of the so called 'free trade'. It is hoped that suspicions of the existence of modern day slavery in the form of lowered compliance with labour standards for economic gain, a key feature of international trade in the eras of slave trade and industrialization, may be dismissed or addressed in instances where they are found to be genuine.

2 2 PRE-WORLD WAR II ERA

2 2 1 Early history

Advocates for the incorporation of labour rights into trade rules have advanced their opinions in response to the conservative case for unrestricted trade.[5] If international trade is to be unrestricted, markets in trade practicing states must not be fixed to boost exports and discourage imports.[6] This philosophical principle was then developed to become the central norm of free trade and remains the dominant principle of modern day trade.[7] However, free trade as a concept was 'tainted' by the legacy of colonialism.[8] Intellectuals trying to comprehend the global political relations expressed in multilateral trade arrangements must be familiar with the significant influence colonialism has had on the conduct of developing nations, even in the contemporary world, particularly on their stance on the inclusion of a social clause in trade agreements.[9] Such was the aversion to colonialism amongst developing nations that as soon as they attained independence from their colonial masters, they embarked on overturning the

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4 See Watchel "Labor's Stake in the WTO" http://www.tni.org/es/archives/act/2302 (accessed 05-07-2011). Watchel notes that Labour supporters argued that the WTO would only accelerate the headlong rush to laissez-faire trade practices by dismantling national regulations. It would overwhelm attempts by nations to defend living standards and the ability of unions to fight for wages and health and safety laws and it would make it harder for nations to defend the rights of workers to join unions. Labour as a result lobbied hard against the establishment of the WTO.

5 Watchel 2.

6 See Oxfam "Rigged Rules and Double Standards: Trade, Globalisation, and the Fight against Poverty" http://www.maketradefair.com/assets/english/report_english.pdf (accessed 05-07-2011).

7 Ibid.

8 See Scott "*Developing Countries in the ITO and GATT Negotiations*" www.manchester.ac.uk/bwpi (accessed 05-07-2011).

9 See Hudec *Developing Countries in the GATT Legal System* (1987) 6.

policies that were imposed on them by colonial governments, and demanded freedom to utilize the commercial restraints that the Western governments had previously reserved for their exclusive use.[10] Freedom in commercial policy-making became bound up with emerging political freedom.[11] Hudec has noted that relations between developed and developing countries had previously been almost exclusively either *de jure* or *de facto* colonial.[12] Indeed, the legacy of colonialism and the ensuing doubt expressed by developing countries towards the trade policies of the colonial states is largely ignored. However, appreciating the lasting impact of this knowledge on the attitudes of developing countries to international trade regulation is critical to understanding their position concerning the trade-labour linkage debate. It is submitted that making no attempts to consider the impact colonialism had on attitudes as well as policies adopted by developing countries towards the ITO/GATT may militate against the adoption of an appropriate solution to the challenges faced by the proposal to link trade and labour standards.

In the opinion of developing countries, trade liberalisation as advanced by the US and UK in the plans for the ITO was largely based on self-interest in opening new markets for manufactured goods and securing supplies of raw materials.[13] India once commented:

> "As leading industrial powers, the prosperity of both the United Kingdom (UK) and United States of America (US) depends on the ready supply of cheap raw materials and on expanding markets for manufactured goods. Exports on an ever-increasing scale rather than internal development, is the primary objective of both. The insistence on world-wide reduction of tariffs and the removal of trade barriers and on 'equal access to the markets and raw materials of the world' which has characterized every statement of policy made by either Government … is thus easily explained".[14]

Clearly the ITO was the brain child of the US and UK, with the US being the more dominant actor.[15] The proposal for a post-war trade organization was developed by a set of inter-departmental and inter-agency committees that met in Washington DC from 1943 to 1945.[16] The four foundations of the ITO were the generalized most-favoured-nation treatment, freeze in

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[10] Scott 10.
[11] Ibid.
[12] Hudec 6.
[13] Scott 12.
[14] See UNCTE *Government of India: Comments on US Proposals for Expansion of World Trade and Employment* (1946 b) 5.
[15] See Odell and Eichengreen *The United States, the ITO and the WTO: Exit Options, agent Slack and Presidential Leadership* (1996) 184.
[16] Ibid.

existing preferences, a commitment to negotiate reductions in existing trade barriers and a ban on using quantitative restrictions except under exceptional conditions. The US provided an early version of their proposal to the UK in 1944.[17] Meade described the UK's alarmed reaction as follows:

> "There is a very dangerous trend of thought in the US, of which Will Clayton in the State Department may be taken as the symbol, that the way to cure unemployment is to have stable exchange rates and free trade rather than (what is much nearer the truth) that the only way to achieve the conditions in which one can establish freer trade and more stable exchange rates is for countries to adopt suitable domestic policies for maintaining employment."[18]

An apparently prostate Britain had little choice. As a condition for the 1945 Anglo-American loan, the UK committed to the restoration of current account convertibility and non-discriminatory trade.[19] In notes exchanged with the US between 1945 and 1946, Belgium, Czechoslovakia, France, Greece, the Netherlands, Poland, and Turkey, all recipients of US aid, committed to similar goals.[20] The first round of negotiations was convened in London in 1946. Participants agreed that quantitative restrictions should be removed and that all trade barriers should be applied in non-discriminatory fashion.[21] However, the UK and France emphasized the need for import controls to support their fragile balance of payments positions.[22] The UK further stressed the importance they attached to trade with the Commonwealth.

Australia insisted that regulatory measures were needed to facilitate industrialization and the pursuit of full employment.[23] It was of the opinion that the US proposals to liberalise trade would 'fossilize' the existing international division of labour in favour of the wealthy industrialised countries, threatening their plans for industrialization.[24] The UK, Belgium, and the Netherlands opposed the US proposals for sanctions against state trading and cartels.[25] With this unstable background to free trade owing to colonialism and the non-industrialized countries'

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[17] Ibid.
[18] See Howson and Moggridge "The Collected Papers of J.James Meade" 1990 *The Cabinet Office Diary* 14.
[19] Ibid 106.
[20] Odell and Eichengreen 185.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] See Capling "The 'enfant terrible': Australia and the Reconstruction of the Multilateral Trade System" 2000 *Australian Economic History Review* 21. Capling stated, "From an Australian perspective what the US and Britain hailed as 'trade liberalisation' looked more like Anglo-American imperialism".
[25] Odell and Eichengreen 185.

desire to develop, it should be no surprise that the trade-labour linkage debate has proved to be more complicated than it perhaps should be. At the centre of the debate has been the view that cheap labour is critical for the development of developing countries. These countries argue that cheap labour during the industrial era was a vital tool for the development of the US and the UK.[26] The same argument has been leveled against all other industrialised countries aside from the US and UK. In response, the US has been resolute in dismissing the importance placed by developing countries on industrialization. Wilcox has ridiculed the use of industrialization as a tool for development, and expressed the view that this opinion is based on the unreasonable idea that it was only through swift industrialization that developing countries could secure improved standards of living.[27] It may be necessary to establish whether this is the route developing nations also want to follow in the pursuit of development in the modern era. This may serve to inform the world as to what is necessary, free trade at the expense of human rights or the protection of human rights at the expense of free trade or a balance of human rights and free trade. This is a critical element of this study. The following discussion starts with a brief analysis of the Atlantic Slave Trade with a view to showing how cheap labour from slaves led to an unfair export boost.

2 2 2 Atlantic slave trade

The Atlantic Slave Trade[28] was driven by European colonists' desire to utilize New World land and resources for capital profits.[29] It remained one of the least studied areas in modern historiology until the past quarter century. Klein attributes such an academic omission to the slave trade's close association with European imperialism, which resulted in a lack of interest in

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[26] Scott 10.

[27] See Wilcox *A Charter for World Trade* (1949) 30.

[28] See Klein *The Atlantic Slave Trade* (2010) 219. The Atlantic slave trade, also known as the transatlantic slave trade, refers to the trade in slaves that took place across the Atlantic Ocean from the sixteenth through to the nineteenth centuries. The vast majority of slaves involved in the Atlantic trade were Africans from the central and western parts of the continent, who were sold by African slave dealers to European traders, who transported them to the colonies in North and South America. There, the slaves were made to labour on coffee, cocoa, cotton and sugar plantations, in gold and silver mines, in rice fields, the construction industry, timber, and shipping or in houses to work as servants. According to Klein, slave trade had its own economics, politics, demographic impact, and cultural implications in relation to Africa as well as America. It could also be placed in the context of world trade and to a certain extent played a role in the 'growing' relationship between Asia, Africa, Europe, and America.

[29] See Becker "Chronology of the History of Slavery: 1619-1789" http://innercity.org/holt/slavechron.html (accessed 10-07-2011).

a morally difficult problem.[30] At the centre of slave trade was labour shortage. Initially, Europeans relied upon the indigenous people for unpaid slave labour, until a great number died from overwork and Old World diseases.[31] Optional sources of labour, such as indentured servitude,[32] failed to provide a sufficient workforce. As many crops could not be sold for profit, or even grown in Europe, exporting crops and goods from the New World to Europe often proved to be more profitable than producing them on the European mainland.[33] This meant that huge amounts of labour were required to produce and maintain plantations that required hard work to grow, harvest, and process valued tropical crops.[34]

Western Africa, and later Central Africa, became the sources for enslaved people to meet the demand for labour.[35] The slaves supplied labour which ensured maximum profits for the trader at no labour cost at all, with slaves often working in harsh and abusive environments.[36] Perhaps, that not so much was written concerning slave labour which directly related to trade during the era of the Atlantic Slave trade maybe an indication that the beneficiaries saw no evil as the economic benefits of slave labour far outweighed their interests in the conditions under

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[30] Klein 219. The issue of the use of slave labour for trade purposes is a relevant academic issue to pursue. It certainly raises questions as to the relationship of the violation of labour standards by developing countries in the interest of trade in the modern world to the violation of labour standards in the industrial era by developed countries for economic gains. The difficult question to address is whether it is fair to prohibit developing states from using cheap labour for economic gains when developed countries benefited from the same. It becomes complicated however when one considers that workers in developing countries will have to serve as cheap labour for their own nations as did their forefathers for the colonialists. It thus becomes necessary to question whether this is the route to attain development envisaged by developing countries in a human rights era?

[31] See Hugh *The Slave Trade: The Story of the Atlantic Slave Trade: 1440-1870* (1997) 10. The Old World diseases included yellow fever, black small pox, sweating sickness and paralysis.

[32] See Shannon *Economic History of the People of the United States* (1934) 73. See also Ballagh *White Servitude in the Colony of Virginia: A Study of the System of Indentured Labour in the American Colonies* (1895). Indentured servitude refers to the historical practice of contracting to work for a fixed period of time, typically three to seven years, in exchange for transportation, food, clothing, lodging and other necessities during the term of indenture. They included men and women; most were under age 21, and most became helpers on farms (performing manual labour) or house servants (performing domestic servitude). They were not paid; wages and cash were in too short supply for that. It was a system that provided jobs and most important transportation for poor young people from the overcrowded labour markets of Europe to labour-short America.

[33] See Harley "Trade: Discovery, Mercantilism and Technology" in Floud and Johnson (eds) *The Cambridge Economic History of Britain since 1700: 1700-1860* (2002) 2.

[34] Shannon 76.

[35] See Nunn "The Long-Term Effects of Africa's Slave Trades" 2008 *The Quarterly Journal of Economics* 123 141.

[36] See Barrientos "'Labour Chains': Analyzing the Role of Labour Contractors in Global Production Networks" http://www.capturingthegains.org/pdf/bwpi-wp-15311.pdf (accessed 10-08-2011).

which the slaves worked.[37] It should then come as no surprise that after the era of slave trade, trade continued to be associated with new forms of slave labour. Two areas of concern threatened the legitimacy of the principle of free trade after slave trade; uses of child labour[38] and prison labour.[39] Both forms of cheap labour, as the case was in the era of slave trade were aimed at producing labour intensive goods for trade purposes at a minimal cost while obtaining maximum profits. The chief protagonists for these forms of labour were the UK and the US, the parties who later stood at the forefront of advocating for the principle of free trade under the ITO/GATT arrangement. An analysis of the use of child and prison labour in the UK and the US follows below.

2 2 3 Child labour in the UK and the US

The advent of the industrial revolution led to a high demand for labour in the UK and the US, as the case had been during the slave trade era.[40] In the UK, families hastily moved to the newly industrialized cities from the rural farm areas to find work but sadly, once the families got there, things did not look as bright as they promised to be.[41] All able members of the family now had to go to work in order to survive sometimes at the lowest level of poverty.[42] The resultant effect

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[37] See Gaspar "Working the System: Antigua Slaves and their Struggle to Live" 1992 *Slavery and Abolition* 131.

[38] See the Ratification of the Convention on the Rights of the Child, Office of the United Nations High Commissioner for Human Rights; Archived from the original on 2006-09-29 http://web.archive.org/web/20060929152806/http://www.ohchr.org/english/countries/ratification/11.htm (accessed 10-08-2011). Child labour refers to the employment of children in a regular and sustained manner. This practice is considered exploitative by many international organizations and is deemed to be 'illegal' in many countries. Child labour was employed to varying extents through most of history, but entered public dispute with the advent of universal schooling, with changes in working conditions during the industrial revolution, and with the emergence of the concepts of workers' and children's rights. In many developed countries, it is considered inappropriate or exploitative if a child below a certain age works (excluding household chores, in a family shop, or school-related work). An employer is usually not permitted to hire a child below a certain minimum age. This minimum age depends on the country and the type of work involved. States ratifying the Minimum Age Convention adopted by the International Labour Organization in 1973, have adopted minimum ages varying from 14 to 16.

[39] The prison problem was and is rooted in the present system of industry and trade, carried forward, as it is, purely for private profit without the slightest regard to the effect upon those engaged in it, especially the men, women and children who perform the useful, productive labour which has created all wealth and all civilization. See the Article by Debs "Prison Labour: Its Effect on Industry and Trade" http://www.marxists.org/archive/debs/works/1899/prison.htm (accessed 15-08-2011).

[40] See Gale "Factory Working Conditions in the Late 1800s, 1880-1899" http://www.galenet.com/servlet/SRC/ (accessed 17-08-2011).

[41] See Phyllis *The First Industrial Revolution* (1965) 18.

[42] See Koeller "The Industrial Revolution, 1700-1900" http://www.galenet.com/servlet/SRC/ (accessed 17-08-2011).

was a sharp increase of child labour in factories. It was in these factories that children were abused, over worked, and poorly paid.[43] The treatment of children in factories was often malicious, inhumane and abnormal with their safety being generally neglected.[44] Their working hours varied from 12 to 14 per day with minimal breaks.[45] It was thus not surprising that numerous accidents occurred in the process injuring or killing children on the job. Children's wages were just but a fraction of what an adult would get, with factory owners sometimes getting away with paying them nothing.[46] Factory owners loved child labour and supported it with arguments that it was good for everything from the economy to the building of the children's characters.[47] Parents of working children were virtually forced to approve of it because they needed the income.[48] As a result, a significant number of people placed great emphasis on fighting for the regulation, improvement, and the abolition of child labour with such efforts leading to the promulgation of the Factory Act of 1833[49] in the UK resulting in reduction of child labour abuses.[50]

In the US, child labour became progressively more common due to economic interests. The industrial revolution was an English idea.[51] The US however had rapidly adopted

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[43] Ibid. Children as young as six years old during the industrial revolution worked long hours for little or no pay. Children sometimes worked up to 19 hours a day, with a one-hour break.

[44] See Staples and Staples *Power, Profits and Patriarchy: The Social Organization of Work at a British metal trades firm, 1791-1922* (2001) 10, 18. The youngest children, who were not old enough to work the machines, were commonly sent to be assistants to textile workers. The people who the children served would beat them, verbally abuse them, and take no consideration for their safety. Both boys and girls who worked in factories were subject to beatings and other harsh forms of pain infliction. Overburdening children with work could lead to serious injuries in the back and/or neck. Punishments such as this would often be dispensed under stringent rules.

[45] Not only were these children subject to long hours, but also, they were in horrible conditions. Large, heavy, and dangerous equipment was very common for children to be using or working near.

[46] Staples and Staples 17. Orphans were the ones who were most vulnerable to abuse in this slave-like labour. The factory owners justified their absence of payroll by saying that they gave the orphans food, shelter, and clothing, all of which were far below par. The children who did get remunerated were paid very little.

[47] See Rahikainen *Centuries of Child Labour: European Experiences from the Seventeenth to the Twentieth Century* (2004) 31.

[48] Staples and Staples 5.

[49] The 1833 Factory Act was introduced to improve welfare for children working in factories. The Act limited the amount of hours children of certain ages could work. Specifically, children 9 to 13 years of age were only allowed to work 8 hours a day. Those 14 to 18 years of age could not work more than 12 hours a day. Children under 9 were not allowed to work at all. Also, the children were to attend school for no less than two hours during the day.

[50] The Factory Acts were a series of Acts passed by the Parliament of the United Kingdom to limit the number of hours worked by women and children first in the textile industry, then later in all industries. The factory reform movement spurred the passage of laws to limit the hours that could be worked in factories and mills.

[51] See Cannadine "The Present and the Past in the English Industrial Revolution 1880-1980" 1984 *Oxford* 136.

industrialization and not only did US citizens believe in the industrial revolution which was occurring in England but they wanted to reproduce the same things in their own country albeit in a better way than in the UK.[52] The Industrial revolution in the US was represented by new technology like the cotton gin and a rising economy. This era in history which could be traced to around 1700s-1800s, changed the way people survived and worked. As a result of the rise of cities, countless families migrated from rural areas as was the case in the UK.[53] Conditions in industry changed along with social and political conditions. Farm labourers and artisans flocked to the manufacturing centres and became industrial workers.[54] Cities grew rapidly. The change from domestic industry to the factory system meant a loss of independence to the worker. A factory worker had to work long hours and was forced to work continuously at the pace set by the machine. The long hours and the monotonous toil were an especially great hardship for the women and children. By 1816, the vast majority of the jobs were held by them.[55]

Industrialization brought problems of capital and labour. A person had to have a lot of capital to buy machines and open a factory. Those who were successful made huge profits with which to buy more machines, put up larger buildings, and purchase supplies in greater quantities at enormous savings.[56] Thus capital increased far more rapidly than it ever had before. Much of it was invested in building canals, railroads, and steamships and in developing foreign trade.[57] The men who controlled these enterprises formed a powerful new class known as the industrial capitalists. However, the industrial capitalists struggled to obtain a voice in the government.[58] They needed a better system of banking, currency, and credit. They had to find and hold markets for their products. They had many difficulties in organizing their factories to run efficiently. They also had to make a profit on their investments in the face of intense competition. This resulted in a laissez-faire approach to industrialization.

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52 See McCormick *The Industrial Revolution In American History* (1998) 10.
53 McCormick 5.
54 See Hackett "Industrial Revolution" http://history-world.org/Industrial%20Intro.htm (accessed 22-12-2011).
55 See Waldvogel Industrial Revolution http://waldvogelglobal.blogspot.com/2011/11/hw-industrial-revolution-due-11-28-11.html (accessed 22-12-2011).
56 Hackett 5
57 Ibid 6
58 Ibid.

Governments in the industrial era established the doctrine that they should keep their hands off business.[59] Factory owners could therefore arrange working conditions in whatever way they pleased. Grave problems arose for the workers with problems of working hours, wages, unemployment, accidents, employment of women and children, and housing conditions becoming prevalent.[60] Children could tend most of the machines as well as older persons could, and they could be hired for less pay. Great numbers of them worked from 12 to 14 hours a day under terrible conditions. Many were apprenticed to the factory owners and housed in miserable dormitories.[61]

More than two million children worked during this era.[62] Child labour was seen in all aspects of work.[63] Children worked in factories, fields, mines and in the city streets.[64] Children were an asset to the employers because they were cheap labour,[65] whilst they also worked to help support their families. At five years of age, some children were regarded as old enough to help in generating more income for their families.[66] At this time in history, children were mostly uneducated except if they came from wealthy families. A famous statement made concerning child labour in the US is as follows: "There is work that profits children, and there is work that brings profit only to employers. The object of employing children is not to train them, but to get high profits from their work."[67] This quote sets the tone of how child labour was recognized by the American government during the late 1800's and early 1900's. A general consensus that blames the industrial revolution for the rise of exploitation of child labour thus exists. Not only were children subjected to work at such a young age but they had to work under deplorable conditions. Children laboured for pennies after a seventy hour work week with those children who worked in the factories suffering from many health conditions such as bronchitis and tuberculosis due to poor ventilation.[68] Children who worked in the coal mines would face sweaty

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59 See Hackett *Europe Transformed* (1992) 20.
60 Ibid.
61 Hackett (1992) 20.
62 See Saller *Working Children* (1998) 8.
63 See Freedman *Kids at Work: Lewis Hine and the Crusade against Child Labour* (1994) 8.
64 McCormick 10.
65 Ibid.
66 See Addams "Child Labor Legislation – A Requisite for Industrial Efficiency" 1905 *Annals of the American Academy of Political and Social Science* 545.
67 See Bartoletti *Kids on Strike* (1999) 12.

and depressing conditions.[69] Many of them had to transport the coal on their back which led to back problems, paralysis and on the whole, a large number of them eventually died.

Regardless of the gross violations of children's rights in labour matters related to trade, employers who favoured child labour suggested that it added to the moral fiber of the child by instilling a value system of work ethic. The president of Merchants Woolen Company, Charles Harding stated:

> "There is a certain class of labour in mills where there is not as much muscular exercise required as a child would put forth in play, and a child can do it about as well as a grown person…There is such thing as too much education for working people sometimes. I have seen cases where young people are spoiled for labour by…too much refinement."[70]

In the early 1900's a social movement was established to remonstrate against the use of child labour in the US. Facing resistance by employers many felt that social reformers were incapable of appreciating how child labour was the dynamic power behind the United States economy. The parties leading the movement were termed the reformers. They had a concern that the national government had to address. The welfare of the child and the abolition of child labour were at the centre of the reformers' objectives.[71] The first organized group of reformers known as The National Child Labour Committee (NCLC) was formed in 1904.[72] The Committee debated the issue of child labour and was comprised of social workers, citizens and politicians. In this Committee, the most celebrated reformers were Jane Addams and Lewis Hine,[73] with Jane Addams playing a key role in the creation of the National Progressive Movement.[74] Changing the social atmosphere in the United States, in her view, could be attained through advocating for the enactment of laws that would advance improved education for children by the government.

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[68] See Solomon-McCarthy "The History of Child Labour in the United States: *Hammer v Dagenhart*" http://www.yale.edu/ynhti/curriculum/units/2004/1/04.01.08.x.html (accessed 20-08-2011).

[69] Ibid.

[70] Ibid.

[71] Ibid.

[72] The National Child Labour Committee, or NCLC, is a private, non-profit organization in the United States that serves as a leading proponent for the national child labour reform movement. Its mission is to promote the rights, awareness, dignity, well-being and education of children and youth as they relate to work and working.

[73] See Gourley *Good Girl Work* (1999) 18.

[74] Ibid. In 1912, when Theodore Roosevelt ran for President of the United States, Addams empathically declared her support for his progressive ideas. As a pioneer of the progressive movement, Jane Addams campaigned for new laws to support the rights of children. As the founder of Hull House in Chicago, Illinois, she was able to provide a platform where children and others could come to seek assistance from the dreadful environment which surrounded them each day.

Lewis Hine also made his contribution towards abolishing child labour. A charter from the US Congress was granted to the NCLC in 1907.[75] This development enabled the NCLC to hire Lewis Hine, a teacher, to research the problems associated with the child labour industry in 1908.[76] Hine, in the several years that followed his hiring, traveled to the US factories photographing the abuse of children in the work place.[77] The pictures he took were later published and seen by many. The pictures had profound impact on America. A tale that revealed horrible violations against children was divulged by the pictures.[78]

But it was not until 1916 that the courts in the US made attempts to deal with the issue of child labour. In this year, the US Congress had passed the first child labour bill, known as the Keating-Owen Act.[79] The Supreme Court declared the Keating-Owen Act unconstitutional on the basis that Congress was using its authority to go outside its mandate to regulate inter-state trade.[80] The resultant effect of the Supreme Court's decision was the abolition of the first child labour bill, the Keating-Owen Act. A significant amount of tension was created between the Congress and the Supreme Court as a result of the Supreme Court's decision. All this tension emanated from the case of *Hammer v Dagenhart*,[81] in which a father, Roland Dagenhart filed a suit on behalf of his two sons Reuben and John who were employed in a cotton mill in Charlotte, North Carolina. Reuben and John were both under sixteen years of age. Dagenhart's law suit claimed that Congress had violated his sons' freedom to work. In response to Dagenhart's claim, the United States District Court filed a response that stated that the child labour bill directly violated child labour laws dealing with commerce from state to state as addressed two years prior by the Keating-Owen Act.

Initially, the case had been heard by the District Court of North Carolina which in its first decision held that the child labour bill was unconstitutional. The District Court further stated that

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75 See Kauffman "The Child Labor Amendment Debate of the 1920s" 1992 *The Ludwig von Mises Institute* 4.

76 Freedman 5.

77 Ibid 5, 8.

78 See Huff "Every Picture Tells a Story" 1998 *Social Work* Volume 43.

79 The Keating-Owen Act banned the sale of any Article produced by child labour (factory, cannery, and mine) and it regulated the number of hours a child could work. The Keating-Owen Act was passed in 1916 under Woodrow Wilson's administration. Many progressives and republicans embraced Woodrow Wilson's efforts as a positive development to curbing the problem of child labour usage in factories.

80 See Pratt *The Supreme Court under Edward Douglass White, 1910-1921* (1999) XIV.

81 See *Hammer v Dagenhart* 247 US 251 1918. The case was argued on April 15, 1918 and decided on June 3, 1918. It was the next case in the struggle against of child labour laws. This case was filed initially in North Carolina in the United States District Court.

Congress had violated several laws including the Constitution.[82] The court also had a reservation to the effect that Congress had violated the Fifth Amendment dealing with due process clause.[83] The Supreme Court then had to address the critical question of whether Congress had the right to regulate goods sold between states made by children less than sixteen years old or not. Justice Day and the majority of the Court held the Keating-Owen Act to be unconstitutional. The judgment of the Court affirmed that Congress had acted *ultra vires* its mandate and that Congress misinterpreted the Commerce Clause which was affirmed by the Keating-Owen Act.[84] Open to various interpretations, it could be argued using the Commerce Clause that commerce was not defined by manufacturing, (the making of products locally) but by the shipment (the actual transportation of the manufactured goods which are shipped interstate).[85]

The judgment of the Supreme Court was not unanimous in that, there was a dissenting opinion.[86] But the judgment of the 3rd of June 1918 left scores of people perplexed. They

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[82] See Wellington *Interpreting the Constitution: The Supreme Court and the Process of Adjudication* (1990) 163, 173. The violations were as follows: the Commerce Clause, the Fifth Amendment and the Tenth Amendment to the Constitution. According to the District Court, Congress claims violated the Commerce Act which is found in Article 1, Section 8 clause 3 which states "the congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Secondly, they saw a breach of the Tenth Amendment which asserts "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[83] Ibid, 172. The Fifth Amendment clearly stated that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor shall be deprived of life, liberty, or property, without due process of; law; nor shall private property be taken for public use, without just compensation." However, many reformers and others were disheartened by the decision. As a result, John Davis and attorney, W.C. Hammer appealed the former decision therefore seeking assistance from the United States Supreme Court. Congress felt that they had a strong backing and compelling evidence based on the Constitution to support their claim. One of their key claims was that Congress has the power to regulate goods created by child labour because there was no one rule that blanketed all the states.

[84] Wellington 172. The Supreme Court argued that the fact of children working in factories and canniers to produce goods that are exchanged between the states does not technically fit the confines of commerce. In view of that fact the Congress has the power to regulate trade but in this case, commerce is not the question when talking about the actual trade process because it does not involve the physical harm of children.

[85] In the previous case of *Gibbons v Ogden* http://www.tourolaw.edu/patch/Gibbons/ (accessed 09-09-2011), it was stated that the power to regulate commerce was the power "to prescribe the rule by which commerce is governed." Reference is also to be made to prior court cases such as *Lackawanna & Western RR Co v Yurkonis* 238 US 439 1915, *Kidd v Pearson* 128 US 1 1888 and *New York v Miln* 36 US 102 1837. All three of these cases were centered on the Commerce Clause. In *Lackawanna & Western RR Co* the court found that coal mining was not defined under the terms of commerce. In the later two cases it was held that the same commerce clause could be redefined to include the regulation of goods made by child labour as identified by individual states.

[86] Wellington 173. This difference of opinion came from Justice Holmes, Justice McKenna, Justice Brandeis and Justice Clarke all of whom concurred. Holmes argued that Congress acted on the basis that it has the right under

questioned why the Court did not find *Hammer v Dagenhart* a moral problem. They believed it was the Court's job to uphold the integrity and ethical standards upon which the US was founded. The US Congress was not deterred by the Supreme Court's decision and therefore did not give up on its efforts to address the problem of child labour. As a result, in 1933, the National Recovery Act (NIRA) was passed.[87] This Act assisted with child labour regulation because it outlawed all forms of child labour. The Act set age limits and working conditions resulting in a significant decline in the number of working children. Assistance from political supporters and labour unions helped make the vision a reality.[88] However, just like prior attempts, in 1935, the Supreme Court ruled the NIRA unconstitutional in the case of *Schechter Poultry Corporation v United States*.[89]

In 1938, another attempt was made by the US Congress to address the problem of child labour usage. The Fair Labour Standards Act also known as Federal Wage and Hour Law was finally recognized by the US federal government.[90] This Act made it mandatory for employers to give children minimum wage of twenty-five cents an hour and a maximum amount of work hours. Additionally, it set age limits and limited certain jobs that children could obtain. Once this Act was upheld by the Supreme Court in 1941, in the case of *US v Darby,*[91] children soon

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the Constitution to disallow certain goods to be traded also known as prohibition. Hence, prohibition includes the use of child labour as represented by the Keating-Owen Act. Also, he disputed that according to the Constitution the Congress falls under the umbrella of being protected by the federal government to monitor commerce as identified in Article 1, Section 8 of the Constitution.

87 See Schlesinger *The Age of Roosevelt: The Coming of the New Deal, 1933-1935* (2003). The National Industrial Recovery Act was an American statute which authorized the President of the US to regulate industry and permit cartels and monopolies in an attempt to stimulate economic recovery, and established a national public works program.

88 See Morris *The Blue Eagle At Work: Reclaiming Democratic Rights In The American Workplace* (2004).

89 In *Schechter Poultry Corporation v United States* 295 US 495 (1935), the Supreme Court of the US invalidated regulations of the poultry industry according to the non-delegation doctrine on the grounds they were an invalid use of Congress' power under the commerce clause. This was a unanimous decision that rendered the National Industrial Recovery Act, a main component of President Roosevelt's New Deal, unconstitutional. See also Alexander "The Impact of the National Industrial Recovery Act on Cartel Formation and Maintenance Costs" 1994 *The Review of Economics and Statistics* 253. During its two-year life, the NIRA required American businesses to develop structures of "self-government" which were meant to stop price deflation and bankruptcies caused by the Depression. In most cases the resulting "Codes of Fair Competition" embodied attempts at regulation of production levels, prices, and trade practices by trade associations. By mid-1935, when the Supreme Court declared the NIRA unconstitutional, hundreds of "Codes" were in operation. The NIRA was criticized for resulting in the formation of cartels in some relatively un-concentrated industries. This was reflected in a breakdown of the cross sectional relationship between concentration and price-cost margin, an outcome consistent with models of monitoring costs.

90 See Douglas and Hackman "The Fair Labor Standards Act of 1938" 1938 *Political Science Quarterly* 493.

91 See *United States v Darby Lumber Co* 312 US 100 1941. This was a case in which the United States Supreme Court upheld the Fair Labor Standards Act of 1938, holding that the US Congress had the power under the

began to stop working and focus on education. As a result of the many laws that were deemed unconstitutional, children in the US today can look back at history and be thankful for the road that was paved on their behalf. The Fair Labour Standards Act still exists and is recognized by the US Supreme Court. The use of child labour in the US and UK was to overlap with other countries. One such country of note was France which modeled its use of child labour after the UK system of child labour usage as driven by industrialization. A concise analysis of the French situation follows below.

2 2 4 The use of child labour in France

France was one of a small group of countries that embarked on the path to industrialization during the eighteenth and early nineteenth centuries.[92] It had its share of spinning mills, coal mines, ironworks, and other manifestations of modern industrial society not least the widespread employment of child labour as conventionally understood during the industrial era.[93] The conventional story of child labour in France began with the borrowing of new British technologies for spinning cotton and other fibers during the late eighteenth century.[94] James Milne, one of the first renegade workers to smuggle new inventions from Lancashire in the UK to France, supported his bid for government funding during the 1780s by emphasizing the potential for employing the previously unemployable on his textile machinery, including "very small children."[95] Some of the early mills mobilized child labour on a large scale. Nine-tenths of the labour force at the Foxlow mill in Orleans in 1790 were boys and girls between five and sixteen, or widowed and infirm women.[96] The Perret spinning mill at Neville, in the Lyonnais, employed forty-two women and ninety young girls in 1783.[97]

The association of the first generation of textile mills with the employment of marginal elements in the labour force encouraged a further parallel with British experience: the drafting of children onto the shop floor.[98] Charitable institutions in France had a long tradition of placing

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Commerce Clause to regulate employment conditions. The unanimous decision of the Court in this case overturned *Hammer v Dagenhart*.

92 See Hindman *The World of Child Labour: An Historical and Regional Survey* (2009) 610.

93 Ibid.

94 Ibid.

95 Ibid.

96 Ibid.

97 See Chassagne *Les coton et ses patrons: France 1760-1840* (1991) 193.

98 Hindman 610.

orphaned and abandoned children on farms or in workshops to help give them a start in life.[99] The turbulent period of revolution and war during the 1790s swelled the ranks of such children, providing the new breed of industrial entrepreneurs with one solution to a tricky problem: tempting workers into the unfamiliar conditions of the factory system.[100] The unfortunate children became, in effect, forced labour. A decree of 1796 allowed employers to bid for batches of children to take on as apprentices.[101] The hard-pressed administration was relieved of the need to pay for their upkeep, and the employers benefited from the long-term contracts imposed on them.[102] Cotton spinners Bernard Delaitre and Antoine Noel, for example, requested a contingent of 120 such girls aged between ten to fourteen years, arguing that labour was difficult to recruit in their rural area of Seine-et-Oise de-partement.[103] Their contracts revealed that the girls had to remain with the firm until they were twenty-one, and any who tried to escape were liable to be arrested and returned to the mill.[104] The 1790s set the pattern for the routine employment of children in French textile mills. Contemporaries soon came to perceive child labour as an issue associated with the factory system. An Alsatian industrialist and reformer Bourcat once wrote:

> "It is in industrial establishments where power-driven machinery necessitates the work of children beside adults, and especially in all types of mechanized spinning mills and similar workshops, that the harmful effects of excessive child labour have been particularly noted."[105]

Sadly, decades after industrialization, child labour still exists in the global era and organizations such as the ILO are still trying to eliminate it. The use of child labour has now become a common feature of trade practices of developing countries as the next chapter will show. It is such history that developing countries are looking at when they argue that developed countries employ double standards when it comes to the industrialization of the former. Apart from child labour, the industrialization process was marred by the heavy reliance on prison labour for economic purposes as shown in the immediately following discussion.

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[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Hindman 610.
[104] Ibid 611.
[105] See Bourcat *Du travail des jeunes ouvriers dans les manufactures, usines au ateliers* (1840) 5.

2 2 5 Industrial prison labour in the US

The rationale behind the use of prison labour was the increase in the dependence of several industries on the cheap, abundant labour force supplied by the prison system.[106] In the 1800s, prisons in America recovered their expenses by hiring prisoners to private companies. In 1885, three-quarters of prisoners were engaged in various forms of labour, frequently for private companies or individuals.[107] This had little to do with efforts at rehabilitation. Prisoners were compelled to labour with no pay, often in hazardous environments; with prisoner miners being killed in cave-ins in the 1800s.[108]

The use of prison labour was necessitated by the system of industry and trade, advanced only for private profit without concern as to the consequences befalling those involved in it, specifically the men, women and children who supplied the valuable and fruitful labour which produced all the capital and development.[109] Thus, it was the economic system, which was accountable for, not only prison labour, but for the gradual enslavement and degradation of all labour, that had to be dealt with before any solution of the prison labour problem or any permanent relief from its demoralizing influences could be in use.[110] In the earlier days punishment was the only reason for imprisonment. Offenders against the ruling class had to serve the sentence in a prison cell, which not uncommonly was furnished with apparatus for torture. With the civilizing process came the idea of the reformation of the culprit**.**[111] The inmates had to be set to work for their own good, no less than for the good of the state.[112] It was at this point that the convict labour problem began and it gradually escalated from that time. Harr has argued that, while there might have been some provisional reforms of the immoral practice of prison labour usage for economic gains, it is still an unmitigated curse from which there can be no escape while an economic system endures in which labour, (that is to say the labourer, man, woman and child) is sold to the lowest bidder in the markets of the world.[113]

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[106] See Erlich "Working for the Man: Prison Labour" 1995 *Covert Action Quarterly* 58.
[107] See Du Pont "Some Benefits of Prisoner Labour" The San Diego Union-Tribune 30 November 1995.
[108] See Leonhardt "As Prison Labour Grows, So Does the Debate" 19 March 2000 *The New York Times* final ed A1.
[109] See Norgate "Export of Prison Goods Confirmed" 8 December 1998 *The Dominion (Wellington)* 6.
[110] See Lafer "Captive Labour: America's Prisoners as Corporate Workforce" 1999 *The American Prospect* 66.
[111] See Cook "Prisoners 'Hired,' so Ex-welfare Clients fired; Free Convict Labour Means Trash Sorters are Recycled Out of a Job." 1999 *The Atlanta Journal and Constitution* 1A.
[112] See Ingley "Inmate Labour: Yesterday, Today and Tomorrow" 1996 *Corrections Today* 28.
[113] See Harr "The New Slavery Movement" 1999 *Social Policy* 28.

More than thirty years ago Professors Wines and Dwight, then Commissioners of the Prison Association of New York, delivered a report to the legislature of the state on prison industry in which they said:

> "Upon the whole it is our settled conviction that the contract system of convict labour, added to the system of political appointments, which necessarily involves a low grade of official qualification and constant changes in the prison staff, renders nugatory, to a great extent, the whole theory of our penitentiary system. Inspection may correct isolated abuses; philanthropy may relieve isolated cases of distress; and religion may affect isolated moral cures; but genuine, radical, comprehensive, systematic improvement is impossible."[114]

Lafer then added that it is as true now as it was then, considered in his most favorable light, the convict is a scourge to himself, a menace to society and a burden to industry, and whatever system of convict labour may be tried, it will ultimately fail in its purpose at reformation of the criminal or the relief of industry as long as thousands of "free labourers," who have committed no crime, are unable to get work and make an honest living.[115] A Commission which investigated the matter in Ohio in 1877 reported to the legislature as follows:

> "The contract system interferes in an undue manner with the honest industry of the state. It has been the cause of crippling the business of many of our manufacturers; it has been the cause of driving many of them out of business; it has been the cause of a large percentage of reductions which have taken place in the wages of our mechanics; it has been the cause of pauperizing a large portion of our labourers and increasing crime in a corresponding degree; it has been no benefit to the state; as a reformatory measure it has been a complete, total and miserable failure; it has hardened more criminals than any other cause; it has made total wrecks morally of thousands and thousands who would have been reclaimed from the paths of vice and crime under a proper system of prison management, but who have resigned their fate to a life of hopeless degradation; it has not a single commendable feature. Its tendency is pernicious in the extreme. In short, it is an insurmountable barrier in the way of the reformation of the unfortunates who are compelled to live and labour under its evil influences; it enables a class of men to get rich out of the crimes committed by others; it leaves upon the fair escutcheon of the state a relic of the very worst form of human slavery; it is a bone of ceaseless contention between the state and its mechanical and industrial interests; it is abhorred by all and respected by none except those, perhaps, who make profit and gain out of it. It should be tolerated no longer but abolished at once."[116]

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[114] See Hawkins *Prison Labor and Prison Industries* (1983) 85.
[115] Lafer 70.
[116] See Ingley "Inmates in the Labour Pool" 2000 *The Christian Science Monitor* 8.

The factual challenge which faced America at that time was its industrial system and its effects upon labour. Prison labour was at the centre of these effects. The competitive system, which creates wage-slavery, throws thousands out of employment and reduces the wages of thousands more to the point of bare subsistence, made prison labour necessary and was its cause.[117] The result was that prison labour was preferred to "free labour". The simple reason for this was that it was cheaper; yielded more profit to the people who bought, exploited and sold it. Furniss has argued that this had its limitations as the use of prison labour could be perceived as capitalist competition that thronged the streets with idle workers, capitalist production that reduced human labour to a commodity and ultimately to crime.[118] In 1887, the US Congress for the first time attempted to outlaw the leasing of convict labour to private parties,[119] but there was a backlash at the state level in the form of a refusal to house federal prisoners.[120] Increasing pressure came from reformers and unionists as the nineteenth century closed. An attempt to use prison labour during a strike at the Tennessee Coal Company in 1891 ended with a surprising show of solidarity; mine workers "stormed the prisons, released the convicts, and burned the prison to the ground."[121] Certainly the miners were most interested in protecting their own jobs and rights, but the fact that they thought of the prisoners at all is significant.[122]

What finally drove legislation restricting prison labour was the Great Depression and increasing fear that private jobs would be lost to cheaper convict labour. The 1935 Hawes-Cooper Act outlawed inter-state trade in convict-made goods, making it a felony and a federal crime to traffic in them.[123] In the same year, 1935, the US Congress banned the use of prison labour on federal contracts exceeding $10,000 through the Walsh-Healey Public Contracts Act.[124] The Walsh-Healey Public Contracts Act placed limits on the purchase of prison-made

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[117] See Eugene *Prison Labour, its Effects on Industry and Trade* (1899) XVn.
[118] See Furniss *Labor Problems: A Book of Materials for their Study* (1925) 6.
[119] See Ingley "Inmate Labour: Yesterday, Today and Tomorrow" 1996 *Journal of Criminal Justice: Corrections Today* 63.
[120] Ibid.
[121] Lafer 66.
[122] Ibid 67.
[123] See O'Meara "Prison Labour is a Growth Industry" 24 May 1999 *Insight on the News* 14. See also Du Pont "Some Benefits of Prisoner Labour" 30 November 1995 *The San Diego Union-Tribune*.
[124] See Derrick, Scott and Hutson "Prison Labor Effects on the Unskilled Labor Market" 2004 *The American Economist* 75. The Act prohibits the employment of females under the age of 18 and males under the age of 16. It also sets standards for the use of convict labour, and job health and safety standards.

goods by the federal government.[125] The 1940 Ashurst-Sumners Act also outlawed trade in goods produced by convicts. Subsection (b) of the Ashurst-Sumners Act exempted goods made in State prisons for use by any prison in any other state, or federal prison-made goods for use by any other federal prison.[126]

Given these developments, industrial prisons proliferated during the first quarter of the twentieth century. Convict labour took various forms. Between 1910 and 1945 chain gangs were popular, as in most states legal provisions allowed some state and, more often, county convicts to work on public roads.[127] Chain gangs were most common in the South. Wearing leg irons, convicts would work in small groups, linked together with long iron foot chains. But for the most part, prisoners in state systems worked in the new industrial prisons.[128] Among the better-known and still operational institutions are San Quentin in California, Sing in New York, and the Illinois State Penitentiary at Statesville. Given the new emphasis on manufacturing and production, the prisons produced materials and goods needed by the military, the government, and the private sector. Demand for prison products had accelerated during World War I.[129]

The income generated by inmate labour, however, was not sufficient to cover the rising costs of operating correctional facilities. Without independent oversight and monitoring, the convict labour system gradually degenerated into corruption and bribery. Moreover, private industry soon complained about being forced to compete with prison industries, which had a clear advantage due to the very low inmate wages.[130] The emerging labour unions also opposed

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[125] Ingley 28. The Walsh-Healey Act or Walsh–Healey Public Contracts Act, passed in 1936 as part of the New Deal, is a United States federal law that applies to US government contracts exceeding $10,000 for the manufacture or furnishing of goods. Walsh-Healey establishes overtime pay for hours worked by contractor employees in excess of 8 hours per day or 40 hours per week, and sets the minimum wage equal to the prevailing wage as determined by the Secretary of Labour. The Act prohibits employment of females under age 18, and males under age 16. The Act sets standards for the use of convict labour, and job health and safety standards.

[126] Ibid 63.

[127] See Flynn and Zahn "Prisons and Jails - Development of Prisons and Jails in the United States - Private, Inmates, Penal, and Punishment" http://law.jrank.org/pages/18929/Prisons-Jails.html#ixzz1WgUjrSCw (accessed 25-08-2011).

[128] See Nagel "The New Red Barn: A Critical Look at the Modern American Prison" http://law.jrank.org/pages/18929/Prisons-Jails.html#ixzz1WhCRUKV0 (accessed 25-08-2011).

[129] See Shichor "Punishment for Profit: Private Prisons/Public Concerns" http://law.jrank.org/pages/18929/Prisons-Jails.html#ixzz1WhCuGsQz (accessed 25-08-2011).

[130] See Logan "Well kept: Comparing Quality of Confinement in Private and Public Prisons" 1992 *Journal of Criminal Law and Criminology* 577.

cheap prison labour.[131] The final blow to prison industries came with the Great Depression, when jobs were scarce or non-existent. Congress responded to the combined pressures of the economy, organized labour, and private interests by passing legislation that first curtailed and then prohibited convict labour.[132] The passage of the Ashurst-Sumners Act in 1940 effectively ended prison industries by prohibiting the inter-state transportion and sale of prison goods in states with laws proscribing them. Most states passed similar legislation prohibiting prison industries from competing with the private sector.[133]

2 2 6 League of Nations Pact

The League of Nations Pact came about after the First World War.[134] In this Pact, member states committed themselves to guaranteeing and maintaining fair and humane working conditions in their own territories as well as in all countries to which their trade and industrial relationships extended.[135] In the context of the League of Nations Pact, authors of the Constitution of the International Labour Organization (ILO) stated in the Preamble that: "The failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own country."[136] The ILO had emerged at the end of the First World War as a single tripartite institution,[137] made up of representatives of governments, trade unions and employers, with a mission to draw up labour regulations applicable to all states and the supplementary mission of checking implementation by each member state.

The International Economic Conference held in London in 1933 and organized by the League of Nations in response to the serious economic depression,[138] should also be noted, as

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[131] Ibid.
[132] Lafer 68.
[133] See Liu "Prison Inmates Offered the Escape of Work" 30 December 1999 Financial Times (London), US edition 16.
[134] See Ruggie "Third Try at World Order? America and Multilateralism after the Cold War" 1994 *Political Science Quarterly* 555.
[135] Ibid.
[136] See Herbert "International Labour Standards: Reversing the Race to the Bottom" http://www.fao-ilo.org/fileadmin/user_upload/fao_ilo/pdf/Other_docs/ILO/ilo_en.pdf (accessed 10-09-2011).
[137] See Article 3(1) the ILO Constitution.
[138] The London Economic Conference was a meeting of representatives of 66 nations from June 12 to July 27, 1933, at the Geological Museum in London. Its purpose was to win agreement on measures to fight global depression, revive international trade, and stabilize currency exchange rates. The Conference was "torpedoed" by U.S. President Roosevelt in early July, when Roosevelt denounced currency stabilization. When the Great Depression devastated the world economy in the years 1929-1932, it was generally assumed that the United States would serve as a hegemon, providing leadership for a program to bring about recovery. President Herbert Hoover in

well as many other events and declarations referring to the necessity of improving the living conditions of workers and of avoiding the introduction of elements of unfair competition, which could lead to difficulties in international trade. However no conclusive results were attained through the said Pact and Conference.

It must be observed that the challenges concerning the need to address labour violations either in the form of child labour or prison labour would not be the last set of challenges that would face the world in trade related matters. Forced labour was another form of violating labour standards for economic interests which became defined during World War I and World War II. A cursory look at this phenomenon will show just how the violation of labour standards in trade related matters has long been a deep rooted problem in the world. An analysis of two of the countries that relied on forced labour will best illustrate the above stated assertion.

2 2 7 Forced labour in Nazi Germany

The use of forced labour in Nazi Germany and throughout German-occupied Europe took place on an unprecedented scale.[139] It was a vital part of the German economic exploitation of conquered territories. The Nazi Germans abducted approximately 12 million people from almost twenty European countries; about two thirds of whom came from Eastern Europe.[140] Many workers died as a result of their living conditions, mistreatment, malnutrition, or became civilian casualties of war. At its peak the forced labourers comprised 20% of the German work force with about 15 million men and women being forced laborers at one point or another during World War I.[141]

Hitler's policy of Lebensraum strongly emphasized the conquest of new lands in the East, known as Generalplan Ost, and the exploitation of these lands to provide cheap goods and labour to Germany.[142] Even before the war, Nazi Germany maintained a supply of slave labour.[143] This

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1931 called for a conference to decide how to reduce tariffs and also revive prices (i.e. reverse the deflation associated with the Depression). The agenda for the Conference was drafted by representatives of six major nations who met in Geneva in 1932. The agenda asserted that intergovernmental debts should be settled as they represented a major obstacle in the road to recovery.

139 See Herbert *Hitler's Foreign Workers: Enforced Foreign Labor in Germany under the Third Reich* (1997) 13.

140 See Beyer and Schneider "Forced Labour under the Third Reich Part-I" http://www.nathaninc.com/sites/default/files/Pub%20PDFs/Forced%20Labor%20Under%20the%20Third%20Reich,%20Part%20One.pdf (accessed 23-12-2011).

141 See Panayi "Exploitation, Criminality, Resistance. The Everyday Life of Foreign Workers and Prisoners of War in the German Town of Osnabrück 1939-49" 2005 *Journal of Contemporary History* 483.

practice started from the early days of labour camps of "undesirables" (German: unzuverlässige Elemente), such as the homeless, homosexuals, criminals, political dissidents, communists, Jews, and anyone whom the regime wanted out of the way.[144] During World War II the Nazis operated several categories of labour camps for different categories of inmates.[145] Prisoners in Nazi labour camps were worked to death on short rations and in bad conditions, or killed if they became unable to work.[146] Many died as a direct result of forced labour under the Nazis.[147]

The largest number of labour camps held civilians forcibly abducted in the occupied countries to provide labour in the German war industry, repair bombed railroads and bridges, or work on farms.[148] Manual labour was a resource in high demand, as much of the work that today would be done with machines was still a manual affair in the 1930s and 1940s such as shoveling, material handling, machining, and many others. As the war progressed, the use of slave labour experienced massive growth. Prisoners of war and civilian undesirables were brought in from occupied territories. Millions of Jews, Slavs and other conquered peoples were used as slave labourers by German corporations, such as Thyssen, Krupp, IG Farben, and even the German subsidiaries of foreign firms, such as Fordwerke (a subsidiary of the Ford Motor Company) and Adam Opel AG (a subsidiary of General Motors).[149] Once the war had begun, the foreign subsidiaries were seized and nationalized by the Nazi-controlled German state, and work conditions there deteriorated as they did throughout German industry.[150] About 12 million forced labourers, most of whom were Eastern Europeans, were employed in the German war economy inside Nazi Germany throughout the war.[151] The German need for slave labour grew to the point, that even children were kidnapped to work in an operation called the Heu-Aktion.[152] More than

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[142] See John *The Fischer Controversy*: *Modern Germany An Encyclopedia of History, People and Culture 1871-1990* (1990) 328. Lebensraum (German for "habitat" or literally "living space") was one of the major political ideas of Adolf Hitler, and an important component of Nazi ideology. It served as the motivation for the expansionist policies of Nazi Germany, aiming to provide extra space for the growth of the German population, for a Greater Germany.

[143] Panayi 483.

[144] Ibid.

[145] Beyer and Schneider 2.

[146] Ibid 3.

[147] Ibid.

[148] See Sohn-Rethel *Economy and Class Structure of German Fascism* (1978) 25.

[149] Ibid 26.

[150] Ibid.

[151] See Marek *Final Compensation Pending for Former Nazi Forced Labourers* (2005) 70.

2,000 German companies profited from slave labour during the Nazi era, including Deutsche Bank and Siemens.[153] In 1944, German records listed 7.6 million foreign civilian workers and prisoners of war in the German territory, most of whom had been brought there by coercion.[154] In this year, 1944, slave labour made up one quarter of Germany's entire work force, and the majority of German factories had a contingent of prisoners.[155]

Not to be out done in the use of forced labour was Spain. So important an issue is the subject of forced labour in Spain's history that during recent years some research has been carried out to introduce Spanish historiography into the main discussions about the contemporary history of forced labour. This has led to the Spanish case of forced labour being compared with some other forms of forced labour in twentieth century Europe such as Nazi Germany. A brief historical analysis concerning the use of forced labour in Spain follows below.

2 2 8 Forced labour in Spain

The use of the forced labour system in Spain can only be understood by paying special attention to the economic rationale that led the state and private enterprises to pursue profits through this kind of labour abuse. Gonzalo provides a well weighted historical analysis of the use of forced labour in Spain. He addressed the interrelation between the two main purposes of forced labour in the history of Spain, the economic and the political, and also looked into the economic logic of that kind of punishment.[156] Gonzalo took into account some of the most important elements in the configuration of labour markets and business strategies, such as the workforce supply-demand relationship, the extraction of capital gains from the work, and the level of productivity of tasks carried out by forced labourers.[157] In this way, Gonzalo attempted to insert the Spanish experience within the European discussions about the relationships between business enterprises

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[152] Ibid 72. See also Hrabar *Hitlerowski rabunek dzieci polskich 1939-1945* (1960) 99. Heu-Aktion was the name of a Nazi German operation where 40 000 to 50 000 Polish, Belarusian and Ukrainian children aged 10 to 14 were kidnapped by the German military and transported to Germany as slave labourers.

[153] See Cohen "German Companies Adopt Fund For Slave Labourers Under Nazis" 17 February 1999 *The New York Times* A1.

[154] Herbert 13.

[155] See Allen *The Business of Genocide* (2002) 11.

[156] See Gonzalo "Forced Labour in Franco's Spain: Workforce Supply, Profits and Productivity" 2011 *European Historical Economic Society* 2.

[157] Ibid.

and fascist regimes, in which the deployment of forced labour has been one of the most important points of debate.[158]

Gonzalo alludes to the fact that the historiography on the great forced labour system in fascist Europe, that of Nazi Germany, has focused on different questions, such as its role in shaping the labour market or the degree of willingness of enterprises to gain profit from forced labour.[159] He states that:

> "While some historians…understand the deployment of forced labour within the changes in class relationships in the fascist regime before the war, and therefore as a structural measure for ensuring the new economic policy, some others…emphasise that the forced labour program can only be understood within the logic of the war economy, and thus as a dynamic and circumstantial measure, which goes beyond and is even contrary to the Nazi economic program. Focusing especially on ethnic policy…forced labour had a special place amongst the measures against the Jewish population from 1938 onwards, long before the extermination measures started in 1942."[160]

Gonzalo then proceeds to indicate that there is a debate concerning the degree of willingness shown by enterprises towards the deployment of forced labourers in European history.[161] According to Spoerer, German companies had very narrow margins to manoeuvre if they wanted to survive in a war context.[162] This historian comments on the need for analyzing the strategies of German enterprises according to economic logic, mainly cost-benefits analysis, within a very special context.[163] Hayes agrees with the need to deal with the complexity of the matter, but observes that most German businessmen "increased the need for such workers and worsened the conditions they were forced to suffer".[164]

Gonzalo highlights that another important question for economic historians concerns the profits involved in forced labour. Explaining his own experience of some months in a Penal Detachment, Albornoz pointed to this challenge when he stated:

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[158] See Herbert "Forced Laborers in the Third Reich: an Overview" 2000 *International Labor and Working-Class History* 58.
[159] Gonzalo 3.
[160] Ibid 4.
[161] Ibid.
[162] See Spoerer "Motivations, contraintes et marges de manoeuvre des entreprises allemandes dans l'emploi de travailleurs forcés pendant la Seconde Guerre mondiale" 2005 *Histoire, Économie & Société* 4.
[163] Ibid.
[164] See Hayes "Industry under the Swastika" in James and Tanner (eds) *Enterprise in the Period of Fascism in Europe* (2002) 34.

> "The forced labour of the prisoners represented a crude accumulation of capital for the construction companies of Francoism, (...) Business, then, at two points, the state and the companies, with a single payer: the prisoner".[165]

Moreover, as Gonzalo indicates, profits resulting from forced labour have been the subject of research for historians in some other countries, like Germany, and it is necessary to distinguish here between profits for private enterprises and profits for the state itself, or even for one of its administrations.[166]

Gonzalo then advances the need to explain the way in which enterprises, and the state itself, obtained prisoners' labour in Spain.[167] He proceeds to make reference to the first decree on forced labour, in May 1937 which became the first legal instrument to try to address the problem of forced labour in Spain.[168] The decree was followed by the Workers' Battalions Rule passed in the same year of 1937.[169] According to Gonzalo, these rules for prisoners of war were quite similar to those for imprisoned men and women, which were included in the order of the Ministry of Justice that created the *Patronato de Redención de Penas por el Trabajo*.[170] In this order the breakdown of the wage mentioned in the decree of 1937 was maintained.[171] The decree also regulated the use of prisoners by private enterprises; in this case the latter "would pay the whole wage to the National Prisons Service".[172] The latter should have taken responsibility for

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[165] See Albornoz "Cuelgamuros: presos políticos para un mausoleo" in Molinero, Sala and Sobrequés (eds) *Una inmensa prisión. Los campos de concentración y las prisiones durante la guerra civil y el franquismo* (2003) 1089.

[166] See Hayes *Industry and Ideology: IG Farben in the Nazi Era* (2001) 325.

[167] Gonzalo 15.

[168] Ibid 15. The decree regulated the issue of the state and enterprises obtaining prison labour in Spain and established some criteria that would remain in force, with some changes, over the following decades. The first of these is the idea that forced labourers would, theoretically, earn some kind of wage. So, the amount of profit would depend on the way the wages to be paid were divided up. In this decree we find that prisoners should earn a minimum wage of 2 pesetas, (0.5 to be paid in hand, and 1.5 that would be designated for his maintenance). If he had a wife and children, the family could obtain some extra wages (2 more pesetas for the wife, and 1 more peseta for each son or daughter under 15 years), although the final amount could never be higher than the average wage in the village where the prisoner was working.

[169] Ibid. Gonzalo indicates that the rule established some changes in prisoners of war as a type of forced labour. In this case, the wage was also of 2 pesetas, divided in a different way (1.65 pesetas for maintenance, 0.25 to be paid in hand, and 0.10 pesetas for extra needs).

[170] Ibid.

[171] Ibid.

[172] Ibid.

the maintenance cost of the prisoners, the payment to the prisoners' families, and the remainder sent to the State Treasury.[173]

Gonzalo then points out how easy it is to see that the State itself was the main beneficiary of that kind of repression, on occasions as an employer, and at other times by hiring out workers.[174] In the first case, there is little doubt about the benefits provided by this kind of worker: although the state was obliged to cover some of the costs of maintaining the working prisoners (such as food, lodging and control, amongst other things), it is obvious that these costs were lower than what the state would have been obliged to pay in salaries for the work carried out.[175] In the second case, the state rented out the workforce and obtained significant profits from this.[176] Gonzalo then indicates that a calculation of the total amount of these profits is another goal for economic history, but thanks to some research that has already been published on the Basque mining industry of Spain, it is clear that the total profits for the state were between 50% and 60% of the wages paid by enterprises.[177]

Gonzalo then indicates that the profit margin for private enterprises renting prisoners from the state was clearly lower, as these enterprises had to pay the minimum wage in their locality to the workers, (except for a part designated for the workers' maintenance, and a small part to be paid to them in hand).[178] In any case, as Gonzalo contends, enterprises had some special ways for obtaining an extra profit from this kind of worker.[179] One of them was to directly ignore the rules about that kind of payment.[180] A clear example of this is the Madrid-Zaragoza-Alicante railway company, which for many months did not comply with the regulation about payment for the renting of prisoners.[181] It simply ignored this, and when it was required to pay, complaints began to be made.[182] Besides this, Albornoz reminds us that in some cases companies paid lower wages to prisoners than to free labourers, "one third, or more, less than the

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[173] Gonzalo 15.
[174] Ibid 16.
[175] Ibid.
[176] Ibid. See also Wachsmann *Hitler's Prisons. Legal Terror in Nazi Germany* (2004) 234.
[177] Gonzalo 16. See also Pastor *El Batallón Minero nº 1 en las minas de Vizcaya* (2010) 74.
[178] Gonzalo 16.
[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] Ibid.

wage of a free worker".[183] Because of the good opportunities for increasing profits with forced labour, Albornoz remarks that this kind of capital accumulation can be regarded, in a certain way, as primitive.[184]

Another way of increasing profits for all those who were managing forced labour (private enterprises, army officers or public administration workers) was the opportunity to earn quite a lot of money through corruption and the black market in food and clothing, the so-called "*estraperlo*".[185] In fact, the black market was an economic mechanism for capital accumulation in post-war Spain,[186] and we must bear in mind that the reproduction costs of forced labourers represented a good opportunity for private businesses, especially for those administrators or companies more interested in obtaining quick private profits than in the efficiency of the tasks carried out by prisoners.[187] It is therefore clear that the violation of labour rights for commercial interests was an ingrained practice in the pre-World War II era as it still is in the modern world, perhaps with some of the same manifestations. This is a clear indicator that history has a way of repeating itself. However, going back to the historical analysis, a solution had to be sought to address the issue of labour rights violations for commercial interests on an international level. The 20th century would provide the first real opportunity to address labour rights violations for economic gains when attempts to link trade and labour issues through the Havana Charter were made.[188]

2 3 POST WORLD WAR II DEVELOPMENTS

2 3 1 Havana Charter

The idea of linking labour rights and trade was included in the Havana Charter of 1948 that was intended to embody the framework for a new world trading system. The Havana Charter emerged out of discussions for a "Charter for an International Trade Organisation (ITO)", a UK-

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[183] Albornoz 1088.
[184] Gonzalo 16. See also Albornoz 86.
[185] Gonzalo 17.
[186] See González and Garmendia "Corrupción y mercado negro: nuevas formas de acumulación capitalista" in Sanchez and Tascón *Los empresarios de Franco* (2003) 237.
[187] Gonzalo 17.
[188] See Dranche "The Short but Amazingly Significant Life of the International Trade Organization (ITO) Free Trade and Full Employment: Friends or Foes Forever?" http://www.yorku.ca/robarts/projects/wto/pdf/apd_ito.pdf (accessed 09-09-2011).

US proposal which was taken before the Economic and Social Council of the United Nations (ECOSOC), which in turn called for a conference to establish the International Trade Organisation.[189] Eighteen countries took part in the Preparatory Committee which met from October 1946 to March 1948 in Havana, hence the name.[190] The Havana Charter was signed by fifty three countries and covered not only trade policy, but also employment and economic activity, amongst others.[191] The Charter explicitly referred to labour issues. Article 7 of the ill-fated Charter proclaimed that:

> "1. The Members recognise that measures relating to employment must take fully into account the rights of workers under intergovernmental declarations, conventions and agreements. They recognise that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and conditions as productivity may permit. The members recognise that unfair labour conditions, particularly in production for export, create difficulties in international trade, and accordingly each member shall take whatever action may be appropriate and feasible to eliminate such conditions in its territory.
> 2. Members which are also members of the International Labour Organisation shall co-operate with that organisation in giving effect to that understanding."[192]

The Havana Charter required members to also monitor for any anti-competitive practices which could affect trade and which could have international repercussions, placing an obligation on members to act in consequence, although it did not include any general obligation to adopt laws in defence of competition.[193] However, mechanisms for cooperation were provided for. However, the Havana Charter was never adopted because of opposition in the US Congress. This meant that other avenues had to be sought to address the challenges of violations of labour

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[189] Over 50 countries participated in negotiations to create an International Trade Organization (ITO) as a specialized agency of the United Nations. The draft ITO Charter was ambitious. It extended beyond world trade disciplines, to include rules on employment, commodity agreements, restrictive business practices, international investment, and services. The aim was to create the ITO at a UN Conference on Trade and Employment in Havana, Cuba in 1947. See Scott "Developing Countries in the ITO and GATT Negotiations" http://www.bwpi.manchester.ac.uk/resources/Working-Papers/bwpi-wp-9509.pdf (accessed 27-08-2011).

[190] See Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" http://ictsd.org/downloads/2009/11/lazoweb_final_opt.pdf (accessed 27-08-2011).

[191] See World Trade Organisation "The History of the World Trade Organisation" http://amun.org.br/2011/wp-content/uploads/2011/07/Study-Guide-WTO.pdf (accessed 27-08-2011).

[192] See Article 7 of the Havana Charter.

[193] See Garcia-Castrillon "Private Parties under the Present WTO (Bilateralist) Competition Regime" 2001 *Journal of World Trade Law* 99.

rights in trade related matters. The General Agreement on Tariffs and Trade (GATT)[194] was the next such avenue.

2 3 2 The GATT

Established in the wake of World War II, the WTO's predecessor, the GATT was the third pillar of the Bretton Woods system, which included economic development loans through the World Bank and monetary stabilization via the International Monetary Fund (IMF).[195] While the IMF and the World Bank date back to the original Bretton Woods Conference of June 1944, trade rules were first addressed in a 1946 meeting that set tariff levels and developed a draft charter for an International Trade Organization (ITO) that was presented at the 1948 United Nations Conference on Trade and Employment in Havana.[196] John Maynard Keynes, the original architect of the Bretton Woods system, had hoped to develop worldwide trading rules that would avoid the destructive protectionism prevalent during the Great Depression, while preserving a commitment to full employment.[197] However, this did not turn out to be an easy task. Undoubtedly there was great displeasure expressed by the developing countries towards the ITO Charter. Amongst the issues that caused great displeasure amongst these developing countries was the omission of development from the ITO Charter. Indeed, the developing countries' position towards the ITO and GATT had been advanced as totally against the manner in which international trade was regulated. Claire Wilcox, the Vice Chairperson of the US delegation at Havana was quoted as having said:

> "...some eight hundred amendments were presented; among them as many as two hundred that would have destroyed the very foundations of the enterprise...some of the proposals advanced in the name of economic development have to be seen to be believed."[198]

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[194] From 1948 to 1994, the General Agreement on Tariffs and Trade (GATT) provided the rules for much of world trade and presided over periods that saw some of the highest growth rates in international commerce. It seemed well-established, but throughout those 47 years, it was a provisional agreement and organization.

[195] See Hillman "Saving Multilateralism: Renovating the House of Global Economic Governance for the 21st Century" http://www.gmfus.org/brusselsforum/2010/docs/BF2010-Paper-Hillman.pdf (accessed 12-09-2011).

[196] See Ostry "Reinforcing the WTO" http://www.utoronto.ca/cis/ostry/docs_pdf/wtogp30.pdf (accessed 12-09-2011).

[197] See Skidelsy "Globalisation and the Bretton Woods Institutions in the Light of Changing Ideas about Markets" http://www.oxonia.org/WE%20Articles/WE_skidelsky.pdf (accessed 12-09-2011).

[198] Wilcox 142.

The relevance of the above statement was to be observed when the US Department of State circulated its 'Proposals for Expansion of World Trade and Employment', which had been drafted during WWII, in collaboration with the UK.[199] The proposals put forward by the US, which subsequently served as the basis for the ITO Charter, made no reference to development, or to the special circumstances which less developed countries faced.[200] This reflected the US attitude that economic development was best left to the private sector and required no government interference.[201] The US argued throughout the negotiations that:

> "…development was primarily a matter of private capital investment and that special measures to deal with this belonged elsewhere, not in the commercial policy rules of the international system".[202]

The insincerity of this arrangement, given the policies followed by the US during its own period of industrialization as already shown in this chapter, was not overlooked by developing countries. As noted in India's comments, under pressure exerted by countries of the British Empire:

> "The UK made a half-hearted attempt to assert the right of undeveloped countries to apply tariffs 'for a limited period under adequate safeguards for the protection of infant industries'. The US, however, forgetful of its own history, was not prepared to concede even this limited right".[203]

It is submitted that by virtue of the statement made by India above, the developing countries sought the right to use the kinds of trade measures used by the industrialised countries during their own period of industrialization. It is in this context that the use of cheap labour as comparative advantage comes into play. India suggested that the high degree of economic development attained by certain countries had been in no small measure due to the use of tariffs and other regulatory devices; and it was only proper that the use of these instruments should not be denied to countries that have just started on the path of development.[204]

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[199] See Finger "Development Economics and the General Agreement on Tariffs and Trade" in Melo and Sapir (eds) *Trade Theory and Economic Reform: North, South and East* (1991) 207.
[200] Ibid.
[201] Scott 15.
[202] Finger 207.
[203] UNCTE 1946b 6.
[204] UNCTE 1946b 61.

Brazil, supported by other developing countries, contended that the ITO should have as a central aim the 'encouragement and promotion of the industrial and economic development of member countries, particularly of those whose development is less advanced'.[205] While the US and the UK had been busy discussing the shape of the proposed ITO between them, it was natural that they easily pushed aside the issue of economic development.[206] As such, when the process began to involve more countries, especially developing countries, the issue of development could no longer be ignored. The resolution of the Economic and Social Council of the UN to hold a Conference on Trade and Employment, at which the Preparatory Committee would begin drafting the ITO Charter, followed closely the proposed resolution put forward by the US, except that it included a section, based on suggestions made by Colombia and Ecuador, calling for the Preparatory Committee 'to take into account the special conditions which prevail in countries whose manufacturing industry is still in its initial stages of development, and the questions that arise in connection with commodities which are subject to special problems of adjustment in international markets'.[207]

Following this, an effort to include developing countries' views and aims was made. A key sticking point was the demand by the less developed countries to be able to afford protection to infant industries.[208] Developing countries therefore sought the right to impose tariffs and quantitative restrictions to protect infant industries.[209] While the industrialised countries were not entirely opposed to this, there was substantial disagreement on how such protection should be given.[210] The US strongly opposed the use of quantitative restrictions, and argued that the most economically beneficial way of supporting infant industries was through the granting of subsidies to domestic producers.[211] The less developed countries were unimpressed with this partly due to the hypocrisy of the argument, given the extensive use of tariffs and quantitative

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[205] UNCTE *Charter for the International Trade Organisation of the United Nations, Presented by the Government of the United States of Brazil* (1946a) para 3.
[206] Scott 15.
[207] See Brown *The United States and the Restoration of World Trade: An Analysis and Appraisal of the ITO Charter and the General Agreement on Tariffs and Trade* (1950) 59.
[208] See Zeiler *Free Trade, Free World: The Advent of the GATT* (1999) 45.
[209] See Gardner *Sterling Dollar Diplomacy: Anglo-American Collaboration in the Reconstruction of Multilateral Trade* (1956) 23.
[210] See Irwin "The GATT in historical perspective" in Anderson and Hoekman (eds) *The Global Trading System Volume 1: Genesis of the GATT* (2002b).
[211] Ibid.

restrictions by the industrialised countries during their own industrialization. The US argued in turn that the fact that industrialised countries had used poor economic policies in the past was not a good reason for developing countries to use them in the future. Wilcox said in her opening statement at the second plenary session of the London Conference:

> "It will doubtless be remarked, in the course of these proceedings, that the United States has not always practiced the gospel that it now presumes to preach. This I admit. But the fact that we have sinned in the past should not be taken to justify all of us in sinning in the future, to our mutual harm".[212]

Whether the above statement is a case of accepting what is right when it suits you is an interesting question. Sadly it came at a time when developing countries saw no benefit of improving labour standards simultaneously with their economic growth. However, the ITO was to be stillborn.[213] The requisite number of states failed to ratify the Charter and so the GATT became the basis for the post World War II world trade system.[214] When in 1950 the Truman administration realized that it lacked congressional support for the Charter's ratification, the ITO died.[215] In its place the key trading nations adopted the earlier and more limited 1946 agreements and established the "provisional" GATT, pending a final transformation into some type of permanent treaty obligation.[216] This temporary arrangement did not include any references to labour rights. The GATT in Article XX refers only to measures relating to products of prison

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[212] See ECOSOC "Preparatory Committee of the International Conference on Trade and Employment, London" 1946a *Journal No. 4*.

[213] See Gill "From GATT to the WTO: A Hong Kong Perspective" http://sunzi.lib.hku.hk/hkjo/view/14/1400196.pdfyuh (accessed 15-07-2011). Since World War II, eight rounds of international trade negotiations have been conducted under the auspices of the GATT an international organization founded in 1947 to establish rules of conduct for international trade (accessed 20-07-2011).

[214] See Barbour "Trade Law: An Introduction to Selected International Agreements and US Laws" http://www.nationalaglawcenter.org/assets/crs/R41306.pdf (accessed 20-07-2011).

[215] See Miller "Origins of the GATT - British Resistance to American Multilateralism" http://www.levyinstitute.org/pubs/wp318.pdf (accessed 20-07-2011). Fiftieth-anniversary explanations for the efficacy of the GATT imply that the institution's longevity is testimony to the free trade principles upon which it is based. In this light, the predominantly American architects of the system figure as free trade visionaries who benevolently imposed post war institutions of international cooperation on their war-torn allies. This research takes issue with such a characterization. Instead, the success of the GATT has been crucially dependent upon its ability to generate pragmatic and detailed policy via a uniquely inclusive forum. An effective institutional procedure, not free trade dogma, has proved key to its endurance--and this feature has been in place since the institution's inception..

[216] See Devuyst "The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap" http://www.worldtradelaw.net/Articles/devuystwtorta.pdf (accessed 20-07-2011).

labour [Article XX(e)],[217] measures necessary to protect public morals (Article XX(a)),[218] and measures relating to human life or health [Article XX(b)].[219]

It took longer than expected, 47 years, to convert the provisional GATT into a permanent WTO, whose structure and provisions are not significantly different from the original 1948 ITO, except that the primary employment promotion purpose of world trade became lost amid the free trade ideology popularized since then.[220] The prominence of employment in the drafting of the Havana Charter would be lost in the creation of the WTO.[221] Between 1946 and 1948, the start of the Cold War had closed what, in retrospect, was a very narrow window for postwar internationalism in the United States that included an activist role for government.[222] GATT was far weaker than the proposed ITO, but even GATT was opposed by the American right as an infringement on American sovereignty.[223]

The WTO was established on 1 January 1995 as a result of the Uruguay Round of Multilateral Trade Negotiations (1986–1994).[224] It was formed from the GATT, which became one of the core agreements annexed to the Marrakech Agreement, the instrument establishing the WTO.[225] None of the other WTO agreements concluded at the end of the Uruguay Round include labour related rights or obligations. The effects of the GATT are still felt and some

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[217] See Ala'i "Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a more Balanced Approach to Trade Liberalization" http://www.auilr.org/pdf/14/14-4-5.pdf (accessed 20-07-2011).

[218] Despite a broad commitment to the liberalization of trade in goods and services, Member States of the World Trade Organization (WTO) retain legal authority to impose trade-restrictive measures "necessary to protect public morals." See Marwell "Trade and Morality: The WTO Public Morals Exception after Gambling" http://www.ppl.nl/bibliographies/wto/files/6451a.pdf (accessed 20-07-2011).

[219] See Dunoff "Reconciling International Trade with Preservation of the Global Commons: Can we prosper and protect?" 1992 *Washington and Lee Law Review* 1407.

[220] Ibid.

[221] See Hudec "The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure" in *The Uruguay Round and Beyond Essays in Honour of Arthur Dunkel, Jagdish Bhagwati and Mathias Hirsch* (1998) 101.

[222] See Weaver "Religious Internationalism: The Ethics of War and Peace in the Thought of Paul Tillich" http://etd.library.pitt.edu/ETD/available/etd-04232006-204532/unrestricted/l_weaver_ETD1.pdf (accessed 23-07-2011).

[223] See Woolcock "Has the WTO gone too far? National Regulatory Autonomy and Market Access" http://www2.lse.ac.uk/internationalRelations/centresandunits/ITPU/docs/woolcockWTO.pdf (accessed 23-07-2011). Due to the dislike of the GATT, conservative commentator Fulton Lewis Junior coined the slogan, "a GATT in your ribs," from the popular James Cagney and Edward G. Robinson Hollywood genre of the day, in which guns, in gangster slang, were called "gats."

[224] See Devuyst "The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap" http://www.worldtradelaw.net/Articles/devuystwtorta.pdf (accessed 20-07-2011).

[225] See Charnovitz "Triangulating the World Trade Organization" http://www.asil.org/ajil/wto3.pdf (accessed 09-08-2011).

commentators have described the WTO as the one major international governance organisation that does not examine the impact of its policies upon the ability of member states to advance human rights.[226] During the WTO's second-year review in late 1996 in Singapore, the United States actively sought to link labour rights with trade. However, this effort was blocked by a coalition of Third World nations (who saw the initiative as a form of protectionism) and the European Union (EU) [which was then dominated by conservative governments].[227] Nonetheless, the attempt put the US government on the side of the trade-labour linkage and forced WTO members to officially consider the issue of linkage for the first time. Even Sir Leon Brittain, the Thatcherite vice-president of the EU who actively opposed trade-labour linkage, was compelled by sister EU governments to affirm that "labour standards and other apparently domestic political issues are now the legitimate concern of the WTO because they are concerns of our constituents."[228]

When the WTO replaced GATT on January 1, 1995, all of the GATT rules and its 47 years of precedents were folded into the WTO.[229] Broader in scope than GATT, the WTO establishes rules of open trade in a variety of industries, including manufacturing, services, and agriculture, as well as intellectual property.[230] A December 1997 agreement adds financial services and banking.[231] While GATT relied solely on pressure and persuasion, the WTO has the power - through its trade policy review process - to pass judgment on domestic laws, regulations, and practices that affect trade.[232] Although the WTO has not yet added basic labour rights to the list of fair trade practices subject to its rulings, decisions about how far the WTO can go to enforce labour rights may have to be reached in the future.

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[226] See Charnovitz "The World Trade Organization in 2020" 2005 *Journal of International Law and International Relations* 167.
[227] Watchel 13.
[228] Ibid.
[229] See Grover "Dispute Resolution: A Case Study of World Trade Organization" 2003 *Journal of Social Science* 77.
[230] See Michalopoulos "Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries" http://siteresources.worldbank.org/INTARD/825826-1111405593654/20432097/TradeanddevelopmentintheGATTandWTO.pdf (accessed 15-08-2011).
[231] Ibid.
[232] See Driesen "What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate" http://papers.ssrn.com/paper.taf?abstract_id=217412 (accessed 29-08-2011).

The deliberations leading up to the formation of the WTO did not take up the issue of labour rights until almost the last moment.[233] Because the Reagan and Bush administrations in the US were uninterested, the issue did not receive attention until the fall of 1993, and it only became a factor then because, in order to win congressional support for WTO approval, the Clinton administration needed to regain labour support lost during the NAFTA debate.[234] When the Clinton administration did finally raise the issue of labour rights and trade, the ensuing uproar among Third World delegations forced the issue to the sidelines.[235] It did not become part of the agreement, but the signatories agreed to take up the matter in the future. This could be construed as either a victory or a defeat, and in fact it was both.[236] Labour rights did not therefore become part of the WTO but the opportunity for tying labour rights to trade policy is significant.

2 3 3 Lessons from the failed ITO

The US for its part as a leading advocate for the inclusion of a social clause in multilateral trade agreements, has been branded an unreliable partner in multilateral trade by opponents as well as its allies concerning its approach to trade. It has generally been viewed as an arm-twisting nation which pursues only its interests in trade and not that of others, especially developing countries.[237] This has resulted in proposals for the inclusion of a social clause in multilateral trade being held with suspicion. For a nation such as the US, it may be argued that since its labour laws prohibit the use of child and prison labour, both sources of cheap labour, it has used the social clause argument as a tool to deny other countries whose legislation permits them the right to use such labour as their comparative advantage. Questions though may be directed at this view as the US

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[233] See McCrudden and Davies "A Perspective on Trade and Labour Rights" 2000 *Journal of International Economic Law* 43.

[234] See Stirling "The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: Proposal for Additions at the World Trade Organization" 1996 *American University Journal of International Law and Policy* 46.

[235] Stirling 46.

[236] Watchel 15.

[237] The US has also been accussed of having been hostile to the GATT in the same manner as it was against the failed ITO. Jackson alluded to a "… history of hostility in the US Congress against GATT." He further stated that, "[T]he enactment of the Trade Agreements Extension Act of 1955 shall not be construed to determine or indicate the approval or disapproval by the Congress of the executive agreement known as the General Agreement on Tariffs and Trade." That the GATT survived was, according to Jackson, "…instructive because it tends to reflect that legal structures or institutions have less to do with the development of affairs than dimly understood political or economic forces, aided by efforts of dedicated men." See Jackson *The Jurisprudence of GATT & WTO* (2000) 18.

which was behind the ITO was also part of its demise after its principals refused to ratify the ITO Charter on the basis that it weakened the protection of its foreign investments.[238]

The historical analysis has also shown that developing countries strongly deny the need for including a social clause in international trade and regard internal structural rigidities in labour and product markets as the main factors behind unemployment.[239] Developing countries fear that better compliance with core labour standards would negatively affect either their economic performance or their competitive position in world markets.[240] Whether this argument has an economic rationale and is persuasive remains subject to so much debate as is the fear that developing countries with their cheap labour are flooding developed countries' markets. The challenges surrounding the levels of consensus about the social clause appear to undermine the important lessons which could be drawn from the failed ITO. However, Members of the international trading system may find it difficult to draw lessons from the failed ITO if they cling to their perceptions without objectively assessing the importance of a social clause in multilateral trade. It is submitted that the developmental benefits from international trade and globalisation would be enhanced only if there is a consensus between developed and developing countries on the inclusion of a social clause in multilateral trade agreements.

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[238] Ibid 18. Jackson observes that the: "...powerful forces for trade protectionism...killed the International Trade Organization (ITO)." The ITO included a social clause within its framework. This could by inference suggest that a social clause in the multilateral trade framework is synonymous with protectionism as it was deemed to be during the negotiation phases of the failed ITO. It is interesting though to note that the US played a role in the demise of the ITO which had a social clause yet it now is at the forefront of advocating for the incorporating of a social clause in the WTO legal framework. It must however be observed that it is such policy inconsistencies such as those pursued by the US which tend to discredit well meaning policies such as the inclusion of a social clause into the multilateral trade agreements.

[239] It is argued that it is unfair for firms and workers in developed countries to compete with firms and workers in developing countries where labour standards and labour costs are much lower hence risk losing market share and jobs to these countries. This argument for a trade-labour linkage has been deemed problematic as it is viewed as not focusing on social welfare in importing countries, rather than on social welfare in exporting countries where the allegedly low labour standards prevail. See Trebilcock *Understanding Trade Law* (2011) 172.

[240] See Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 245. See also Trebilcock 172. Trebilcock has argued that objecting to developing countries' reliance upon a lowered compliance to labour standards, "...carries a serious risk of depriving developing countries of one of their major sources of comparative advantage, that is, low labour costs." Jackson further argued that, "...it is important to note that labour costs and labour productivity are closely related and, in the case of developing countries, reflect the absence or low quality of many complementary factors of production, such as infrastructure, education and training, managerial expertise and health care policies." It must however be questioned whether it is not significant for developing countries to focus on the quality of their complementary factors of production for them to improve their competitiveness in international trade. This is an issue which latter chapters of this study will address.

To attain such a consensus, it is necessary to establish whether there was anything commendable about the ITO's approach to a social clause. Such an analysis must take as its departure point the acknowledgement of the fact that international trade provides opportunities for sustained global economic growth and employment. The ITO could have had a plausible agenda of building a social market globally because it set out to create a balance between the full employment obligation in developed countries and the developmental needs of the underdeveloped nations.[241] In that sense, the failed ITO might have carried profound ideas which have been ignored. One such key idea is the obvious view that the framework agreement of international trade cannot just be a system of pure commercial gain designed to advance the free trade principle at any cost.[242] This idea makes perfect economic and policy sense. For instance, if economic growth were to freeze, few countries, if any, would accept the dictates of basic market logic to open their economies, regardless of the cost and despite the consequences.[243] In that sense, a division of labour and regulation at the international level would be necessary. The Havana Charter offered such an arrangement. It sought to reshape the relationship between trade, development and employment in a manner which the GATT/WTO has failed to achieve. The GATT only had residues of the non-liberal characteristics that had resulted in the failure of the

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[241] The ITO was negotiated in what is sometimes regarded as the "three-ring circus". Part of its negotiations focused on the drafting of the ITO Charter, another focused on tariff reduction and the last part focusing on drafting provisions relating to tariff reductions. This has often prompted the argument that the ITO could have been too ambitious a proposal for the time it was advanced. See Lester, Mercurio and Davies *World Trade Law: Text, Materials and Commentary* (2012) 57. See also Jackson *World Trade and the Law of GATT* (1969) 42. It must however be questioned whether it is wise to adopt an ITO approach in the global era in which numerous challenges to trade and development are emerging.

[242] As at present, there are inaccurate views to the effect that the WTO is a free trade institution. Emphasis in this regard is placed on limiting governments' interference with the trade activities of other governments or trade actors. However, the WTO does allow tariffs and in limited circumstances other forms of protection. That the WTO regulates rules to trade indicates that trade must be conducted in an orderly way and should be fair. See Lester *et al* 67. See also Samuelson *Economics* (1980) 651. Samuelson stated that: "…Free trade promotes a mutually profitable division of labour, greatly enhances the potential real national product of all nations and makes possible higher standards of living all over the globe." Whether Samuelson's argument is a fair reflection of contemporary trade practices is subject to much debate. It is not clear as to why "free trade" in the global era does not result in improved standards of living especially in developing countries or the mutually profitable division of labour.

[243] It is therefore not surprising that one of the policies underlying contemporary international economic rules and institutions is the policy of promoting economic development in countries that were not industrialised at the end of World War II. Viewed in terms of the current trade regime, questions could be raised about the appropriateness of the rules of the GATT/WTO concerning free trade objectives vis-à-vis the development goal. This has led to questions regarding the fairness of the WTO and other economic institutions concerning their attitude to development. The ITO embraced a development agenda hence it is correct to conclude that its failure was as a result of protectionist pressures. See Jackson (1997) 14.

ITO as an organization with Article XX(e) being the only provision worth noting concerning the inclusion of a social clause in the legal framework of international trade.[244]

The Havana Charter had an explicit provision that its members had the authority to adopt legal and binding interpretations of it. This was crucial because with this power, the ITO had the authority to establish its operations and further the objectives set out in its Charter. This would also allow it to grow and adapt to the changing international economy. This arrangement is lacking in the GATT/WTO system. It should now be necessary to establish the value of having an organization like the WTO which can only recommend compliance as opposed to the ITO whose Charter gave it such power to make legal and binding findings. Jackson once expressed the view that:

> "…in the case of the ITO, interpretation and dispute settlement decisions carried with them a binding treaty obligation even when its member states disagreed with a decision because it was unfavourable to their immediate interests. The penalty for non-compliance entailed sanctions, the principal one being suspension of trade concessions. By contrast, GATT had no such provision. It had no binding interpretative powers once the ITO was stillborn. In terms of international law setting norms, the GATT, unlike the ITO, had no requirement hence all countries had to use their dispute resolution procedure exclusively."[245]

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[244] See Trebilcock and Howse *The Regulation of International Trade* (2005) 572-573. Trebilcock and Howse observed that, "The reference to prison labour in GATT Article XX(e), as well as the fact that explicit language on labour rights was in the failed Havana Charter, arguably suggest that if GATT Article XX had been designed to encompass sanctions with respect to labour rights, explicit language would have been used to articulate such an exception." In the absence of such an exception, human rights can be protected under the principle of public morality. According to Howse, this analysis is consistent with the WTO Appellate Body's interpretation of GATT Article XX(g) in the *US Shrimp/Turtle* case. See *US-Import Prohibitions of Certain Shrimp and Shrimp Products* WT/DS58/R (15 May 1998). See also Howse "The Appellate Body Ruling in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate" 2002 *Columbia Journal of Environmental Law* 491. See also Howse "Back to Court After Shrimp/Turtle? Almost but Not Quite Yet: India's Short Lived Challenge to Labour and Environmental Exceptions in the European Union's Generalized System of Preferences" 2003 *American University International Law Review* 1333. In the Shrimp/Turtle case, the Appellate Body interpreted that, "…the *chapeau* of Article XX provides a check against protectionist or other abusive implementation of trade bans for ostensible labour rights purposes. In determining whether the measures in question are applied so as to constitute arbitrary or unjustified discrimination or disguised restriction on international trade, the Appellate Body had to determine whether the labour rights situation in the particular countries in question has been singled out as especially grave or warranting particular attention by the international community." In this case a sanctions-imposing state would justify singling out one target country and not including others where the labour rights situation is bad. This was the case with Burma when it was singled out by the US for violating ILO standards. If the Appellate Body can allow for such a scenario as outlined in the Shrimp/Turtle case then why should it be difficult to establish a trade-labour linkage in the WTO legal framework as envisaged by the ITO?

[245] See Jackson *The World Trading System: Law Policy of International Economic Relations* (1989) 90.

The Havana Charter had also broken new ground because it permitted reference to the International Court of Justice (ICJ) in some matters.[246] Appeal to the ICJ was needed because in the words of Wilcox, the Vice-Chairperson of the US Delegation to the Havana Conference, "it provided for the development of a body of international law to govern trade relationships."[247] Without the power of formal binding interpretation, the GATT's dispute settlement mechanism was and is voluntary and thus could be ignored largely without penalty thus making new legal norms difficult to establish.[248] Under GATT rules, a contracting party was not obligated to accept an amendment which it opposed. For the developing countries of the world, the end of the ITO created a multitude of problems. It had provided a framework to stabilize the international price of primary commodities. It also saw the need for producers to work together to market primary products. In terms of investment rules, the pivotal idea of the Charter was that a new investment regime could only succeed on the condition that countries dismantle state-erected barriers and enforce a code regulating the restrictive practices of international business. Developmental inequalities were to be addressed within a non-liberal framework. This was all lost when the ITO failed. Resultantly, it has taken decades for the developing nations of the world to make economic and social planning the centre of their development agenda in international trade.

The Havana Charter not only applied to governments but also to the actions of private firms whose restrictive business practices threatened to undermine the liberal goal of non-discriminatory trade.[249] The ITO contained a whole chapter on anti-competitive practices.[250] In contrast, the GATT included none of that language.[251] With the end of the ITO, GATT members opposed any steps for regulating intra-company trade, to set clear standards for multinationals or, in any way, to impose any obligations on international private actors.[252] Led by the US and others, the GATT Contracting Parties decided not "to bring this subject under GATT" but only

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[246] Ibid.

[247] Ibid 93. See also Trebilcock 171. Trebilcock noted that: "The 1948 Havana Charter that was intended to embody the framework for a new trading system also declared that 'members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade and accordingly each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.'"

[248] Jackson (1990) 93.

[249] Ibid.

[250] Ibid.

[251] Ibid.

[252] Jackson (1990) 212.

provide for limited consultations.[253] Restrictive business practices were explicitly excluded from GATT procedures and were not a subject covered by its disputes mechanism.[254] In short, only governments would be subject to international regulation, not multinational companies.[255] This was contrary to the public objectives embodied in the ITO that private authority no less than state actors had to be accountable to international law.[256] The GATT was to be silent on the monopolistic practices of powerful transnational actors, a key problem behind labour rights violations.[257] The ITO championed the principle that countries had the responsibility to manage job loss when it occurred, along with the obligation to restructure their economies when business failures threatened to undermine the benefits from increased trade.[258]

Whatever its shortcomings, the ITO which appeared as the practical expression of the full employment revolution in state practice internationally, could have been good in some way. It would have been a remarkable organization that would establish the idea of an integrated trade and employment organization, not an excessively specialized one like the WTO. Despite its short but significant existence, the disappearance of the ITO left a huge gap in the creation of the post-war institutions of global governance concerning labour rights and other international standards. Without the ITO, there is no institutional place for labour standards neither in the GATT nor the WTO. In this sense, it may be proper to conclude as misguided, allegations that the ITO Charter was intended to favour the US and the UK. Instead, the GATT/WTO system without the social clause that the developed countries favour may just be the problem that developing countries have to deal with.

Therefore, though it failed, the ITO may have had the potential to set the international trade agenda in the right direction. It also is crucial to observe that a critical analysis of the ITO could possibly provide a guide to the framework necessary to take the multilateral trade system forward, in the global era. Surely trade and economic endeavour should be conducted with a view to raising standards of living as well as ensuring full employment and a large and steadily growing real income. Trade must also ensure effective demand and development in the full use

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[253] Ibid.
[254] See GATT Article XXIII.
[255] Jackson (1990) 212.
[256] Ibid.
[257] Ibid.
[258] Ibid.

of the resources of the world as well as expanding the production and exchange of goods. Assuming this line of thought, it can only be hoped that after a careful examination of the history of the unequal treatment of the rights of workers in comparison with the rights of employers and investors, a social clause may be incorporated in the legal framework of international trade in order to provide substantive protection of workers' rights. This may add a critical dimension to the economic growth sought by developing countries.

2 4 CONCLUSION

The aim of the historical analysis was to show that the idea of the inclusion of a social clause in multilateral trade agreements is not new or on the whole novel.[259] The linkage between trade and labour standards has a very long history dating as far back as the 19th century.[260] However, it could be argued that what may be new are the calls to intuitionalize such a concept within the GATT/WTO framework by providing clearly for a social clause based upon a linkage between trade and labour rights. The basis of such an approach is the realisation that while becoming more substantial, the rights of workers are still not at par with the rights of capital under trade and economic agreements. This chapter has also shown that the issue of a social clause is not easy to address. The economic argument for the inclusion of a social clause has been used to suggest that low wages and labour standards in developing countries threaten the living standards of workers in developed countries. The moral argument asserts that low wages and labour standards violate the human rights of workers in developing countries. Advocates for the social clause regard it as a tool for curbing the social dumping of products made with lower labour standards, which in their opinion constitutes unfair competition. Those against the social clause criticize it as a form of non-tariff protectionist barrier by developed countries that are perceived by some as reluctant to allow developing countries to advance in economic terms. This issue is made more complex if one considers that industrialization as a process thrived on poor labour standards mainly related to forced, child and prison labour.

This chapter attempted to provide a historical insight into the rationale behind calls for a social clause in the international trade system. A social clause would make it possible to restrict

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[259] See Trebilcock 170. See also Trebilcock and Howse "Trade Policy and Labour Standards" 2005 *Minnesota Journal of Global Trade* 261; and Barry and Sanjay *International Trade and Labour Standards: A Proposal for Linkage* (2008) 10.

[260] Trebilcock 170.

or stop the importation or preferential importation of products originating in countries, industries, or firms, where labour conditions do not meet certain minimum labour standards such as avoiding the use of child, prison and forced labour. The mandatory element of a social clause would imply that all countries engaged in international trade have a legal obligation to observe certain workers' rights and also that this obligation should be enforceable through trade sanctions. The chapter has shown that this approach has not gone without a challenge. Labour rights have been largely argued to belong to the domestic labour law system and not in the international trade system. This has led to unending challenges in trying to link trade and labour rights with developing countries choosing to lower the standards in the interest of free trade. Professor Weiss of the University of Maryland School of Law has concluded that:

> "When a country starts out lacking adequate legislation to cover the substantive labour law areas or where there is legislation and it is weak and not up to international standards, a promise to effectively enforce that law, however binding, is not very meaningful, unless the promise is buttressed by one to implement an international labour law standard."[261]

Failure to address the issue of a social clause from an international perspective in view of the historical analysis may thus be tantamount to effectively permitting a race to the bottom. Globalization of the world economy has clearly led to choices concerning the location of production being increasingly determined by labour costs in sectors that produce labour-intensive products. Since labour standards vary between countries, corporations simply side-step a country's domestic law and move to countries where labour standards are low. As such countries have embarked on attracting trade with cheap labour. However, it may now be necessary to question whether lowering labour standards to attract investment is a viable economic choice for developing countries in the long run. Spain thrived on primitive economic practices involving the use of cheap labour, as did Nazi Germany, France, the US and the UK. Developing countries are eager to have a fair share of the cake but at whose expense? Is it not the appropriate time for developing countries to realize that exploiting their own workers, as a tool for the so called development, may result in unending economic disadvantage?

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[261] See Weiss "Two Steps Forward, One Step Back or Vice Versa: Labour Rights Under Free Trade Agreements from NAFTA, through Jordan, via Chile, to Latin America and Beyond" 2003 *University of San Francisco Law Review* 689.

From the historical analysis, one may further question whether a continuing deadlock in attempts to address the inclusion of the social clause in the multilateral trade system may not one day lead to the loss of public support for global trade. Some may view the deadlock not to be a refusal but rather a reflection of the existence of a genuine set of challenges too big to overcome. Issues such as the sovereignty and the differences in the levels of development of countries quickly come to mind. Indeed countries cannot be pushed into committing themselves into international arrangements which are not suitable to their own interests. However the world has become a global village with shared norms and values. It is in that context that the need to protect labour rights in trade has emerged as a global issue.

Even though it may appear as if the multilateral system cannot address this issue, members of the multilateral trade system have used regionalism to recognise labour rights in trade as will be shown in chapter five of this study. What is striking with this development is that the same members of the multilateral trade system are the signatories of regional trade agreements regardless of their levels of development. Even more striking is the fact that countries like China, which is regarded as a developing country, practice gross violations of core labour standards in other developing. This has resulted in an additional problem of the violation of core labour standards amongst developing countries themselves which may imply that sovereignty or development may not be the underlying challenge to the inclusion of a social clause in the international trade system. There could be other issues such as greed on the part of politicians in developing and developed countries, a factor which leaves one to ponder as to how a just, equitable and reasonable system of international trade may be achieved at a multilateral level.

It may be submitted that at some point in history developing countries had to rely on a lowered compliance with labour standards as a comparative advantage and as the basis of their case for industrialization. However, this reliance on low labour standards as a comparative advantage suggests a need to adopt a new approach to labour practices that degrade workers, force them to work in unhealthy environments and condemn them to virtual wage slavery as well as poverty similar to what occurred in the European and North American industrialization and slave trade eras. Developing countries should consider a new approach to industrialization built on human capital and infrastructural development amongst other factors. Objectively analysed,

the multinational companies which invest in developing countries predominantly originate from western countries hence profits are likely to be remitted to their countries of origin whilst poverty worsens in developing countries. The next chapter will examine the relevance of human rights and the right to development agenda in advancing proposals to include a social clause in the WTO legal framework. It will analyze the role that human rights can play in the trade-labour linkage debate as well as the problems related to the application of the right to development as a human right in relation to the social clause debate.

CHAPTER THREE

Human Rights, the Right to Development and the Trade-labour Linkage Debate

3 1 INTRODUCTION

The significance of associating labour standards with trade has been debated since the concept of international cooperation for the promotion of those standards was first raised as far back as the Congress of Vienna and times before.[1] Observing that both labour standards and trade sanctions are connected to the economy, there have been constant calls for the linking of labour and trade standards.[2] History has already shown that the eras of slave trade and industrialization in which economic gains were prioritised over the rights of persons rendering labour services to the slave master and the industrialist respectively, were characterised by gross violations of the workers' rights.[3] The end of slave trade and industrialization, with concerns over the protection of human rights being a central issue, did not see an end to the violation of workers' rights in trade-related matters.[4] Instead, the non-industrialised countries took it upon themselves to argue for the lowering of labour standards in trade-related matters as a tool for industrialising just as the western countries did during their period of industrialisation.[5]

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1 See Cappuyns "Linking Labour Standards and Trade Sanctions: An Analysis of their Current Relationship" 1998 *Columbia Journal of Transnational Law* 659.

2 See Monshipouri, Welch and Kennedy "Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities" 2003 *Human Rights Quarterly* 967.

3 Apart from the slave trade and industrialisation era violations of workers rights, it is important to observe that has this been a longstanding concern with regard to trade with countries which have policies that are considered to violate basic human rights. Apartheid South Africa is a good example of a country which violated human rights to the extent that it was expelled from the multilateral trade system. See Lester, Mercurio and Davies *World Trade Law: Text, Materials and Commentary* (2012) 879. Lester *et al* observed that, as a result of violations of human rights in Apartheid South Africa there were "widespread boycotts of South Africa and of foreign companies doing business there." Burma which was renamed Myanmar is another example of a country whose human rights violations record led to a complaint being filed against it with the WTO by the US. See Citizen "Public Citizen, Global Trade Watch, Massachusetts Burma Procurement Law Challenged at the WTO" http://www.citizen.org/trade/issues/burma/Articles.cfm?ID=11103 (accessed 21-11-2012).

4 The need to prevent the gross violation workers rights which characterised the slave trade and the industrialisation era of North America and the western countries has led to labour standards being often regarded as part of a broader set of human rights. See Hoekman and Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* (2009) 629.

5 See Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 245. According to Jackson, developing countries argue that prohibiting their reliance on low labour standards as a competitive advantage would be tantamount to imposing upon them, "trade restrictive measures based on cultural and political considerations within large industrial countries." Such an approach, in the opinion of developing countries would effectively be detrimental to their development objectives. Jackson's arguments are still plausible in the global era as developing countries still contend that a lowered compliance to labour

However, the attitude to labour rights as human rights in the aftermath of the atrocities of slave trade and the world wars had to change as labour rights had to be observed as a vital tool for aiding not only the development agenda of non-industrialised countries related their national economies but also the general welfare of their people. All this has to be addressed against the background of the conflict between the general ignorance of the impact of colonialism by the western world and the seemingly fatal resistance to the improved recognition of human rights by developing countries. Sadly, for developing countries, such an approach will have negative effects on the development of their own people than anywhere else in the world. This chapter will assess how the conception of labour rights as human rights impact on proposals to link labour standards to trade. It will show which labour rights ought to be recognised as human rights as not all labour rights fall under the umbrella of human rights. An analysis of whether the World Trade Organisation (WTO) has a responsibility to observe human rights as the member states will also be carried out.[6] Furthermore, the dimension brought in by the emergence of the right to development as a stand-alone human right will be analysed with a view to showing the

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standards is their competitive advantage. See Trebilcock *Understanding Trade Law* (2011) 172. Trebilcock puts a distinction between the arguments for a trade-labour linkage and the human rights approach to a trade-labour linkage. He observed that:

> "Several rationales for a trade policy-labour standards linkage have often been advanced. First, it is argued that it is unfair for firms and workers in developed countries to have to compete with firms and workers in developing countries where labour standards and labour costs are much lower, and hence risk losing market share and jobs to these countries. Second it is argued that this form of competition may lead to a race to the bottom, where countries will be induced to ratchet down their labour standards to the lowest common denominator, but at the end of this process of destructive competition end up with similar market shares (a form of Prisoner's Dilemma or collective action problem). Third, core labour standards should be conceived of as basic human rights as reflected in the United Nations Universal Declaration of Human Rights and the United Nations Covenants on Civil and Political Rights and Economic Social and Cultural Rights. The first two rationales for a trade-policy-labour standards are problematic, in that they focus on social welfare in importing countries, rather than social welfare in exporting countries where the allegedly low labour standards should prevail...With respect to the third rationale for a trade policy-labour standards linkage, the focus is squarely on social welfare considerations in exporting countries, rather than importing countries, and seems an entirely cogent basis for collective global action to ensure that core labour standards in all countries, conceived of as universal human rights... are respected."

In this case, it is important to note that the human rights approach could be beneficial to developing countries as they are usually exporters of raw materials in which case emphasis on developing a trade-labour linkage using the human rights approach would be to the benefit of their citizens.

6 See Trebilcock 173. The WTO might not be precluded from protecting human rights. Trebilcock observed that: "Basic universal human rights, while defying precise definition have increasingly come to be viewed as a fundamental element of customary international law, and to that extent they extend beyond particular treaty obligations, are viewed as *Erga Omnes* which are owed to the international community at large and hence are enforceable by all members of that community." In this sense the WTO must recognise the need to protect human rights even if it is not a specialised institution for dealing with such rights. This argument could signify that space may have to be created for the protection of labour standards in trade within the WTO legal framework.

significance of protecting labour standards as dynamic tools for the advancing of developing countries. This will assist in determining whether the approach to calls for a social clause in the WTO is being approached with sensitivity to the history that shaped developed and developing countries or not.[7] The chapter starts by analysing the place of labour rights in the human rights regime.

3 2 LABOUR RIGHTS IN THE CONTEXT OF THE CONTEMPORARY HUMAN RIGHTS SYSTEM

The Universal Declaration of Human Rights (UDHR) stands as the formative text of the contemporary human rights system.[8] The UDHR set a framework for the pursuit of human rights globally.[9] It aimed at attaining a world in which the dignity and value of each human being was

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[7] See Lester *et al* 883. Lester *et al* argue that: "In order to remain democratically acceptable, global integration law (e.g. in the WTO) must pursue not only 'economic efficiency' and 'social justice' as defined by human rights. Otherwise, citizens will rightly challenge the democratic and social legitimacy of integration law if it pursues economic welfare without regard to social human rights..." This view is not accepted by all though. See Alston "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann" 2002 *European Journal of International Law* 815. Alston was of the view that adopting human rights in the WTO legal framework would "have far-reaching consequences for the existing international human rights regime as well as for the balance of values reflected in the vast majority of existing constitutional orders. The most fundamental change would be that human rights would...become detached from their foundations in human dignity and would instead be viewed primarily as instrumental means for the achievement of economic policy objectives." However, Lester *et al* have opined that rather than taking radical position concerning a trade policy-human rights linkage debate, "...it would seem to be more productive to pursue the debate over the appropriate relationship between trade and human rights in two directions. The first, which focuses on the ways in which the two separate bodies (in this case the WTO and ILO) can best be reconciled and made complementary to the greatest extent possible...(the 'trade and...'' debate)...The second approach is to begin a more sustained and critical debate that focuses upon Petersmann's agenda [which proposes that the new opportunities for the worldwide enjoyment of human rights created by a global division of labour (such as additional economic resources, job opportunities, worldwide communication systems and access to new medicines and technologies) must be accompanied by the stronger legal protection of social human rights so as to limit abuses of deregulation (e.g. by international cartels, trade in drugs and arms, and trafficking in women and children), help vulnerable groups to adjust to change without violation of their human rights, and put pressure on the authoritarian governments to protect not only business interests but also the human rights of all their citizens] in a systematic and intellectually open way which acknowledges the underlying assumptions and imposes a high scholarly burden of proof on the proponents of the different positions."

[8] The Universal Declaration of Human Rights (UDHR) was adopted on 10 December, 1948, and was intended to put in motion legal and cultural forces making it clear that the world community would no longer tolerate the atrocities that occurred in preceding decades and especially in the context of the holocaust. See Adams "From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining" 2008 *Just Labour: A Canadian Journal of Work and Society* 49.

[9] See Petersmann "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration" 2002 *European Journal of International Law* 621. Petersmann whilst calling for reconsideration of the Washington Consensus and for strengthening human rights in global integration law observed that:

valued and protected. Several matters affirmed to be human rights in the UDHR were important to the world of work and these included freedom of association, freedom from slavery, discrimination at work and child labour.[10] The functional duty of sustaining human rights was entrusted to United Nations (UN) agencies. It is on that basis that the key duty to account for labour matters was given to the International Labour Organization (ILO).[11] Founded after World War I as part of the League of Nations, the ILO was and still is a tripartite organization with representation from labour, business and governments.[12] In acknowledgment of the principle that "lasting universal peace can be established only if it is based upon social justice," the ILO embarked on establishing basic standards for all of the world's workers.[13]

The ILO has now outlived both the League of Nations and the disturbances triggered by World War II. Its mission was reaffirmed in the 1944 Declaration of Philadelphia which became part of the organization's constitution in 1946.[14] The Declaration focused on a series of key

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"Everyone is entitled to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights (UDHR) can be fully realised. The human rights obligations in the UN Charter and in the UDHR of 1948 were negotiated at the same time as the 1944 Bretton Woods Agreements, the General Agreement on Tariffs and Trade (GATT) of 1947 and the 1948 Havana Charter for an International Trade Organization. All these aimed at protecting liberty, non-discrimination, rule of law, social welfare and other human rights values through a rules-based international order and 'specialized agencies' (Article 57 of the UN Charter) committed to the economic principle of 'separation of policy instruments':

- foreign policies were to coordinated in the UN so as to promote 'sovereign equality of all its Members' [Article 2(1) of the UN Charter] and collective security;
- liberalization of payments and monetary stability were collectively pursued through the rules and assistance of the International Monetary Fund (IMF);
- GATT and Havana Charter aimed at mutually beneficial liberalization of international trade investments;
- development aid and policies were coordinated in the World; and
- social laws and policies were promoted in the International Labour Organisation (ILO) and other specialized agencies..."

Petersmann makes an important observation to the effect that, "...apart from organisations such as the ILO, World Health Organisation and the United Nations Educational, Scientific and Cultural Organization (UNESCO), human rights were not effectively integrated into the law of most worldwide organisations so as to facilitate functional international integration (such as liberalization of trade and payments)...Regional integration law, by contrast, has moved towards a different 'integration paradigm' linking economic integration to constitutional guarantees of human rights, democracy and undistorted competition."

[10] See Trebilcock 172.

[11] See Valticos "The ILO: A Retrospective and Future View" 1996 *International Labour Review* 473-474. See also De la Cruz, Von Potobsky and Swepston *The International Labor Organization, The International Standards System and Basic Human Rights* (1996) 63.

[12] See Article 7 of the ILO Constitution adopted in 1919. See also ILO "The ILO: What it is. What it does" http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@webdev/documents/publication/wcms_082364.pdf (accessed 18-10-2011).

[13] See the ILO Constitution's preamble.

principles to embody the work of the ILO. These include: labour is not a commodity,[15] freedom of expression and of association are essential to sustained progress,[16] poverty anywhere constitutes a danger to prosperity everywhere,[17] the war against want needs 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 with them in free discussion and democratic decision with a view to the promotion of the common welfare,[18] all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity,[19] and to achieve these fundamental goals "effective international and national action" is necessary.[20]

The 1944 Declaration also provided that it did not foresee its universal principles giving rise to uniform labour standards in all countries but expressly stated that they would "be determined with due regard to the stage of social and economic development reached by each people," but that "their progressive application to peoples who are still dependent, as well as those who have already achieved self-government, is a matter of concern to the whole civilized world".[21] It is submitted that the wording of the 1944 Declaration might have been and may still be easily misconstrued as implying that even those labour rights which are protected as human rights cannot have a uniform minimum standard application in the world. However, this was clarified by the 1998 ILO Declaration on Fundamental Principles and Rights at Work which sought to ensure the realization of the core labour rights by setting standard entitlements or a

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[14] The Declaration of Philadelphia reaffirmed the traditional purposes of the ILO and then diverged in two innovative ways: the importance of human rights to social policy, and the need for international economic planning. See Duffy "Organizational Growth and Structure" 1972 *International Organization* 481. With the end of the world war in sight, the Declaration of Philadelphia sought to adapt the guiding principles of the ILO "to the new realities and to the new aspirations aroused by the hopes for a better world." See Sulkowski "The Competence of the International Labour Organization under the United Nations System" 1951 *The American Journal of International Law* 287. The Declaration of Philadelphia was adopted at the 26th Conference of the ILO in Philadelphia, United States of America. In 1946, when the ILO's constitution was being revised by the General Conference convened in Montreal, the Declaration of Philadelphia was annexed to the constitution and forms an integral part of it by virtue of Article 1.

[15] ILO Declaration of Philadelphia Article 1(a).

[16] Ibid, Article I (b).

[17] Ibid, Article I (c).

[18] Ibid, Article I (d).

[19] Ibid, Article II (a).

[20] Ibid, Article IV. See also Sulkowski 288.

[21] Ibid, Article V.

floor set of rights that all States must conform to, irrespective of their level of development or location in the international economy. The seven fundamental Conventions embraced in the 1998 Declaration, which re-iterates the thrust of the 1944 Philadelphia Declaration and the ILO Constitution, refer to freedom of association and collective bargaining,[22] forced labour,[23] non-discrimination[24] and minimum age,[25] all of which affect specific rights entrenched in the human rights Covenants.

By the time the UDHR was endorsed, the ILO's operational measures were well recognized and there appeared to be no need to alter them. The ILO's key instruments were and remain its conventions and recommendations.[26] At the time of the proclamation of the UDHR, the ILO adopted a number of conventions and recommendations related to the issues provided for in the UDHR. For example, concerning human rights issues such as the freedom of association and collective bargaining, the ILO adopted important instruments such as Convention 87 concerning Freedom of Association and Protection of the Right to Organize[27] and Convention 98 concerning The Right to Organize and Collective Bargaining.[28] As a result of its already established procedures, the ILO saw no need to reframe its work in the developing language of the growing international human rights community. It continued using its own ideas and terms and thereby became progressively divorced from the human rights community.[29] As such, when human rights authorities spoke of the rights of individual people everywhere, the ILO spoke of the duties of states. Also, when the human rights community spoke of the disregard of individual human rights, the ILO spoke of failure to adhere to international standards.

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22 ILO Conventions 87 and 98.
23 ILO Conventions 29 and 105.
24 ILO Conventions 100 and 111.
25 ILO Convention 138.
26 Adams 49. Conventions are international treaties that, when ratified by states, generally become part of domestic law whilst recommendations mark a general consensus about the issues under consideration but one that has not reached the level to move to treaty status.
27 The Convention concerning Freedom of Association and Protection of the Right to Organize or Freedom of Association and Protection of the Right to Organize Convention is an International Labour Organization Convention. It is one of the eight ILO fundamental conventions. It affirms the Declaration of Philadelphia and was adopted on the 9th of July 1948.
28 The Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively or Right to Organize and Collective Bargaining Convention is an International Labour Organization Convention. It is one of eight ILO fundamental conventions just like the Convention concerning Freedom of Association and Protection of the Right to Organize. It was adopted on the 1st of July 1949.
29 See Leary "The Paradox of Workers' Rights as Human Rights" in Compa, Lance and Diamond (eds) *Human Rights, Labor Rights and International Trade* (1996).

Whilst the ILO grew divorced from the human rights framework, the UDHR was by nature and content, too brief and non-binding as a text. As such, the international community had to create additional broad international instruments to give detail to its contents so as to make it influential. The result was the adoption of two covenants: the International Covenant on Civil and Political Rights (ICCPR)[30] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[31] which interestingly both made references to labour standards regardless of the fact that the ILO had grown increasingly divorced from human rights. The UDHR and the two fundamental covenants then became universally recognized as the International Bill of Rights.[32] Upon its adoption in 1966, the ICESCR integrated labour rights which were wholly drafted more or less on the experience of the ILO.[33] The labour rights integrated in the ICESCR include the right to work,[34] just and favourable conditions of work,[35] trade union rights, including the right to strike[36] and right to social security, including social insurance.[37] It also included the rights of the family,[38] provision of an adequate standard of living,[39] health[40] and culture,[41] which all contribute to the development of people in disadvantaged societies. This effectively meant that all labour standards included in the ICESCR were human rights. However, it is imperative for the purposes of this study to appreciate that not all ILO

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[30] The International Covenant on Civil and Political Rights (ICCPR) was adopted and opened for signature, ratification and accession by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on the 23rd of March 1976.

[31] The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on the 23rd of March 1976.

[32] See Howard and Donnelly *International Handbook of Human Rights* (1987) 9. The International Bill of Human Rights is an informal name given to one General Assembly resolution and two international treaties established by the United Nations. It consists of the Universal Declaration of Human Rights (adopted in 1948), the International Covenant on Civil and Political Rights (1966) with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (1966).

[33] ILO "Protecting Labour Rights as Human Rights : Present and Future of International Supervision" 2006 Proceedings of the International Colloquium on the 80th anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations edited by Politakis *International Labour Office Geneva: ILO* 4.

[34] ICESCR, Article 6.

[35] ICESCR, Article 7.

[36] ICESCR, Article 8.

[37] ICESCR, Article 9.

[38] ICESCR, Article 10.

[39] ICESCR, Article 11.

[40] ICESCR, Article 12.

[41] ICESCR, Article 15.

Conventions are covered by human rights Covenants. A number of them relate to domestic labour law matters, not expressly to human rights circumstances. The difference is significant as in non-human rights issues; States are free to alter their positions in view of future societal developments. This however cannot be the case with human rights standards because once a human right, always a human right.[42] The core labour rights have proven to form the minimum baseline on which the labour rights can be regarded as human rights, hence, they are at the centre of interest in this study. As such when labour standards are referred to in the context of this study, it must be understood that such reference is only in respect of labour standards which amount to human rights and are universally applicable and not subject to the discretion of states in terms of implementation. Labour rights would not only be referred to in the above specified human rights instruments but they were also referred to by the African Charter on Human and Peoples' Rights (ACHPR).[43]

Like ILO Conventions, the Covenants are international treaties. Initially, the cold war made it necessary to come up with the two already mentioned covenants on civil and political rights and economic, social and cultural rights rather than just one combined covenant. The rationale behind this approach was the inescapable understanding that western capitalist democracies were prepared to commit not only in theory but also in practice to such issues as due process before the law, free elections and to trial by jury[44] yet they were not as enthusiastic to recognize the right of all workers to a job or a livable wage or decent housing as required by the Covenant on economic, social and cultural rights.[45] The eastern socialist countries took a contrary position, robustly supporting economic and social rights while being reluctant to embrace all of the trappings of western democracy.[46] Although involved in the development of the Covenants, the ILO was uncomfortable with the division into categories and thus tried to dissociate itself from the ensuing controversy.[47] As a result it became further distanced from the expanding human rights community. It is submitted that the position held by the western

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[42] ILO "Protecting Labour Rights as Human Rights: Present and Future of International Supervision" 4.
[43] See Article 15 of the African Charter on Human and Peoples' Rights which was adopted on the 27th of June 1981 and entered into force on 21 October 1986.
[44] Adams 50.
[45] Ibid. See also Article 7 of the ICCPR.
[46] Adams 50.
[47] See Swepston "Labour Rights and Human Rights," Keynote Speech, Conference on Workers' Rights, Human Rights: Making the Connection, Toronto, 17 November 2007.

countries appears to be the trap into which the developing countries seem to be falling albeit in the wake of their noble cause to attain development. It appears that the obsession in trying to address colonial imbalances might have been taken to the extreme by developing countries, a feature which sadly comes at the expense of their peoples' welfare. The western countries stand to lose nothing as their development came at the expense of the cheap labour and gross violations of the rights of workers who came from developing countries as slaves. Developing countries on the other hand seem to have everything to lose as their people suffer double jeopardy in that their rights were violated as slaves and now they have to make do with lower levels of recognition of their labour rights as human rights by their own governments who continuously preach the gospel of anti-colonialism. It appears that lowering labour standards would be a priority in the pursuit of development yet little regard is given to the consequences of such an approach in the future.

If one reflects upon the predicament of the poorly remunerated mine workers in informal mining sectors of the Democratic Republic of Congo (DRC), where workers slave in hazardous mines under very poor working conditions, without so much of reprimand from the DRC government, and with so much influence being wielded by Western powers or at least the rebels they sponsor,[48] it might be proper to conclude that western countries are the primary beneficiaries of lower labour standards in developing countries which are promoted by the developing countries themselves.[49] Eric Kajemba, a Congolese civil society leader and mining expert commented on the effects of the Dodd-Frank Act, as follows:

> "Congolese mineral exports are down 90 percent due to a new rule requiring US companies to avoid indirectly financing rebel groups. John Prendergast, The Enough

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[48] On July 21 2010, President Obama signed into effect the Dodd-Frank Wall Street Reform Act. The Act sought to regulate the financial markets and make another economic crisis less likely. It sought to use transparency in trade as a vehicle to just economic practices. However, the Dodd-Frank law has added insult to the violation of workers' rights in mineral mines by slowing trade in minerals trade in the DRC a factor which has further hampered development in the country.

[49] The International Trade Union Confederation (ITUC) released a report on 24 November 2010 on the situation of core labour standards in the Democratic Republic of Congo (DRC). The release was timed to coincide with the review of the trade policies of the DRC by the General Council of the WTO at the end of November. The report finds prevalent violations of all core international labour standards especially with regard to child and forced labour. Although legislation recognises the fundamental rights to form and join a union, collectively bargain and strike, the report finds that many so-called trade unions are actually organised by employers in an effort to discourage free trade unions from operating. Anti-union discrimination remains unpunished along with many other crimes against trade unions. The police and judiciary frequently make arbitrary use of their powers against trade unionists, and cover up the actions of investors and corrupt officials who breach the law.

> Project, and Global Witness are directly responsible for this completely predictable havoc, as are the American legislators and industry personnel who took their testimony as gospel, let them write section 1502 of the legislation, and ignored dissenting voices in the debate over the minerals. We now have a situation in which the already tenuous economy of the eastern DRC is further deteriorating. Ordinary Congolese are suffering far more than the militias at whom this legislation was targeted. And I, for one, would like to know what the people who caused this problem are going to do about it."[50]

Clearly western countries, just like their African counterparts would thus be equally liable for trading in products that emanate from the gross violation of workers' rights.

The DRC is not the only country in this blend of self-inflicted and foreign-inflicted predicament. Another prime example of the so-called drive towards development at the expense of human rights can be seen in Zimbabwe. A country once the bread basket of Africa has now become a basket case. At the centre of its fall has been the attempt to redress colonial imbalances in the so called "Third Chimurenga economic war"[51] which unfortunately has been characterized by gross human rights violations. Public servants in particular do not have a broader right to collective job action and can only do so with the concurrence of the Minister of Labour. They are also poorly paid yet diamonds from the country are being sold for billions of dollars on foreign markets, which in most instances are European markets. Such has been the state of human rights violations in the country that the introduction of the New Economic Partnership for African Development (NEPAD),[52] long before the "Third Chimurenga economic war", was even regarded as a test case for Zimbabwe.[53] For employees in the private sector who have the right to strike, the procedural requirements for striking are so demanding, as to defeat the whole purpose

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[50] See Texas in Africa "The DRC Minerals Mess" http://texasinafrica.blogspot.com/2011/08/drc-minerals-mess.html (accessed 30-10-2011).

[51] See Chitiyo "Harvest of Tongues: Zimbabwe's "Third Chimurenga and the Making of an Agrarian Revolution" in Lee and Colvard (eds) *Unfinished Business: The Land Crisis in Southern Africa* (2003) 159. The word Chimurenga refers to an uprising. The "chimurenga mythology" has become a core element of state survival and agrarian transformation. Chitiyo compares the Zimbabwean model, "a populist-coercive version of socio-agrarian reform" which, for better or worse, has revolutionized the agricultural system, with the current South African model of "incrementalist, rationalist and linked to the global agenda of development as governance."

[52] The New Partnership for Africa's Development (NEPAD) is a programme of the African Union (AU) adopted in Abuja, Nigeria in 2001. NEPAD is a radically new intervention, spearheaded by African leaders to pursue new priorities and approaches to the political and socio-economic transformation of Africa. NEPAD's objective is to enhance Africa's growth, development and participation in the global economy.

[53] The WTO, NEPAD and social clauses are all linked to the process of globalisation. While the WTO is a key instrument in driving this process, NEPAD has been described as "Africa's response to globalisation". The proposed social clause in trade agreements is meant to ensure basic workers rights and to avoid a race to the bottom as far as labour standards in the global economy are concerned.

of collective job actions due to the attempts by the Zimbabwe African National Union Patriotic Front (ZANU PF)[54] controlled government's attempts to thwart collective job actions which they see as protest actions that are anti-revolutionary. This approach to human rights by these developing countries may appear to call into question the sincerity of arguments for lowering labour standards at the expense of human rights on the basis that the former is central to their comparative advantage. Understanding core labour standards as fundamental human rights may perhaps assist in addressing ruling elites' resistance to change.

3 3 THE ADVANCE OF CORE LABOUR STANDARDS AS HUMAN RIGHTS

Due to the fact that the ILO chose to go alone rather than getting involved in the east-west debate over the separation of human rights into two groups, the ILO did not become a major participant in the developing human rights community and debate.[55] The end of the Cold War in the early 1990s however saw the UN funding a number of international conferences intended to profile the work of the ILO in the post-cold war period. In 1993 there was a summit on human rights in Vienna that issued the Vienna Declaration.[56] In it, the international community restated its obligation to upholding the universality and indivisibility of human rights.[57] The Vienna Declaration's Preamble states that:

> "The World Conference on Human Rights, Considering that the promotion and protection of human rights is a matter of priority for the international community, and that the Conference affords a unique opportunity to carry out a comprehensive analysis of the international human rights system and of the machinery for the protection of human rights,

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[54] The Zimbabwe African National Union Patriotic Front (ZANU-PF) has been the ruling party in Zimbabwe since independence in 1980, led by Robert Mugabe, first as Prime Minister with the party simply known as ZANU, and then as President from 1988. In the 2008 parliamentary election the ZANU-PF lost sole control of parliament for the first time in party history, brokering a difficult power-sharing deal with the Movement for Democratic Change (MDC). However the party still remains in control of most functions of the state due to its backing from the army.

[55] Adams 50.

[56] The Vienna Declaration and Programme of Action (VDPA) is a human rights declaration adopted by agreement at the World Conference on Human Rights on 25 June 1993 in Vienna, Austria. The VDPA confirmed the Universal Declaration of Human Rights and the United Nations Charter.

[57] Part I para 5 of the VDPA provides that, "All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." The VDPA stresses that all human rights are of equivalent significance, pursuing to end the qualitative separation between civil and political rights and economic, social and cultural rights, which was pronounced during the Cold War era.

> in order to enhance and thus promote a fuller observance of those rights, in a just and balanced manner…Invoking the spirit of our age and the realities of our time which call upon the peoples of the world and all States Members of the United Nations to rededicate themselves to the global task of promoting and protecting all human rights and fundamental freedoms so as to secure full and universal enjoyment of these rights."[58]

The Vienna Declaration also drew a straight link between respect for human rights, democracy and international development.[59] Just about the same time when the Vienna Declaration was being adopted, an extensive number of civil organizations started to challenge the impact of globalization.[60] Businesses were growing around the world, production was being found in countries distant from those in which the outcomes were promoted and financial markets were becoming gradually global. This is a feature of globalization that appears to dominate the trade relations between developing and developed countries in the present times. The Uruguay Round of the General Agreement on Tariffs and Trade was developing the rules that would lead to a liberalized trade regime that would be managed by the WTO which came into existence in 1995.[61] However, it is submitted that the outputs of international liberalization and trade growth were and still are not being impartially shared.[62] No significant improvement in the quality of life

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[58] VDPA preamble.

[59] See Part I para 8 which states that "Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world."

[60] Adams 50.

[61] The Uruguay Round was the eighth round of Multilateral trade negotiations conducted within the framework of the General Agreement on Tariffs and Trade (GATT), spanning from 1986-1994 and embracing 123 countries as "contracting parties". The Round transformed the GATT into the World Trade Organization. The Round came into effect in 1995 and has been implemented over the period to 2000 (2004 in the case of developing country contracting parties) under the administrative direction of the newly created World Trade Organization (WTO).

[62] The fact that several countries are placing little importance on a need to protect labour standards as human rights in trade (in the interest of economic gains) might explain the reluctance to acknowledge a trade-labour linkage in the WTO legal framework. See Trebilcock 173. Trebilcock considers the rationale for a "...trade-policy labour standards linkage..." whose "...focus is squarely on social welfare considerations in exporting countries, rather than importing countries..." as "...an entirely cogent basis for collective global action to ensure that core labour standards in all countries, are conceived as universal human rights..." However, Trebilcock argues that due to what he perceives as "the precise content of several of the core labour standards" and "what forms of child labour are unacceptable" with many forms of "violations of core labour standards" occurring in "non-traded goods sectors (e.g. use of child labour)" there would be "...no defensible case for privileging core labour standards over other basic international human rights such as freedom from genocide, torture, arbitrary arrest or detention without trial, or racial or gender discrimination." Trebilcock's arguments whilst plausible to a certain

of those who are less well-off, if any at all, can be noticed in the so called developing countries.[63] It comes as no surprise when one reaction to the non-improvement in the quality of people's lives is a drive to make observance of core labour rights a conventional feature of globalization.[64]

The proposal to make States' membership to the WTO dependent on their respect for human rights thus naturally flowed from the need to improve people's lives in the world.[65] It therefore was not surprising that as far back as the UN's 1995 Summit on Social Development,[66] core labour rights, including freedom of association and the right to organize and bargain collectively, were overwhelmingly re-stated to be basic human rights. Reinstating its attachment with the international human rights community, the ILO contributed robustly in the work of the

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extent might not be a true reflection of reality in developing countries. There is no dispute as regards the content of what constitutes core labour standards. Lester *et al* plausibly observe that: "The fact that core labour standards are human rights is uncontroversial; no Member State voted against the ILO Declaration when it was put forth at the 86th Session of the General Conference of the ILO in June, 1998. The ILO Declaration itself acknowledges core labour standards have a special status within the international labour law hierarchy in that core labour standards are imposed upon ILO Members by them simply being Members of the organisation. Thus, Member States that have not ratified the relevant conventions are nevertheless bound to promote and realize the basic principles concerning...core labour standards." See Lester *et al* 878. Furthermore, child labour violations in African countries such as the DRC (where detention and torture are rife) and Malawi, as chapter 7 of this study will establish are taking place in traded sectors as opposed to non-traded sectors. In South Africa, the violation of farmworkers' and miners' rights as chapter six of this study will reveal, are taking place in trade-related sectors. It could be argued that protecting core labour standards as human rights in trade could also have objectives of addressing concerns on torture, detention, racial or gender discrimination to the extent that fall within the scope of a trade-labour dispute.

63 See Davis and Trebilcock "Legal Reforms and Development" 2001 *Third World Quarterly* 23.

64 See Lester *et al* 879. Lester *et al* argue that: "As human rights, the core labour standards are worthy of inclusion as a GATT-protected norm. By viewing core labour standards as human rights and not merely as an attempt to level the playing field, the case for the WTO incorporating the rights and correspondingly playing a role in their enforcement becomes clear for at least two reasons. First, when viewed as basic human rights, core labour standards can be seen to be promoting human freedom of choice. Such freedom of choice is entirely consistent with a liberal trading regime that seeks to ensure other human freedoms, particularly the right of individuals to engage in market transactions without discrimination on the basis of the country of origin...Second, the human rights approach shows that imposing trade restrictions on products manufactured in a manner that fails to comply with universally acknowledged human rights is not an economic regulation *per se*, but rather a form of social regulation driven by the fundamental premise that human rights are universal and indivisible. Viewed in this manner, it becomes clear that the enforcement of human rights is not merely a convenient opportunity to engage in protectionism, but an obligation to respect, protect and fulfill their responsibilities under international human rights treaties, including the ILO Declaration." See also Trebilcock and Howse *The Regulation of International Trade* (2005) 581. Trebilcock and Howse observe that linking trade to core labour standards (as human rights) will not impose a discriminatory set of conditions on WTO Members' exercise of their trading rights. Instead, compliance with core labour standards as human rights would be something they are all ready committed to doing in as much as they are Members of the ILO and signatories of the ICCPR and ICESCR.

65 See Tsogas *Labour Regulation in a Global Economy* (2001) 129.

66 The World Summit for Social Development was held in March 1995 in Copenhagen, Denmark. At this summit, governments reached a new agreement on the need to put people at the centre of development. The Social Summit was the biggest meeting ever of world leaders at that time. It vowed to make the conquest of poverty, the goal of full employment and the fostering of social integration overriding objectives of development.

Summit on Social Development. When the Summit ended, governments adopted the Copenhagen Declaration, the Ten Commitments and the Programme of Action of the World Summit for Social Development.[67]

In 1996, a year after the World Summit for Social Development, the World Trade Organisation (WTO) provisionally thought over and abandoned the suggestion of including a "social clause" in its multilateral trade instruments. The basis of its decision was a plea of its lack of ability to judge nations on that criterion and passed the stick to the ILO.[68] The outcome of this approach was that the ILO at its annual conference in 1998, approved the adoption of the Declaration of Fundamental Principles and Rights at Work already alluded to in this chapter. Due to the fact that representatives at the annual conference were drawn not only from states but also organized labour and employer organizations, the 1998 Declaration represented an international labour-management state compact about the human rights nature of core labour rights including aspects of labour such as collective bargaining.[69]

The Secretary General of the United Nations proclaimed the introduction of the Global Compact with international business, two years after the 1998 Declaration.[70] The Global Compact challenged corporations to pledge amongst other things the respect for and work towards the full implementation of a set of labour standards.[71] However, the Global Compact did

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[67] See the United Nations Report of the World Summit for Social Development, Copenhagen, 6-12 March 1995 4. The commitments are as follows: Create an economic, political, social, cultural and legal environment that will enable people to achieve social development; eradicate absolute poverty by a target date to be set by each country; support full employment as a basic policy goal; promote social integration based on the enhancement and protection of all human rights; achieve equality and equity between women and men; attain universal and equitable access to education and primary health care; accelerate the development of Africa and the least developed countries; ensure that structural adjustment programmes include social development goals; increase resources allocated to social development and strengthen cooperation for social development through the UN.

[68] Tsogas 130.

[69] See Bellace "The ILO Declaration of Fundamental Principles and Rights at Work" 2001 *International Journal of Comparative Labor Law and Industrial Relations* 269-270. In the context of the Declaration collective bargaining was clearly declared to be equivalent in stature and concern with employment equity, and freedom from child and forced labour.

[70] The Global Compact was first announced by the then UN Secretary-General Kofi Annan in an address to The World Economic Forum on January 31, 1999, and was officially launched at UN Headquarters in New York on July 26, 2000. The United Nations Global Compact is a United Nations initiative to encourage businesses worldwide to adopt sustainable and socially responsible policies, and to report on their implementation. The Global Compact is a principles-based framework for businesses, stating ten principles in the areas of human rights, labour, the environment and anti-corruption. Under the Global Compact, companies are brought together with UN agencies, labour groups and civil society.

[71] The labour standards were drawn explicitly from the ILO Declaration. Business had to uphold the following labour standards: Principle 3, the freedom of association and the effective recognition of the right to collective

not bind firms legally,[72] although the number of corporations that have vowed to respect and work toward the full implementation of a set of labour standards has gone up to over three thousand.[73] This has resulted in the formal acceptance of the right of workers to organize without interference and for their organizations to be recognized for the purpose of bargaining collectively a feature of labour practice which has now become a global norm.[74]

In 2004, the need to strengthen the influence of the international code of acceptable corporate conduct concerning human rights resulted in a Sub-commission[75] of the UN's Human Rights Council (then Human Rights Commission) issuing the UN Norms.[76] The document on UN Norms on the Responsibilities of Transnational Companies and other Business Enterprises with regard to Human Rights stipulated what were, in the Sub-commission's expert view, the international human rights duties of business. It claimed that corporations had legal responsibilities to respect and conform to human rights standards to which business retorted that it was not the police and could not be expected to fulfill the functions of the state.[77] Reacting to the debate, the UN Secretary General appointed a Special Rapporteur to consult extensively with all those concerned with the subject and to offer recommendations for resolving the controversy.

Ruggie has specified that an interim report confirmed that the Commission had been "doctrinally excessive" in its statements regarding the legal responsibilities of business.[78] In

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bargaining; Principle 4, the elimination of all forms of forced and compulsory labour; Principle 5, the effective abolition of child labour; and Principle 6, the elimination of discrimination in employment and occupation.

72 The Global Compact reflected a formal, moral commitment to behave in accord with core labour standards including respect for the right of workers to organize and bargain collectively without interference. See Human Rights Watch "A Strange Case: Violations of Workers' Freedom of Association in the United States by European Multinational Corporations" 2010 http://www.hrw.org/sites/default/files/reports/bhr0910web_0.pdf (accessed 27-10-2011).

73 Ibid.

74 Ibid.

75 The Sub-Commission on the Promotion and Protection of Human Rights (before 1999, known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities) was a think tank of the United Nations Commission on Human Rights. It was wound up in late August, 2006. With the dissolution of the Commission on Human Rights and its replacement by the Human Rights Council in 2006, responsibility for the Sub-Commission passed from the former to the latter. On 30 June 2006 the Council resolved to extend the Sub-Commission's mandate on an exceptional one-year basis and subject to the Council's subsequent review. The Sub-Commission met for the final time in August 2006; among the recommendations it adopted at that session was one for the creation of a Human Rights Consultative Committee as a standing body to assist the Human Rights Council.

76 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

77 See Kinley and Chambers "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law" 2006 *Human Rights Law Review* 447.

conducting further analysis on the subject, Ruggie developed a framework that comprises three key principles namely: the state's duty to protect against human rights abuses by business; the corporate responsibility to respect human rights; and effective access to remedies.[79] This framework does not go as far as the UN Norms in establishing the obligations of business for human rights but it does make clear that business assume any responsibility other than compliance with law.[80] Unfortunately, Ruggie's framework left the legal obligations of business uncertain. However, what stands clear at this point is that whatever the technical legal exposure of business ought to be, there is a rapidly strengthening global social norm that expects business to take some responsibility for human rights.[81]

Specific examples of recognising labour rights as human rights come in the form of upholding the right to collective bargaining that would materialize through conforming to the conduct norms drafted by the ILO and its committees. In 2006, the demands on business became greater than before when the World Bank's commercial lending division, the International Finance Corporation (IFC),[82] issued a set of guidelines that it would apply to corporate applicants for development loans.[83] The guidelines stipulate that for a corporate to qualify for a commercial loan, such corporate "will not discourage workers from organizing and bargaining collectively."[84] This IFC standard resultantly became part of the Equator Principles, a policy

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[78] See Ruggie "Promotion and Protection of Human Rights, Interim Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises" 2006 United Nations Commission on Human Rights http://www.globalpolicy.org/reform/business/2006/02srsgreport.htm (accessed 27-10-2011).

[79] See Ruggie "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises" 2008 New York, United Nations' Human Rights Council.

[80] Ibid.

[81] Kinley and Chambers 447.

[82] The International Finance Corporation (IFC) was established in 1956 and promotes sustainable private sector investment in developing countries. It is a member of the World Bank Group and is headquartered in Washington, DC. The IFC is the largest multilateral source of loan and equity financing for private sector projects in the developing world. It promotes sustainable private sector development primarily by, financing private sector projects and companies located in the developing world, helping private companies in the developing world mobilize financing in international financial markets and providing advice and technical assistance to businesses and governments.

[83] See International Finance Corporation "Performance Standards on Social and Environmental Sustainability" http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/PPSOverview_English/$FILE/PPS+Overview+of+Consultation+and+Engagement_English.pdf (accessed 31-10-2011).

[84] Ibid.

generally sanctioned by international lending institutions around the world.[85] As such, in order to obtain a development loan, adherence to the new policy has fast become a practical requirement. If this norm was to be incorporated in the WTO multilateral trade instruments, the large majority of international trading firms would almost certainly fail the test because discouraging workers from organizing is a common practice in the world.[86]

Note worthy attempts to promote the rights of workers as human rights can be traced to countries such as the US and Canada. In the US, the desire to promote knowledge, understanding and respect for core labour rights as human rights saw the emergence of the Society for the Promotion of Human Rights in Employment in the year 1997.[87] The Society swiftly drew hundreds of labour relations specialists to advance their mission. In 2000 US-based Human Rights Watch commissioned a study of the state of US labour law and practice from an international human rights perspective and found the country sadly wanting.[88] That report has

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[85] The Equator Principles were developed by private sector banks led by Citigroup, ABN AMRO, Barclays and WestLB and were launched in June 2003. The banks chose to model the Equator Principles on the environmental standards of the World Bank and the social policies of the International Finance Corporation. 67 financial institutions have adopted the Equator Principles, which have become the standard for banks and investors on how to assess major development projects around the world. The Principles apply to all new project financings globally with total project capital costs of US$10 million or more, and across all industry sectors. The principles are: Principle 1, Review and Categorisation of a project; Principle 2, Social and Environmental Assessment, Principle 3, Applicable Social and Environmental Standards; Principle 4, Action Plan and Management System; Principle 5, Consultation and Disclosure; Principle 6, Grievance Mechanism; Principle 7, Independent Review; Principle 8 Covenants; Principle 9, Independent Monitoring and Reporting and Principle 10, Equator Principles Financial Institutions Reporting.

[86] See Adams "America's Union-Free Movement in Light of International Human Rights Standards," in Block, Richard, Friedman, Kaminski and Levin (eds) *Justice on the Job, Perspectives on the Erosion of Collective Bargaining in the United States* http://www.msu.edu/../AdamspaperforLIR858.doc (accessed 27-12-2012). Adams argues that were the IFC norm applied fairly in Canada and the United States to domestic corporations, the large majority of "non-union" firms would almost certainly fail the test because discouraging workers from organizing is the Canadian industrial norm. This in a way shows that the calls for a social clause are not purely a western agenda but have a bearing on all workers in the world more so workers in developing countries which are yet to industrialise and need to develop to ensure a better livelihood for their citizens.

[87] The Society for the Promotion of Human Rights in Employment (SPHRE) was initiated in the 1997. SPHRE grew from a broad consensus underwritten by a large number of organizations including the UN, the ILO, the Organisation of Economic Cooperation and Development (OECD), the WTO, the International Confederation of Free Trade Unions and the International Organization of Employers. SPHRE´s purpose is to promote awareness, understanding and respect for fundamental employment human rights which include (but are not limited to) the following: Freedom of Association, Right to Organize and Bargain Collectively, Prohibition of Forced Labor, Elimination of Exploitative Forms of Child Labor and Non-discrimination in Employment or Occupation.

[88] See Compa "Unfair Advantage, Workers' Freedom of Association in the United States under International Human Rights Standards, New York" 2000 *Human Rights Watch* 51.

had a significant impact in increasing American labour's human rights awareness with regard to collective bargaining and with moving the human rights and labour movements closer together.[89]

In Canada, the National Union of Public and General Employees joined with the United Food and Commercial Workers to promote the message of workers' rights as human rights.[90] They were soon joined by the Canadian Teachers' Federation and the Canadian Police Association. This is the international and recent local environment in which the Supreme Court of Canada delivered its 2007 decision constitutionalising the right to bargain collectively.[91] As the Court noted its decision "may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining." Although the Court made that statement primarily in reference to historical developments in Canada, it is equally, if not more accurate with respect to global developments which may inform the calls for a social clause in the WTO.

3 4 WHY USE A HUMAN RIGHTS APPROACH TO ENGAGING THE TRADE-LABOUR LINKAGE DEBATE

There has been increasing discussions among development actors and agencies about a rights-based move towards development. However what this approach precisely entails remains a matter of debate requiring clarity. Eyben[92] and Ferguson[93] viewed the approach as being deeply rooted in human rights legislation. The approach is unique and holds the potential of re-politicising areas of development that have become domesticated as they have been

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89 See Compa "Labor's New Opening to International Human Rights Standards" 2008 *Working USA* 99. In 2001 the AFLCIO, the US's major trade union federation launched its Voice@Work Campaign in which it began to vigorously employ the language of labour rights as human right. With significant trade union financial backing, in 2003 American Rights at Work was formed with the mission of "advancing democracy in the workplace."

90 See Fudge *Collective Bargaining in Canada, Human Right or Canadian Illusion?* (2005). See also Adams "America's Union-Free Movement in Light of International Human Rights Standards," in Block, Friedman, Kaminski and Levin (eds) *Justice on the Job, Perspectives on the Erosion of Collective Bargaining in the United States* 2006b.

91 See the case of *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia* 2007 2 SCR 391, 2007 SCC 27. In this case, the Supreme Court of Canada affirmed the human rights status of collective bargaining.

92 See Ebyen "International Development Organizations and Rights Based Approaches" presentation to 'Rights and Power' workshop International Development Studies November 2003.

93 See Ferguson "Global Social Policy Principles: Human Rights and Social Justice" www.dfid.gov.uk/pubs/files/sdd-gsp.pdf (accessed 27-10-2011).

mainstreamed by dominant organizations such as the World Bank. On the contrary, Uvin[94] advocates that the contemporary rights-based development proposals need to be viewed with a fair measure of concern. The Rights-based approach, according to Uvin, has become the most modern development fashion item to be seen; and fears that it is being used to dress up the same old development in what may amount to the Emperor's New Clothes.[95] Uvin's proposal appears to be one of the central arguments to the resistance of including a social clause in the WTO arrangement by developing countries. However, it is imperative to assess the significance of the human rights concept of development in view of all the underlying perspectives concerning the subject. This will allow an informed view on the debate and arrest any fears of human rights being used as a tool to undermine the developing states' development agenda especially where trade is involved.

3 4 1 The significance of the human rights approach to development

To establish the desirability of a social clause in the WTO through the recognition of core labour rights as human rights, an analysis of justifications for the use of human rights in development may be necessary. According to authorities in the field of development studies, the reasons for the importance of human rights in development can be put into three groups: normative, pragmatic and ethical. The normative justification is that rights put values and politics at the very heart of development practice. Hausermann argues that what is distinctive about a human rights approach to development is that it works by setting out a vision of what ought to be: that is, it provides a powerful normative framework to orient development cooperation.[96] In doing so, she suggests, it brings an ethical and moral dimension to development assistance, one that by implication has been lacking.[97] Through specifying a set of globally accepted standards, supported by international law, it offers a firm foundation for people to make claims on their states and for holding states to account for their duties to improve the access of their citizens to

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94 See Uvin *Human Rights and Development* (2004) 12.

95 Ibid.

96 See Hausermann "A Human Rights Approach to Development" 1998 *Discussion Paper* commissioned by the Department for International Development of the UK Government in preparation of the Government White Paper on International Development, London: Rights and Humanity. Others would argue, of course, that such a vision is so infused with the values of the enlightenment that its cultural and historical specificity undermines any claims to universality. See also Kabeer "Citizenship and the Boundaries of the Acknowledged Community: Identity, Affiliation and Exclusion" 2002 *International Development Studies (IDS) Working Paper* 171.

97 Ibid.

the realisation of their rights.[98] Critics support this argument by comparing a rights-based approach with other approaches to development such as the needs-based approach. While a needs-based approach centres on obtaining additional capital for service delivery to marginalised groups, a rights-based approach requires that the existing capital must be shared more equally, and assists the marginalised people to assert their rights to existing resources, thus making the procedure openly political.[99]

Fundamentally different end products inspire the two approaches. Rights are based on legal obligations and in some cases ethical obligations that have a strong foundation in human dignity even though they are only in the process of evolving into legal obligations but needs can be met out of charitable objectives.[100] Critics refer to differences between the normative strength of a rights-based approach and utilitarian-driven approaches[101] such as low cost-high impact project approach and cost-benefit analysis. A rights-based approach is prone to give precedence to severe or gross types of rights violations even if these affect only a small number of people, while these other approaches would recommend a basis for justifying a focus on less severe types of violations that affect a larger number of people.[102]

Practical justification for the use of a rights-based approach to development also exists. Ferguson contends that to talk in terms of rights is in itself a "vehicle for increasing the accountability of government organisations to their citizens and consequently increasing the likelihood that policy measures will be implemented in practice".[103] Equally, for global actors such as the WTO keen on giving meaning to rights outside the traditional confines of state responsibility, the construction of a rights-based-approach in the development framework presents an opportunity to make non-state actors liable for human rights abuses.[104] The Office of the UN High Commissioner for Human Rights, in its Draft Guidelines for a Human Rights

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98 As the Committee on Economic, Social and Cultural Rights made clear, such obligation extends to the creation of enabling conditions rather than direct provisioning.

99 See Jonson "Human Rights Approach to Development Programming 2003 Nairobi UNICEF" http://www.unhchr.ch/development/approaches-04.html. (accessed 27-10-2011).

100 See Adamson and Morrison *Law for Business and Personal Use* (2011) 18.

101 See Bentham *An Introduction to the Principles of Morals and Legislation* (1789) chapter I paragraph 1.4. Utilitarianism is an ethical theory holding that the proper course of action is the one that maximizes the overall good. It is centers on consequences of a particular conduct, meaning that the moral worth of an action is determined by its resulting outcome.

102 See Jonson "Human Rights Approach to Development Programming 2003 Nairobi UNICEF".

103 See Ferguson "Global Social Policy Principles: Human Rights and Social Justice" 1999 London DFID 23.

104 Ibid.

Approach to Poverty Reduction Strategies, puts across this wider idea of liability to human rights protection as follows:

> "Perhaps the most important source of added value in the human rights approach is the emphasis it places on the accountability of policymakers and other actors whose actions have an impact on the rights of people. Rights imply duties, and duties demand accountability."[105]

Furthermore, under international law, the State is the principal duty-bearer with respect to the human rights of the people living within its jurisdiction.[106] However, the international community at large also has a responsibility to help realize universal human rights.[107] Thus, monitoring and accountability procedures must not only extend to States, but also to global actors such as the donor community, intergovernmental organizations, international Non-Governmental Organisations (NGOs) and Transnational Companies (TNCs), whose actions bear upon the enjoyment of human rights in any country.[108]

A rights-based approach can also provide a chance to reflect further largely on the supremacy dynamics inherent in the practice of international development and on questions of ethics. As Eyben and Ramanathan[109] argue, to talk of rights is to talk about power and the obligations of those engaged in development assistance. At the centre of such an approach, they contend, is an impetus to actors involved in development to engage submissively with issues of power.[110] Gaventa sums up the issue by advancing the notion that rights-based approaches to development can work both to sharpen the political edges of participation in the wake of the instrumentalism produced by mainstreaming, and to make critical linkages between participation, accountability and citizenship.[111]

3 4 2 The conflicting viewpoints to adopting a rights-based approach to development

Several discussions concerning the rights-based approach to development rely on the use of legislative instruments in development and on the effectiveness of a normative framework that

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[105] UN OHCHR 2002 para 23.
[106] UN OHCHR 2004 para 23.
[107] See Pierre Claude and Weston *Human Rights in the World Community: Issues and Actions* (2006) 257.
[108] UN OHCHR 2002 para 230.
[109] See Eyben and Ramanathan "Rights-based Approaches to Inclusive Development: Perspectives on the Implications for DFID India" 2002.
[110] Ibid.
[111] See Gaventa 'Introduction: exploring citizenship, participation and accountability' 2002 *IDS Bulletin* 11.

has its foundation in international covenants and conventions.[112] It is submitted that while many would admit that what is essentially being advanced as rights-based approach is not in itself noticeably different to what those working in development have been doing all along,[113] there is also a view that lending these practices the support of internationally agreed legislation does change the way in which they come to be viewed by development agencies and national governments.[114] It may be argued that the rights-based approach may act as a means of validating a more developmental yet drastic approach to development. However, while the rights-based approach to development may present an important arrangement for development actors that may help address neo-liberal instrumentalism notions such as "participation"[115] and "empowerment"[116], bringing into play remote international human rights standards also present their own problems.

An example of such a problem is that most underprivileged people have little access to the establishments that may put their rights into effect, and the interface between different legal systems governing their access to entitlements makes the process of recognising and claiming rights complex.[117] The lack of acknowledgement by advocates of the rights-based approach of the wide range of strategies, tactics and institutions through which people frame and make rights claims outside of formal legal instruments and institutions is highlighted by the critique leveled

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[112] See Nyamu-Musembi and Cornall "What is the 'Rights-based Approach' all about? Perspectives from International Development Agencies" *IDS Working Paper 234* 4. For some of those involved with promoting a rights-based approach, it is precisely because it has its referents in a set of internationally agreed legal documents that it provides a different, and potentially more powerful, approach to development.

[113] Ibid. Work in the rights-based approach to development includes activities such as advocacy and empowerment work to build political capabilities and consciousness, or work in participatory development to engage beneficiaries in a more active process of social transformation.

[114] Ibid.

[115] See Connor "A New Ladder of Citizen Participation" 2007 *National Civic Review* 249. Participation in social science refers to different mechanisms for the public to express opinions and ideally exert influence regarding political, economic, management or other social decisions. Participatory decision making can take place along any realm of human social activity, including economic, political, management, cultural or familial.

[116] See Wilkinson "Empowerment: Theory and Practice" 1998 *Personnel Review* 40. Empowerment refers to the process which enables individuals or groups to fully access personal or collective power, authority and influence, and to employ that strength when engaging with other people, institutions or society. In other words, empowerment is not giving people power; people already have plenty of power, in the wealth of their knowledge and motivation, to do their jobs magnificently. Empowerment is defined as the act of letting power out, a result which encourages people to gain the skills and knowledge that will allow them to overcome obstacles in life or work environment and ultimately, help them develop within themselves or in the society.

[117] See Nyamu-Musembi "Toward an Actor-oriented Perspective on Human Rights" 2002 *IDS Working Paper* 169.

at the rights-based approach by the Sustainable Livelihoods in Southern Africa (SLSA) team.[118] Farrington points out other more pragmatic reasons for remaining suspicious of what this approach would actually be able to accomplish, arguing that finite financial resources demand the establishment of priorities, which in turn undermines the principle of indivisibility, and highlights the dilemma of dealing with competing rights.[119]

These differences of perspective turn on different views of the role of law, and legislative instruments, in development, a theme which is an important dimension of the debate on human rights and development in respect of which a point of caution is necessary.[120] Whilst official policy statements and professions of intent provide some material with which to analyse the normative positions of development agencies and actors on what a rights-based approach consists of and its links to previous approaches such as participation, there is a limit to how much any such generalisation can make sense of the politics of development policy and practice.[121]

A number of organizations declare their commitment to human rights, although most of their practices remain completely unchanged by nice-sounding policies structured on the basis of development opposed principles that stay supremacist in practice. Others may have no official policy, yet individuals within them or particular country programmes are able to carry out work that is informed by broadly similar principles to those articulated within the rights discourse without ever calling what they are doing rights-based.[122] Others still may selectively adopt some elements of the rights discourse, turning it to suit their own purposes: this is, after all, a discourse that offers almost everyone what they might be looking for.[123] Therefore due care and diligence will be exercised about drawing any hard and fast conclusions about the normative influence of rights in what remains a shifting and contested terrain, even within the agencies that have the

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[118] See Mehta, Scoones and Ashley *Rights Talk and Rights Practice: Challenges for Southern Africa* 2003 Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape.

[119] See Farrington "Sustainable Livelihoods, Rights and the New Architecture of Aid" 2001 *Natural Resource Perspectives* 69.

[120] See Crook and Houtzager "Making Law Matter: Rules, Rights and Security in the Lives of the Poor" 2001 *IDS Bulletin* 35.

[121] Nyamu-Musembi 169.

[122] Ibid.

[123] Ibid.

most assertive declarations of support for such an approach, a factor to which this study is sensitive.[124]

3 5 THE SCOPE OF THE RIGHTS-BASED ADVANCE TO DEVELOPMENT

That which is now referred to as the rights-based move towards development has a fairly current record in the discourse of global development organizations, rising in the post-Cold War era in the early 1990s, and gaining force in the build up to the Copenhagen Summit on Social Development.[125] However, a number of the principles articulated as part of the approach adopted at the summit are not recent.[126] They have been a feature of efforts for self-definition and for social justice long before the discussion of rights went global in the post-World War II period.[127] It is submitted that it is indeed odd to reflect on the structuring of contemporary rights discussions given these precursors. It certainly is of key significance to place the contemporary rights talk in history, as many fears and promises which originate from the pronunciation of a rights-based approach to development ought to be considered as growing from long-lasting ties between the states, powers and institutions that are drawn into the present rights discussions.

3 5 1 Anti-colonialism struggles and rights

Whilst discussions of rights in development may be recent among international organizations, as already indicated in this work, the real moves towards the recognition of social, economic and cultural, as well as civil and political, rights has been characteristic of the political setting in several developing countries particularly in Africa, for a long time. The discussion about rights was, and still is, a crucial element of struggle and freedom movements in developing countries; nationalist and anti-colonial movements framed their demands for self-rule in terms of the everyday constraints that colonial administrations imposed not just on their liberty, but on their livelihoods.[128] In the context of this background, Manji argues that:

> "The struggle for independence in Africa was thus informed, at the base, by the experience of struggles against oppression and brutal exploitation experienced in everyday life. These struggles constituted the emergence of a tradition of struggles for rights which was organic

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[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] See Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 7-8.

> to and informed by the specific histories and experiences of those involved . . . The concept of rights was . . . forged in the fires of anti-imperialist struggles. It was informed by the need to overthrow all forms (not just colonial) of oppression and exploitation, not by constructs which had either been embodied in the UDHR or imported into Africa by those nationalist leaders who had spent periods in exile or study in the imperial homeland."[129]

Manji further contends that it was in the process of such struggles that rights were developed and became the foundation for battles for social justice.[130] In giving credibility to Manji's arguments, making reference to events in which the consciousness of injustice led to uprisings in the colonial era and showed the general view the struggle for rights, would be of great significance. Examples of such events are the mobilisation of anti-colonial forces in Zimbabwe's Chimurenga wars,[131] the rebellions of Kikuyu women in colonial Kenya,[132] the Aba Women's War in Nigeria[133] and last but not least the non-violent direct actions led by Gandhi in India.[134] Manji went on to assert that the state's introduction of the concept of development resulted in the social energy generated during popular uprisings wasting away as the state took over, codifying rights

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[129] See Manji "The Depoliticisation of Poverty" in Eade ed *Development and Rights* (1998) 14.

[130] Ibid.

[131] See Martin *The Struggle for Zimbabwe: The Chimurenga War* (1981). Chimurenga is a Shona word for "revolutionary struggle". The word's modern interpretation has been extended to describe a struggle for human rights, political dignity and social justice, specifically used for the African insurrections against British colonial rule 1896-1897 (First Chimurenga) and the guerrilla war against the white minority regime of Rhodesia 1966-1980 (Second Chimurenga). The concept is also occasionally used in reference to the land reform programme undertaken by the Government of Zimbabwe since 2000, the so-called Third Chimurenga. The Rhodesian Bush War, also known as the Second Chimurenga or the Zimbabwe War of Liberation, was a civil war which took place between July 1964 and December 1967 in the unrecognized country of Rhodesia (latterly Zimbabwe Rhodesia). The conflict pitted three forces against one another: on one side was the Rhodesian government, under Ian Smith (later the Zimbabwe Rhodesian government under Abel Muzorewa), on another was the Zimbabwe African National Liberation Army, the military wing of Robert Mugabe's Zimbabwe African National Union, and on the third was the Zimbabwe People's Revolutionary Army of Joshua Nkomo's Zimbabwe African People's Union. The war and its subsequent Internal Settlement, signed in 1978 by Smith and Muzorewa, led to the implementation in June 1979 of universal suffrage and end of white minority rule in Rhodesia, which was renamed Zimbabwe Rhodesia under a black majority government.

[132] See Presley "The Mau Mau Rebellion, Kikuyu Women, and Social Change" 1988 *Canadian Journal of African Studies* 502.

[133] The Aba Women's War was a tax revolt in 1929 by Igbo women against British colonial rule in south-eastern Nigeria. Initially the protest was through song and dance, but it degenerated into looting of European trading stores and attacks on prisons in an attempt to free prisoners. It is estimated that over 50 Igbo women were killed. See Zukas "Women's War of 1929" http://www.revolutionprotestencyclopedia.com/fragr_image/media/IEO_Womens_War_of_1929 (accessed 30-10-2011).

[134] See Gangrade *Moral Lessons From Gandhi S Autobiography and Other Essays* (1921) 155. Gandhi led India to independence and inspired movements for civil rights and freedom across the world. Gandhi first employed non-violent civil disobedience as an expatriate lawyer in South Africa, in the resident Indian community's struggle for civil rights.

in "laws and constitutions whose relevance or application was determined by the self-proclaimed, and increasingly unaccountable, guardians of the State".[135]

The change from rights to development, Manji proceeded to argue, accelerated the de-politicisation of poverty. The result was the transformation of the structures that had come out to organise around basic rights into development institutions.[136] It may be rightfully submitted that the contemporary rights-based approach to development disregards this history. It undoubtedly shows no substantial link with its politicised history. It is apparent that limited consideration tends to be given to the fact that the politicized history situates relationships between the colonised and colonising countries into a somewhat difficult position. However, there are other facets of this history that are important to remember. The colonial project was irregular and conflicting. It was not a faultless procedure of extraction and domination. Spaces were opened through its inconsistencies for specific social groups, for instance women, to gain access to new opportunities and realise new rights that traditional society did not recognise. This gave birth to innovative substantial opportunities for certain excluded groups. The irony of the ways instrumentalist involvement was aggressively changed by people into something that they could make use of in securing freedoms has significant modern character.[137] It is from this angle that the calls for recognising core labour rights in the WTO must be advanced.

3 5 1 1 The right to development and demands for a New International Economic Order (NIEO)

From the colonial era to the period after World War II in which development started to be expressed as a scheme with the element of international collaboration, development and human rights were regarded as detached concepts. The concept of development was the territory of economists and human rights the field of lawyers and activists.[138] However, the admission of newly independent nations into the United Nations in the 1960s and 1970s prompted the initial efforts to link the two fields.[139] The ICESCR offered a vital starting point for a number of

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[135] Manji 16.
[136] Ibid.
[137] Ibid.
[138] See United Nations Development Programme (UNDP) Human Development Report 2000 http://hdr.undp.org/en/media/hdr_2000_ch0.pdf (accessed 27-10-2011).
[139] See Robinson "Bridging the Gap between Human Rights and Development: From Normative Principles to Operational Relevance" www.worldbank.org/wbi/B-SPAN/sub_mary_robinson.htm (accessed 25-10-2011).

proposals led by developing countries one of whose outcomes was the Declaration on the Right to Development (DRD). The proclamation of the DRD was a landmark development in years of efforts by developing countries within the UN to force transformations that would lead to a NIEO in the interest of poor countries.[140] The Declaration is non-binding, and may be perceived as a diluted adaptation of the drastic restructuring measures sought by the developing countries behind the NIEO. Even so, the NIEO to a certain extent does reflect a few of the radical politics of that era.[141]

Relating to differences between developed and developing countries the NIEO advocates for the joint commitment of all states to generate a just and equitable global setting for the recognition of the right to development. It highlights a shared responsibility of all states to remove obstacles such as unfair trade rules and the debt burden, in actual fact pointing a critical finger at the developed countries for not applying themselves sufficiently or at least fairly to this cause. This has resulted in the developed countries' resistance to the NIEO reflected in the voting outline on the resolution adopting the NIEO declaration which clearly illustrates this developed-developing country divide. Even if eight developed countries voted in favour of adopting the declaration, this number fell considerably when a later resolution attempted to propose a comprehensive plan of action to put the Right to Development into practice.[142] The resolution called on states to build world food security, resolve the debt burden, eliminate trade barriers, promote monetary stability and enhance scientific and technical cooperation.[143]

In the domain of global human rights practice an insistent measure of resistance over the course of the late 1980s and 1990s to the types of rights that were seen as development concerns like shelter, water and food continued. Opposition to economic and social rights by developed countries, especially the US was observed as having its roots in the Cold War.[144] The position

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[140] Ibid.

[141] For example, instead of limiting itself to a conservative consideration of rights as being about state-citizen relations, it places an emphasis on the global dimension.

[142] See Resolution 41/133 of 4 December 1986. This second resolution called for international cooperation aimed at stable and sustained economic growth and increased concessional assistance to developing countries.

[143] See Brownlie "The Human Right to Development" 1989 *Human Rights Unit Occasional Paper November London: Commonwealth Secretariat* 12. The industrial countries rejected these proposals because they saw them as the imposition of one-sided obligations, and an invasion into what should be, according to them, the discretionary or voluntary field of development assistance, where spelling out precise obligations is anathema.

[144] Ibid.

transformed in the aftermath of the Cold War.[145] However, social and economic rights continually meet a predominantly US-led degree of doubt as to their status as rights. Conventional western-based human rights NGOs only started to work on social and economic rights since the mid-1990s with the human rights movement tending to stay distant from matters of economic and social justice.[146] The current talk on rights-based moves inside global development spheres shows a slight consciousness of the former struggles around the Right to Development. The absence of the Right to Development from the rights glossary of international development actors is explained partly by a deliberate effort to steer clear of the controversies raised by its reference to global inequalities.[147] It is these crucial issues which, when addressed, may contribute positively to the attitudes of developing countries towards the advancement of human rights and in particular the introduction of core labour rights in the WTO. As it stands continual denials by the developed countries of the impact of colonialism and its negative effect on developing countries will see the further deterioration of human rights conditions in the later.[148]

3 6 THE RIGHT TO DEVELOPMENT

The Senegalese Jurist, Keba M'baye, became the first person to advance the idea of the Right to Development (RTD) in the year 1972.[149] The RTD's first legal acknowledgment was given in the 1981 African Charter on Human and Peoples' Rights,[150] and was later on integrated into the global human rights framework through the adoption in 1986 of the Declaration on the DRD by

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[145] The rule of the indivisible, interdependent and non-hierarchical nature of rights has become the norm since the 1993 World Conference on Human Rights held in Vienna.

[146] Mainstream human rights groups such as Amnesty International did not get into the language of '"rights-based approach" to development' until 2001/2. See Amnesty International Speech at World Social Forum, Porto Alegre 2002.

[147] The Department for International Development (DFID) for instance makes no reference to the Right to Development in either of its two White Papers (DFID 1997; 2000a) and only a passing reference in the Target Strategy Paper on rights (2001). The UK Foreign and Commonwealth Office specifically advised proponents of a rights-based approach within the UK DFID to exclude any reference to the declaration. DFID makes it quite clear that it does not ground its approach to development assistance in the UN Declaration on the Right to Development, and that its assistance is based on a moral, not legal, obligation to alleviate poverty.

[148] See Alfred "Colonialism and State Dependency"2009 *Journal of Aboriginal Health* 43.

[149] See M'Baye "Le Droit au Developpement comme un Droit de L'Homme" 1972 *Human Rights Journal Revue Des Droits de L'Homme* 503,515. In a lecture at the International Institute of Human Rights in Strasbourg, in 1972, M'Baye asserted that it was a right belonging to all men, as every man has a right to live and a right to live better.

[150] See Article 22 of the African Charter.

the United Nations General Assembly. The 1993 Vienna Declaration and Programme of Action (VDPA),[151] the 2000 Millennium Declaration,[152] and most recently, the Durban Declaration and Programme of Action[153] reaffirmed the RTD as a universal and inalienable human right. The United Nations Declaration on Right to Development defines the RTD as:

> "…an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[154]

The VDPA reaffirms the right to development, which is regarded as contentious by some human rights scholars and UN member states.[155] As provided for in the DRD, the human person is the primary beneficiary of development. Certainly, states must assist each other in ensuring development and removing impediments to development.[156] The international community ought to encourage an efficient global collaboration for the recognition of the right to development and the eradication of barriers to development.[157] Long-term advancement towards the application of the right to development needs efficient development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.[158]

3 6 1 Trade and development

Currently, the membership of the WTO stands at around one hundred and fifty three members with almost two thirds of the membership being developing countries, transition economy

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[151] VDPA paragraph 10 reaffirms "the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights."

[152] UN General Assembly, *The Millennium Declaration*, in pursuance of UN General Assembly Resolution 55/2 of 8 September 2000 paragraph 11 states: "We are committed to making the right to development a reality for everyone and to freeing the entire human race from want."

[153] The Durban Declaration recalls the commitment of the Millennium Declaration "to make the right to development a reality for everyone" in Paragraph 19 and affirms "the solemn commitment of all states to promote universal respect for, and observance and protection of, all human rights, economic, social, cultural, civil and political, including the right to development, as a fundamental factor in the prevention and elimination of racism, racial discrimination, xenophobia and related intolerance." See also paragraph 78.

[154] Article 1, Declaration on the Right to Development by the UN General Assembly, Resolution 41/128 of 1986.

[155] Part I para 9 reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development.

[156] See Article 22 of the African Charter.

[157] See Article 22 of the African Charter.

[158] Part I para 11 goes on to state: "The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations..."

countries or recognized as least developed country members.[159] This increased participation of developing countries has led to the discussion of the issue of trade and development. Over the last few years it has become uncommon, indeed almost impossible, to conduct a discussion on any one of the diverse aspects of the law and practice of the WTO without at least token reference being made to its development dimension.[160] No one policy can set in motion the complex process of economic development, but trade is considered one important component of any development policy.[161] The UN has proclaimed the existence of the human right to development.[162] Yet the problem that persists is that this right is defined so vaguely that it stands only as an obligation on the States and inter-governmental organizations to work within the scope of their authority to combat poverty and misery in disadvantaged countries.[163] There is a common ground between this human right to development and WTO initiatives concerning developing countries. The WTO Agreement[164] sets out the facilitation of development as its objective,[165] and the first WTO Ministerial Conference addressed the importance of integrating developing countries into the multilateral trading system by assisting with their economic development. The Doha Round also includes a development agenda that addresses key issues of trade and development, such as debt and finance, trade and transfer of technology, technical cooperation and special and differential treatment for developing countries.[166]

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[159] See Footer "Developing Country Practice in the matter of WTO Dispute Settlement" 2001 *Journal of World Trade* 55.

[160] Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations April 15 1994.

[161] At the first session of UN Conference on Trade and Development (UNCTAD) in 1964, Secretary General Raol Prebisch presented a report that first broached the idea that preferential trade tariff rates were a key to economic development in the "Third World".

[162] UN General Assembly, *UN Declaration on the Right to Development* in pursuance of UN General Assembly Resolution 41/128, 1986, U.N. General Assembly Resolutions 2542, 2586 and 2626. See also UN General Assembly *Study on the Current State of Progress in the Implementation of the Right to Development* UN document E/CN 4/1999/WG 18/2 1999.

[163] See Bunn "The Right to Development: Implications for International Economic Law" 2000 *American University International Law Review* 1425.

[164] See WTO The Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) http://www.wto.org/english/docs_e/legal_e/04-wto.pdf (accessed 25/10/2011).

[165] See the Preamble to the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) states in relevant part, "Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".

[166] WTO, *Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1 (2001).

In 1995, when the WTO was established, a vast new body of trade law was introduced opening a trading system that is the only 'multilateral' trading system and is the main source of international trade law and policy. Prior to the establishment of the WTO regime, the 1947 General Agreement on Tariffs and Trade (GATT) was in place. Developing countries played only a small role in the foundation of the GATT as only ten of the original twenty-three GATT contracting parties were in this category.[167] Development was seen by the drafters of GATT as primarily a national process which would require state intervention, state planning and state financing. The principles of tariff reductions, non-discrimination and reciprocity in the GATT were conceived on the presumption that the world is essentially homogenous composed of countries of equal strength and comparable economic development, yet the real world of international trade composed of countries with varying and diverse levels of economic development and vast differences in economic and social systems.[168] The developed countries enshrined as inviolable the principle of non-discriminatory (Most Favoured Nation) tariff agreements and proceeded to the even more widespread use of non-discriminatory non-tariff barriers, which principally affect the developing countries.[169] A brief discussion of some of the principles aimed at attaining development in developing countries follows.

3 6 1 1 Most Favoured Nation (MFN) principle

The basic rationale for MFN is that if every country observes this principle, all countries will benefit in the long run through the resulting more efficient use of resources.[170] Developing countries felt, over the course of the years, that they could not compete for export markets on an

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[167] The ten original developing countries GATT Contracting Parties were Brazil, Burma, China, Ceylon, Chile, Cuba, India, Pakistan, Syria and Lebanon. In the first few years of the GATT China, Lebanon and Syria withdrew from GATT.

[168] When GATT was established in 1947, 11 of the original 23 Contracting Parties would have been considered developing countries.

[169] This principle was enshrined in Article I of the GATT.

[170] See Article 1 of the GATT. The MFN principle is a non-discrimination provision. It appears to forbid a specially favourable treatment by one trading party to another. The concept is one of equal treatment to another party which is most favoured. See also Jackson The World Trading System: Law and Policy of the International Economic Relations (1997) 157 and Trebilcock and Howse *World Trade Organization* (2005) 78. According to the International Law Commission, MFN Clause, 'Text of Draft Articles on Most-Favoured Nation Clause' 1978 *Yearbook of the International Law Commission* 27 "under a most- favoured- nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject- matter of the clause."

equal basis with developed countries.[171] However, the MFN principle is viewed as an impediment to a trade-labour linkage proposal in that, it provides for a non-discriminatory access to export markets, irrespective of the level of development of the exporting country.[172] The developing countries successfully demanded for the provision of differential treatment to ensure that the world trading system responds to the particular needs of the developing countries.

3 6 1 2 Enabling clause

In the year 1964 a rival organization of sorts called United Nations Conference on Trade and Development (UNCTAD) was formed. It is UNCTAD's existence that made GATT start with an array of initiatives. Therefore a ten-year waiver allowing for preferential rates applicable to imports from developing countries only, and then the Enabling Clause were introduced. Giving in to the demand made by the developing countries to support them in their development GATT members, in 1979, enacted the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause).[173] The Enabling Clause suspended the GATT's general Most Favoured Nation (MFN) rule and allows developed country members to give differential and more favourable treatment to developing countries.[174] The mechanism for this treatment is the Generalized System of Preferences (GSP), under which developed countries offer non-reciprocal preferential treatment to products originating in developing countries.[175] Another point to be noted is that the Enabling Clause

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[171] See Trebilcock and Howse 571.

[172] See Trebilcock 175. Trebilcock observed that: "Trade sanctions raise difficult questions under the GATT/WTO system as it currently exists. For example, conditioning MFN treatment on adherence to core labour standards is likely to raise questions as to whether this form of conditionality violates the requirement of 'unconditional' extension of MFN treatment to all GATT/WTO members under Article I of the GATT...In the event that trade sanctions are held to violate Article I, Article III or Article XI, an importing country would be required to justify these measures under Article XX, which for the most part is silent on labour standards....". See also Trebilcock and Howse 572. Trebilcock and Howse argued that, "...sanctions targeted at particular countries that violate core labour standards are very likely to be found to contravene Article I of the GATT, since they discriminate based on the country of origin of the goods." A full discussion on the plausibility of imposing sanctions on an offending country as a measure of addressing violations to core labour standards in trade will be done in chapter eight of this study.

[173] See World Trade Organization "Differential and More Favourable Treatment: Reciprocity and Fuller Participation of Developing Countries" WTO Doc No L/4903 (Nov 28, 1979) http://www.wto.org/english/docs_e/legal_e/enabling_e.pdf. (accessed 25-10-2011).

[174] See Stamberger "The Legality of Conditional Preferences to Developing Countries under the GATT Enabling Clause" 2003 *Chicago Journal of International Law* 607.

[175] See the GATT Enabling Clause P2 (a).

provided for the principle of Graduation[176] wherein these preferences will be withdrawn in a situation where the developing countries make good progress. Thus, successfully developing economies would be subject to the same rights and obligations of the multilateral trading system as industrialized countries. Yet this system has its own flaws which cannot be ignored.[177] Firstly the program is discretionary and therefore lays down no standard on the basis of which the quantum of preference can be decided. Secondly this preference can be revoked at any point in time.[178] Thirdly the Enabling Clause enables developed countries to provide preferences for developing countries, but it does not obligate them to do so.[179]

3 6 1 3 GATT Article XXXVII

The GATT's Article XXXVII sets out the provisions on Trade and Development. These provisions provide an array of measures and commitments by the developed countries and the WTO for assisting developing countries in economic development. Yet these provisions are not obligatory in nature. Article XXXVII creates an exception for "compelling reasons", including legal reasons, for fulfillment of commitments by developed countries, thus reducing their effectiveness as countries might enact laws which would hinder the implementation of commitments. In view of these few and inadequate measures to attain development in the GATT/WTO, different platforms had to be used to address the development issue. Thus in a series of GATT/WTO rounds and meetings, the issue of development was battled with. The key meetings are discussed below.

3 6 1 4 GATT/WTO Rounds and Meetings

The Uruguay Round during the 1980s also left its mark on special treatment. The effects are visible above all in the results of the Round, concluded in 1995 with the establishment of the WTO. Around 76 developing countries participated in the round which altered the reciprocity

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[176] See GATT Contracting Parties, Decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", Decision of 28 November 1979 (L/4903), Enabling Clause, para 7, available at http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm. (accessed 26-10-2011).

[177] See Karasik "Securing the Peace Dividend in the Middle East: Amending GATT Article XXIV to Allow Sectoral Preferences in Free Trade Areas"1997 *Michigan Journal of International Law* 527.

[178] See Nogueras and Martinez "Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems" 2001 *Columbia Journal of European Law* 307.

[179] See Lee "Facilitating Development in the World Trade Organization: A Proposal for the Council for Trade and Development and the Agreement on Development Facilitation" 2006 *Asper Review of International Business and Trade Law* 177.

component of special and differential treatment (S & D) in two ways. First, the countries negotiating in the round adopted a new single-undertaking approach under which prospective WTO members had to agree to virtually all WTO disciplines.[180] Second, the system shifted to limited non-reciprocity of implementation. Developing countries lost the option of maintaining different levels of obligation and instead were granted additional periods of time to adjust to the burdens of fully-implemented WTO obligations.[181] Also where permanent exceptions are given, the number of beneficiary developing countries is often too limited, for example, where exemptions are allowed in subsidy rules to permit export subsidies, only a handful of Least Developed Countries (LDCs) benefit from this exemption on a permanent basis.[182]

At the first WTO Ministerial Conference, held in Singapore in 1996 the importance of integration of LDCs into the multilateral trading system was reiterated. The Members adopted an Action Plan for the LDCs. In the follow-up process several industrialized and developing countries expanded existing preferences for LDCs or introduced new specific LDC preferences and preferential agreements which include the Arms Initiative of the EU and the extended Africa Growth and Opportunity Act of the USA (AGOA).[183] The 1998 Geneva Ministerial Conference carried forward the Singapore issues; however no new initiative or policy statement for LDCs was entertained. The failure to put forward effective means of implementing special treatment policies at the Ministerial Conference in Seattle in 1999 led to the same becoming crucial issues at the Ministerial Conference in Doha in November 2001. Paragraph 44 of the Ministerial Declaration provides for reviewing the special treatment policies and for effective implementation.[184] Of approximately 100 issues raised by developing countries, forty issues were adopted in Doha concerning various WTO Agreements. Special emphasis was laid on

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[180] The single-undertaking approach did not include plurilateral disciplines in Annex IV to the WTO Agreement, such as the Agreement on Trade in Civil Aircraft, of interest to a small minority of states. See Garcia "Beyond Special and Differential Treatment" 2004 *Boston College International and Comparative Law Review* 291.

[181] See Fukasaku "Special and Differential Treatment for Developing Countries: Does it help those who help themselves?" 2000 United Nations University World Institute for Development Economics Research Working Paper 197.

[182] Lee 177.

[183] See Thomas "Special and Differential Treatment for Developing Countries" 2005 *Global Issue Papers* 15 http://boell-latinoamerica.org/download_en/SDT_en.pdf (20-10-2011).

[184] "We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational" WTO Ministerial Declaration, Doha 2001 WT/MIN(01)/DEC/1 http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm. (accessed 28-10-2011).

implementation issues, S & D treatment provisions especially in trade negotiations, technical cooperation and capacity building. The unsuccessful Cancun Ministerial Conference[185] attempted to carry forward the Doha Development Agenda. Its major areas of focus included allowance of access to essential medicines for the countries which do not have the capacity to manufacture drugs crucial for addressing public health crises, and also make use of compulsory licensing provisions of the TRIPs Agreement and parallel imports.[186] With all the above mentioned attempts at recognising development in the WTO being made with little success, questions had to be raised about the attitude of the organisation to human rights as a key component of development. A discussion of the WTO and human rights will therefore be necessary to show that the WTO has an even greater role to play in human rights protection and development than it currently perceives.

3 7 THE WTO AND HUMAN RIGHTS

After World War II, a number of policymakers sought to entrench human rights rules in trade agreements. As already indicated in earlier chapters, the outline treaty for the failed International Trade Organization (ITO) was the first trade agreement to embrace clear labour rights objectives. The ITO was the closest legal mechanism by which labour rights could have been recognized as human rights in the framework of international trade as the proposals were then discarded by its signatories after the US Congress declined to vote on putting into practice this piece of legislation.[187] In the aftermath of the failure of the ITO, trade was then administered by the General Agreement on Tariffs and Trade (GATT), which presided over only measures like tariffs and quotas. The GATT unlike the ITO had no precise declaration of its recognition of human rights. This is a feature that was to extend to the WTO which came into effect in 1995, after eight

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[185] See Stokes "The Culture Clash at Cancun" 2003 *National Journal* 2890. The fifth WTO ministerial conference was held in September 2003 in Cancun. The Cancun Conference collapsed because of internal squabbles and irreconcilable philosophical differences between the developed countries and the developing countries. These differences included the huge agricultural subsidies to farmers in the rich countries and the inclusion of the Singapore issues in the Cancun meeting agenda. Consequently, the WTO now appears to be teetering on the verge of a complete collapse. At this time, the WTO member countries are polarized into two main blocks, the "haves" and the "have nots".

[186] The general impression would be that the WTO sees itself as having no central role in recognizing human rights as vital development instruments, regardless of the fact that the right to development is a fundamental human right in itself. See the World Trade Organization Annual Report (2004) 3-5 http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep04_e.pdf. (accessed 29/10/2011).

[187] See Diebold "The End of the I.T.O." 1952 *Essays in International Finance* 37.

years of difficult consultations. The global community formed the WTO to oversee trade affairs among member states that use the organisation to negotiate a reduction in multilateral trade barriers and to resolve disagreements concerning guiding principles that one or more states may observe as distorting trade.

Having inherited the legacy of the GATT after the failed ITO, WTO rules make no explicit mention of human rights, regardless of the inescapable view that one of the organisation's key objectives is to improve human welfare. Being an institution of negative regulation, the WTO rules offer little direction on what governments ought to do in promoting human rights as they work to develop trade.[188] It came as no surprise that when the WTO was formed, member states became progressively more disturbed with the slow movement of multinational trade negotiations in the sphere of human rights. The result was the advent of the practice of negotiating bilateral or regional trade agreements, including free trade agreements in which human rights provisions were included.[189]

This has seen the WTO coming under more and more criticism from human rights supporters for the negative impact of its activities on the human rights condition in several countries, in particular developing countries, a feature which stalls development.[190] While not all criticism directed to the WTO can be demonstrated, it cannot be refuted that globalization and economic liberalism in general and trade liberalization in particular do not only have constructive effects on the enjoyment of human rights. As a matter of fact, numerous linkages

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[188] See Bartels "Trade and Human Rights" in Wolfrum *et al* 2009 *Oxford Handbook of International Trade Law* 571. The WTO outlines what members cannot do when they link trade policies and human rights policies. States cannot distort trade in the interest of promoting human rights at home or abroad.

[189] See Aaronson "Is the Wedding of Trade and Human Rights a Marriage of Convenience or a Lasting Union?" in Hafner-Burton (ed) *Forced to be Good: Why Trade Agreements Boost Human Rights* (2009) 220. The North American Free Trade Agreement (NAFTA), a 1993 trade agreement between the US, Canada, and Mexico, was the first modern trade agreement to include several explicit human rights provisions. It included labour rights provisions in a side agreement, but it also included specific transparency and public participation obligations beyond those delineated in the GATT. Policymakers around the world responded to NAFTA with a flurry of new FTAs (These agreements are called Regional Trade Agreements or Preferential Trade Agreements). As of December 2008, there were over 230 such agreements in force, and many others are being negotiated. But free trade agreements are not the only trade strategy used by policymakers to link market access and human rights. The United States and the European Union (as well as other trading entities) also include human rights provisions in their preference programs. See also Pascal "Multilateral and Bilateral trade Agreements: Friends or Foes." Annual Memorial Silver Lecture Colombia University http://www.wto.org/english/news_e/sppl_e/sppl46_e.htm (accessed 27-10-2011).

[190] See Povarchuk *Cambodia's WTO Accession: A Strenuous but Necessary Step for a Poor Nation Seeking Economic Prosperity* (2004) 646.

exist between trade rules and human rights, of which trade liberalization and the implementation of WTO rules could produce negative impacts on the human rights conditions in a country by impeding human rights policies of WTO members.[191] The relation between global financial law and human rights has been scrutinized in a series of reports[192] produced by UN human rights establishments, under the support of the Economic and Social Council (ECOSOC).[193]

The reports assessed the results of different areas covered by the WTO, such as the liberalization of trade in services, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[194] trade in agricultural products, and investment liberalization on the human rights situation within WTO members. Zagel contends that while it is without doubt that the liberalization of international trade has improved economic development, the reports showed that trade liberalization can have harmful effects on the economic and social well-being of the population in a country, which influences the enjoyment of their human rights in general.[195] It is submitted that these harmful effects arise mainly because states disregard their human rights obligations when implementing trade rules. What must come to the fore is that the shortcomings of human rights protection by the WTO are of exacting magnitude in developing countries, but are also present in developed countries.

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[191] See Zagel "Human Rights Accountability of the WTO" 2007 *Human Rights and International Law Discourse* 335.

[192] Several reports prepared by the High Commissioner for Human Rights provided a detailed analysis of the trade and human rights relationship. See the UN Economic and Social Council (ECOSOC), Economic, Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights. Report of the High Commissioner (E/CN.4/Sub.2/2001/13) (2001); UN ECOSOC, Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights. Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights resolution 2001/32 (E/ CN.4/2002/54) (2002); UNECOSOC, Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights. Report of the High Commissioner (E/CN.4/Sub.2/2002/9) (2002); UNECOSOC, Economic, Social and Cultural Rights: Human Rights, Trade and Investment. Report of the High Commissioner for Human Rights (E/CN.4/Sub.2/2003/9) (2003).

[193] See UNECOSOC "The Realization of Economic, Social and Cultural Rights. Human Rights as the Primary Objective of International Trade, Investment and Finance Policy and Practice" Working Paper submitted in accordance with Sub-Commission resolution 1998/12 (E/CN.4/Sub.2/1999/11) (1999). The working paper was written by Ms Udagama and Professor Oloka-Onyango and gave a detailed analysis concerning the relationship between trade, investment and human rights. The two had been appointed by the UN Human Rights Commission as Special Rapporteurs to undertake a study on the issue of globalization and its impact on the full enjoyment of all human rights. After two preliminary reports, in 2000 and 2001 respectively, they submitted a final report in 2003. See UNECOSOC "Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights." Final Report submitted by Oloka-Onyango and Udagama, in accordance with Sub Commission decision 2002/105 (E/CN.4/Sub.2/2003/14) (2003).

[194] See the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) 15 April 1994.

[195] Zagel 335-336.

The negative effects can be traced in many areas aside from the subject of labour which forms the basis of this study. These include the adverse effects on the right to health caused by the TRIPS rules that need patent protection for medicines, making the products more expensive and therefore limiting access to inexpensive medicines.[196] In addition, it is possible that the liberalization of services envisaged by the present General Agreement on Trade in Services (GATS)[197] negotiations involves a negative impact on essentially economic, social and cultural rights.[198] It is now common knowledge that many international organizations have acted and are still acting in response to human rights impact assessments leading them to develop widespread practice to improve their human rights accountability, yet the WTO an organisation seen as a key driver of human welfare is yet to do so.

The UN framework has a far-reaching consideration on the impact on human rights of sanctions imposed by the UN Security Council.[199] However since 1997 when the then UN Secretary-General Kofi Annan put human rights at the heart of the UN and initiated a human rights conventional procedure throughout the entire organization and its functions,[200] many UN organizations have developed models for incorporating human rights into their activities.[201] With this background, ECOSOC went on to start a thriving discourse with the International Monetary Fund (IMF) and the World Bank, which led to the institutions starting to incorporate human rights features in their structural adjustment programmes so as to *satisfy* the reasonable condemnation on the negative impact of their programmes, which were only aimed at economic gains and had mainly disregarded the social and human rights circumstances within their target

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[196] See UN ECOSOC Economic, Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights Report of the High Commissioner (E/CN.4/Sub.2/2001/13) (2001).

[197] See General Agreement on Trade in Services (GATS) 15 April 1994.

[198] See UN ECOSOC, Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights. Report of the High Commissioner (E/CN.4/Sub.2/2002/9) (2002). A practical example given in this report would be the privatization of health care, education, or water supply leading to the problem that many people cannot afford those services any more.

[199] See CESCR General Comment No. 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights; UN ECOSOC, The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights. Working Paper prepared by Marc Bossuyt (E/CN.4/Sub.2/2000/33) (2000).

[200] See UN Secretary-General, Renewing the United Nations: A Proposal for Reform (A/51/950) (1997); UN Secretary-General, We, the Peoples: The Role of the United Nations in the 21st Century (A/54/2000) (2000); UN General Assembly, United Nations Millennium Declaration (UNGA Resolution 55/2 of 18 September 2000).

[201] See Frankovits "Mainstreaming Human Rights: The Human-Rights Based Approach and the United Nations System" 2005.

countries.[202] The possibility of review was created by setting up the World Bank Inspection Panel.[203]

Regionally, the European Union (EU) has been an important model for progressively integrating human rights into its activities, though it may be argued that this is largely attributed to Europe's level of development. While in its early years, the European Court of Justice (ECJ) did not feel any need to consider human rights in its judgments, it took note of human rights as being relevant for the European Community (EC) as part of the general principles of Community law for the first time in 1969.[204] Thereafter, the ECJ established a remarkable human rights case-law, and save for a number of non-binding human rights declarations, human rights are now protected in the primary law of the EU.[205] The Charter of Fundamental Rights of the European Union is the most recent and most inclusive document to recognise human rights,[206] and was referred to in the Court's case-law before it even had the status of a binding instrument.[207] In addition, the EU has been integrating human rights features into its activities through numerous mainstreaming actions.[208]

Regardless of the attempts being made by other institutions, the WTO has been quite reluctant to deal with human rights aspects of its work. It has remained adamant that it is a trade and not a human rights organization, and argued that human rights issues should be handled by other competent organizations.[209] It is submitted that the WTO's major role is to offer a medium for trade negotiations, implementing trade rules and settling trade disputes,[210] and that the WTO organs possess only a few official powers to make binding pronouncements, with decisions

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[202] See Suzuki "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks" 2005 *Michigan Journal of International Law* 177. See also Darrow *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (2003) 53.

[203] See Orakhelashvili "The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organizations" 2005 *International Organizations Law Review* 57.

[204] See the case of *Erich Stauder v City of Ulm-Sozialamt* 1969 EC R 419. See also Rosas "The Sources of Fundamental Rights of the European Union: A Structural Overview" in Bergsmo and Eide (eds) Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide (2003) 719.

[205] See Articles 6 (1), 7 and 49 of the Treaty on European Union. See also Articles 13, 136, and 177 of the Treaty establishing the European Community.

[206] The Charter was proclaimed in Nice on 7 December 2000 and enshrined as Part II in the Draft European Constitution. See also the Draft Treaty establishing a Constitution for Europe (OJ 2003 C 169/1) (18 July 2003).

[207] See the case of *JCB Service v Commission* 2004 EC R II-49 paras 1 and 36.

[208] See De Schutter "Mainstreaming Human Rights in the European Union" in Alston and De Schutter (eds) *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (2005) 43.

[209] See paragraph IV of the WTO Ministerial Council, Singapore Ministerial Declaration of 13 December 1996.

[210] See Article III of the Agreement establishing the World Trade Organization of 15 April 1994.

adopted by consensus, giving each member the ability, in theory, to block decisions.[211] Moreover, in contrast to decisions and acts of other international organizations, WTO rules and decisions do not have any direct effect for individuals, but are directed to the members, which are obliged to implement them in their national legal orders.[212] The WTO seems of late to have become aware that it cannot just overlook the human rights debate and since 2003, a WTO delegate has taken part in the annual meetings of ECOSOC and the international financial institutions.[213] The first informal discussion took place through an unofficial visit of the UN Special Rapporteur on the right to health, Paul Hunt, to the WTO Secretariat.[214]

Moreover, it is noteworthy that the current WTO Director General Pascal Lamy has proclaimed that there is a new 'Geneva Consensus' to 'humanize globalization' and that the WTO will play its part towards that undertaking.[215] Accordingly, it is the purpose of this study to examine ways in which to address the exclusion of core labour rights as fundamental human rights from the WTO instruments.

3 7 1 The legal basis for the WTO's human rights commitments

Since the WTO is a global organization with an almost worldwide membership,[216] it is necessary to look at existing human rights instruments and obligations at a universal level to determine the relevant substantive human rights standard for WTO accountability.[217] A list of substantive human rights is protected in the UDHR. The substantive rights enclosed in the UDHR were codified and vested with a monitoring mechanism in the ICCPR and the ICESCR, instruments which give essence to the human rights provisions in the UN Charter.[218]

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[211] See Article IX of the WTO Agreement.
[212] Zagel 339.
[213] UN ECOSOC, Summary by the President of the Economic and Social Council of the Special High-Level Meeting of the Council with the Bretton Woods Institutions and the World Trade Organization New York document A/58/77 – E/2003/62 of 9 May 2003.
[214] UN ECOSOC, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization document E/CN.4/2004/49/Add.1 of 2004.
[215] See the speech by Pascal Lamy given in Santiago de Chile on 30 January 2006, http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm. (accessed 25/102011).
[216] The WTO has an estimated over 153 Members and with 29 states involved in accession negotiations.
[217] Article 1 (3), Article 55 (c) and Article 56 of the UN Charter oblige all UN member States to cooperate internationally to promote respect for and observance of human rights.
[218] See Tomuschat *Human Rights. Between Idealism and Realism* (2003) 31.

Regardless of the separation of the human rights list into two covenants, a holistic human rights notion exists today, where the universality, indivisibility, interdependence and interrelatedness of all human rights is recognised in international law,[219] and implementing obligations are regarded as principally the same for all UN member states.[220] The substantive rights protected in the UDHR and the two UN Covenants are barely disputed by any state.[221] Apart from the prospect of making reservations[222] and suspending human rights in a state of emergency,[223] most human rights[224] are subject to limitations. Limitation clauses are contained in all human rights instruments,[225] the intent of which is to allow the limiting of an individual's rights, where this is necessary for the protection of certain plainly identified public policy interests or for the protection of the rights of other individuals.[226] Limitation clauses allow states to impose restrictions, if the unlimited enjoyment of a right would lead to absurd results or if rights would clash with each other or other interests of the state.[227]

In spite of all the potential to limit human rights, there is, however, a set of minimum core responsibilities protected in each substantive human right that states must respect, ensure and protect under any conditions.[228] This minimum benchmark, which cannot be eliminated,

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[219] UN General Assembly, Universal Declaration of Human Rights, Article 2 (1); UN General Assembly, Declaration on the Right to Development, Articles 1 (1) and 6; International Conference on Human Rights, Proclamation of Teheran, para. 2; UN General Assembly, UN Declaration on Social Progress and Development para 2 (b); UVDPA paras I.1, I.5 and I.10; International Commission of Jurists, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights para 1 and Tomuschat 81.

[220] Ibid, Chapter II.B. General Implementing Obligations and Chapter II.C. Obligation to Prevent Human Rights Violations and to Provide Remedies.

[221] Zagel 341. The general recognition of these rights must, however, be seen in the light of the wide-ranging possibilities for states to limit the substantive content of their human rights obligations.

[222] See ICCPR General Comment No. 24, which outlines a number of reservations that would be null and void, as they contradict the object and purpose of the covenant.

[223] See Article 4 of the ICCPR. However, there are a number of non-derogable rights, such as in Article 4(1) of the ICCPR, and the ICESCR General Comment No. 15 para 40 as well as General Comment No. 14 para 47.

[224] Exceptions are a few absolute human rights, such as the prohibition of torture Article 7 of the ICCPR and the freedom of thought and consciousness Article 18 of the ICCPR.

[225] See Articles 4, 5, 12 (3), 14 (1), 18 (3), 19 (3), 21, 22 (2), and 25 of the ICCPR; and Articles 4, 8, 29 and 30 of the UDHR.

[226] See Quinn "The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" 1987 *Human Rights Quarterly* 194.

[227] See Article 5 of the ICCPR, Article 5 of the ICESCR and Article 30 of the UDHR. For example, freedom of association can be restricted to protect national security; freedom of speech is limited by the right to privacy and personal integrity of another person, the criterion for balancing the scope of both rights being the principle of proportionality.

derogated from or otherwise limited, must be guaranteed regardless of the flexibilities that are provided for in the human rights concept as such.[229] The essence of the right must not be jeopardized; otherwise the covenant would be largely deprived of its *raison d'être'*.[230] Ignoring of the minimum core obligations in any case results in the infringement of human rights.[231]

To establish whether substantive human rights standards are relevant in a WTO framework, it is essential to establish to what degree the WTO and its members are bound by international human rights law.[232] Most WTO members have ratified at least one of either the two UN Covenants[233] or the specialized UN human rights treaties,[234] and are thus bound by those treaty obligations when acting in the WTO. In order to be relevant for the remaining WTO Members and the WTO as an international organization, human rights must form part of general international law in that they must constitute customary international law or general principles of law.[235] To determine the customary international law nature of human rights, it is essential to

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[228] See the ICESCR General Comment No. 3 para 10 and ICCPR General Comment No. 31 para 6. See also International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 9 and the International Commission of Jurists, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para 47.

[229] See Article 2 (1) of the ICESCR; see also ICESCR General Comment No. 3, para 10. The available resources that allow for flexible implementation of economic, social and cultural rights are no excuse for not enabling those rights.

[230] See the UDHR Article 30. This limit is also contained in Article 4 of the ICESCR, which requires all restrictions to be 'compatible with the nature of the right'.

[231] See the International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 8.

[232] See UN Charter, Article 1 (3) and Article 55. Most WTO members are bound to observe human rights by international treaty obligations and all WTO members, except the European Communities, Hong-Kong and Chinese Taipei are UN member States as well, and thus recognize the UDHR and are bound by the general obligation to promote respect for and protection of human rights.

[233] The only exceptions of WTO Members not having signed or ratified any of the two covenants are Antigua and Barbuda, Brunei Darussalam, Cuba, Fiji, Malaysia, Myanmar, Oman, Qatar, Papua New Guinea, St. Kitts and Nevis, St. Lucia, Saudi Arabia, Singapore and United Arab Emirates.

[234] The Convention on the Rights of the Child (CRC) 1577 UNTS 3 of 20 November 1989 is ratified by all WTO Members except the US while the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1249 UNTS 13 of 18 December 1979 is ratified by all WTO Members save for Qatar, Tanzania and the US.

[235] Many scholars state that the rights enshrined in the UDHR, or at least parts of it, constitute customary international law without providing detailed evidence for this statement. This is supported by a number of authors, although many of them do not make the effort to examine the statement in detail. See for example Salcedo "Human Rights, Universal Declaration" in Bernhardt (ed) *Encyclopedia of Public International Law* (1948) 925; Eide *The Universal Declaration of Human Rights: A Commentary* (1992) 6; Hannum "The Status of the Universal Declaration of Human Rights in National and International Law" 1995 *Georgia Journal of International and Comparative Law* 289 as well as Sands and Bowett Law of International Institutions (2001) 458.

determine whether there is supporting state practice and *opinio iuris*.[236] In practice, both elements are not always given equal weight when establishing whether a rule forms part of customary international law.[237]

It is difficult in most instances to differentiate between state practice and *opinio iuris*,[238] since judgments or unilateral declarations do not only amount to state practice, but also amount to *opinio iuris* to a certain extent.[239] Valid state practice that also articulates an *opinio iuris* would be national constitutions and laws recognizing human rights, national court judgments, unilateral declarations of politicians and other state agents,[240] or demonstrations against human rights abuses happening in other countries,[241] and acts of state practice that provide ample evidence that states consider themselves to be bound by substantive human rights principles.[242] Also, the UDHR is acknowledged by UN member States that are not parties to any UN human rights conventions as basis for defining human rights abuses in the human rights monitoring procedures founded on ECOSOC Resolutions 1503 and 1235.[243] Subsequent to the approach of the ICJ in the Nicaragua case, in which the ICJ acknowledged that soft law instruments such as the Friendly Relations Declaration[244] or the CSCE Helsinki Declaration[245] create a

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[236] See Article 38 (1) (b) of the Statute of the International Court of Justice 26 June 1945. See also ICJ 20 February 1969 North Sea Continental Shelf case, *Federal Republic of Germany v Denmark*, *Federal Republic of Germany v Netherlands* 1969 ICJ Reports 3 para 71.

[237] See the ICJ 27 June 1986, Military and Paramilitary Activities in and against Nicaragua case, *Nicaragua v United States of America* 1986 ICJ Reports 14 para 183. In this case, the ICJ established that the prohibition of the use of force is customary international law. The court basically ignored state practice, and based its conclusions merely on the examination of *opinio iuris*.

[238] See Simma and Alston "The Sources of Human Rights Law: Custom, Ius Cogens and General Principles" 1992 *Australian Yearbook of International Law* 88.

[239] Tomuschat 34.

[240] See the ICJ 20 December 1974, Nuclear Tests Cases, *Australia v France*, *New Zealand v France* 1974 ICJ Reports 252 and 456.

[241] Zagel 344.

[242] Ibid.

[243] Tomuschat 117.

[244] On 24 October 1970, the UN General Assembly adopted a Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (Res. 2625 (XXV)), setting out, and expanding upon, seven principles in Sect. 1: (1) 'The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations'; (2) 'The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered'; (3) 'The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter'; (4) 'The duty of States to co-operate with one another in accordance with the Charter'; (5) 'The principle of equal

manifestation of *opinio iuris* that is adequate to found the prevention of the use of force as customary international law,[246] a sizeable number of soft law instruments, together with the UDHR, the Vienna Declaration and the UN Millennium Declaration,[247] that have been accepted by the majority of states, must be recognised as expression of the *opinio iuris* of states concerning the acknowledgement of substantive human rights.[248]

Criticism is levelled to the customary international law nature of human rights to the effect that a number of genuine human rights abuses that impede the reality of regular state practice exist. Remarkably, the customary international law nature of the prohibition of the use of force, as well as the rules of the law of war as codified in the 1949 Geneva Conventions, are never disputed, although there is as much contradictory state practice through factual breaches, as in the field of human rights.[249] An argument against this construction is that in nearly all cases of human rights abuses there are either efforts of the responsible state to rationalize the conduct, which demonstrates that there is consciousness for prevailing human rights responsibilities, or to obscure the conduct, being conscious of its unlawfulness.[250] Such explanatory justification by the perpetrators means that there is *opinio iuris* that the actual behaviour is a breach of existing human rights obligations. One may argue that the WTO as a 'persistent objector'[251] is not bound by international human rights law. The WTO does not deny the reality of human rights, or the applicability to its activities, but it simply contends that human rights are not appropriate to the WTO framework or denies that its purpose is to protect human rights.

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rights and self-determination of peoples'; (6) 'The principle of sovereign equality of States'; and (7) 'The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter'.

[245] The Helsinki Final Act, Helsinki Accords or Helsinki Declaration was the final act of the Conference on Security and Co-operation in Europe held in Helsinki, Finland, during July and August 1, 1975. Thirty-five states, including the USA, Canada, and all European states except Albania and Andorra, signed the declaration in an attempt to improve relations between the Communist bloc and the West. The Act's "Declaration on Principles Guiding Relations between Participating States" (also known as "The Decalogue") enumerated the following 10 points: I. Sovereign equality, respect for the rights inherent in sovereignty II. Refraining from the threat or use of force III. Inviolability of frontiers IV. Territorial integrity of States V. Peaceful settlement of disputes VI. Non-intervention in internal affairs VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief VIII. Equal rights and self-determination of peoples IX. Co-operation among States X. Fulfillment in good faith of obligations under international law.

[246] *Nicaragua v United States of America* para 188.

[247] See the UN Millennium Declaration (UN General Assembly Resolution 55/2 of 18 September 2000).

[248] Zagel 345.

[249] Ibid 346.

[250] Tomuscat 34.

[251] See the ICJ 18 December 1951 Fisheries Case, *United Kingdom v Norway* 1951 ICJ Reports 116 131.

3 8 CONCLUSION

A strong case for upholding labour rights as human rights and for their subsequent inclusion in the WTO framework exists.[252] The normative weight associated with human rights discourse in liberal democratic societies has made it a popular political tool for social movements looking to press towards development while the same cannot be said of illiberal societies.[253] Although the world has been impressed by the rapid economic development of countries such as China, there is usually no allusion to the millions of ordinary people, mostly workers and peasants, who are unable to take advantage of this economic boom because it takes place at their expense. Human rights literature generally does not mention labour rights or, if a link is drawn, the reference is normally to "labour rights and human rights".[254] The underlying assumption created is that labour rights are not included under human rights.[255] However, this chapter has shown that labour rights are indeed a form of human rights to which effort must be applied by the international community to ensure respect for these rights in particularly in trade-related matters.

Clearly all substantive human rights are ideally of importance in the WTO framework.[256] If WTO activities negatively affect such rights, those activities should accordingly constitute human rights violations.[257] Therefore, in the case of real conflicts between trade rules and human

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[252] Trebilcock 172. See also Petersmann 621 and Trebilcock and Howse 578.

[253] Lester *et al* 883-884.

[254] See Lester *et al* 878. Lester *et al* argue that, "With such a high ratification rate and widespread endorsement within the broader human rights system, core labour standards do not simply constitute rights that belong to workers, but rather constitute rights that belong to individuals as human beings."

[255] Core labour standards are recognised in the UDHR, ICCPR and ICESCR which are human rights instruments. This implies that core labour standards form part of the international human rights framework and must be protected as such.

[256] See Trebilcock and Howse 572. A trade-human rights linkage is of greater significance to the extent that efforts have been made to ascertain whether Article XX(a) of the GATT which permits otherwise GATT-inconsistent measures necessary to protect public morals might be invoked to justify trade sanctions against products that involve the use of child labour or the denial of workers' basic rights. In the case of *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/R, November 10 2004 para 6.461, the WTO Panel suggested that, "each WTO Member has considerable discretion to determine what practices would violate the morale code of the community." Trebilcock and Howse plausibly conclude that, "Based on the panels' differential reasoning as to the content of public morals, there is no reason why the content of 'public morals' could not extend to beliefs of the importing country concerning the wrongfulness of consuming products produced in a context-either corporate or national-where basic labour rights are not respected." Trebilcock and Howse also noted that the WTO Panel based on dictionary definitions found that, "... 'public morals' concerned the interests of 'the community or nation as a whole'. The nation here is of the broadness and generality of the interest concerned, and thus *a fortiori* the interests of the global community as reflected in human rights treaties of *erga omnes partes* character, would be encompassed by 'public morals'."

[257] Article 2 (2) of the ICESCR. See also the ICESCR General Comment No. 13 para 6 (b) and para 57; ICESCR General Comment No. 14, paras 6 (b) and 35. For example the right to education or health being affected by

rights obligations, the WTO must admit that it is bound to apply the appropriate human rights rules and standards, a practice that can be inferred from the position of the WTO in relation to international law in general and other specific non-economic concerns.[258] In general, the WTO sees itself as being bound by international law[259] and the dispute settlement institutions apply other sources of international law as a source of interpretation,[260] in addition to recognizing the importance of, for instance, environmental protection in its case-law.

Therefore, it must perhaps be considered that at least the principle of non-discrimination and the minimum core obligations of all human rights, which cannot be derogated from, suspended, or otherwise limited constitute part of customary international law that must be observed by all WTO members, irrespective of whether they are parties to any human rights treaties, and by the WTO as an international organization.[261] The next chapter sets out a theoretical and/or conceptual framework for understanding the trade-labour linkage debate within the WTO. The chapter examines legal debates concerning the trade-labour linkage debate. The chapter will also explore the debates with respect to the exclusion of the social clause in international trade on the basis of its presumed threat to developing nations' comparative advantage.

GATS rules if poorer individuals cannot afford schools or health care anymore due to the liberalization of educational services, thus leading to discriminatory treatment of parts of the population in relation to those rights.

[258] See the WTO Appellate Body Report regarding environmental protection adopted on 20 May 1996, *United States-Standards for Reformulated and Conventional Gasoline* WT/DS2 and WT/DS4 http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed 25-10-2011).

[259] Ibid.

[260] See for example the WTO Appellate Body Report, adopted on 6 November 1998, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58 para 130 http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed 30-10-2011).

[261] See the Interpretation of the Agreement of 25 March 1951 between the World Health Organisation and Egypt, Advisory Opinion, 1980 ICJ Reports 73 89. See also Schermers and Blokker *International Institutional Law* (2004) 1339.

CHAPTER FOUR

Theoretical and Empirical Evidence on the Prospects of a Trade-labour Linkage

4 1 INTRODUCTION

The basis for free trade is the certainty of gaining profits from trade. Economists agree that there are gains from trade.[1] However, in the global era, free trade has increasingly come under heavy criticism for its continual association with a lowered compliance with core labour standards, mostly, in the interest of quick but short term economic gains especially in developing countries.[2] The appalling conditions of employment under which products for trade are being produced such as very long working hours, low wages, dangerous workplaces where discrimination and intimidation from the employer and oppression from the state are the rule rather than the exception, are fast becoming a cause for concern.[3] It is therefore not unusual to hear skeptics of free trade contending that arguments in favour of free trade and in particular the concept of comparative advantage may have been valid in the early 19th century but not in today's globalized world.[4]

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1 See Samuelson *Economics* (1980) 651. Samuelson who was a prominent economist proposed that: "...there is essentially only one argument for free trade or freer trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labour, greatly enhances the potential real national product of all nations and makes possible higher standards of living all over the globe." the preamble of the 1947 GATT began with a preamble which includes phrases that suggest developmental goals such as, "raising standards of living" and "expanding...exchange of goods." See Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 12. See also World Trade Organisation (WTO) "The Causes of Trade" http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr08-2c_e.pdf (accessed 21-12-2011).

2 See Lester, Mercurio and Davies *World Trade Law: Texts, Materials and Commentary* (2012) 26. Lester *et al* have observed that: "Free trade has been particularly controversial in the context of how countries develop, that is, go from poor to rich (generally speaking, through industrialisation). It is safe to say many people would want to see this happen throughout the developing world. However, there is much disagreement as to how to bring it about. On the one side, free traders argue that it is the openness to trade that has been the key to economic development in the past whereas protection has left many poor countries with inefficient industries and low economic growth. On the other hand critics of this view contend that all of today's developed countries used protection to give their companies time to catch up with those who were more advanced (and they furthermore contend that today's developed countries are acting badly by trying to take away from poor countries the tools they themselves used to develop). These arguments form the basis of the trade-labour linkage debate with developing countries insisting on low labour standards as their comparative advantage." See also Imade "The Two Faces of Globalization: Impoverishment or Prosperity?" http://globalization.icaap.org/content/v3.1/01_imade.html (accessed 30-01-2012).

3 Ibid 27.

Developing countries argue that low labour standards are their comparative advantage in trade.[5] They strengthen their argument by making reference to the industrialisation process in the Western countries which heavily relied on cheap labour premised on the gross disregard of workers' rights.[6] The disregard of the rights of slaves from developing countries might not have impacted negatively on development in the Western countries at that time as it did to developing countries. In the global era, workers in developing countries are again the subject of poor observance of workers' core labour rights as were their ancestors.[7] These workers have greatly contributed to trade and the profits accruing thereof, yet their development has remained minimal.[8] Could this be a sign that developing countries are taking a wrong approach to

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4 See Lester *et al* 26. Lester *et al* observe that whilst the theory of comparative advantage is regarded by some as a, "...fine theory...a country's comparative advantage is not always something that it is born with (although in some cases, such as proximity to natural resources, it is). Rather some kinds of comparative advantage can be created. For example efficient production techniques can be learned through practice. In essence the view is that protection can give 'infant industries' time to learn how to operate efficiently, to catch up with established competitors." The point in Lester *et al*'s argument is that protectionism can be a plausible strategy to development depending on the circumstances prevailing and informing trade in a country.

5 See Howse "The World Trade Organization and the Protection of Workers' Rights" 1999 *The Journal of Small and Emerging Business Law* 2.

6 See Lo and Jacobson "Human Rights from Field to Fork: Improving Labor Conditions for Food- sector Workers by Organizing across Boundaries" http://www.jstor.org/stable/10.2979/racethmulglocon.5.1.61 (accessed 30-01-2012).

7 The use of low labour standards is supported by some economists regardless of its immediate impact on the workers in developing countries. Lester *et al* observe that some economists contend that: "It is...unquestionably correct that developing countries need to be allowed to use instruments which help them overcome the many obstacles of backwardness and, especially...the absence of knowledge of what to do-and how to do it-that is an essential characteristic of that backwardness. They may use them unwisely from time to time. But they have sometimes worked. Sovereign governments should be allowed to take such actions-and if necessary learn from their mistakes." See Lester *et al* 43. There is also the view that regardless of the low labour standards and productivity characteristic of developing countries, developed countries are largely hypocritical in their treatment of developing countries. Lester *et al* note that developed countries, "...call on developing countries to adjust, liberalize and respond to market forces. But this is not advice that the high-income countries themselves adopt. Instead, high income-countries force the developing countries to take greater account of their own concerns than they themselves do of developing-country concerns." See Lester *et al* 44. Furthermore, whilst global markets could be good for developing countries, "...the rules according to which they are being asked to play the game are often not. Caught between WTO agreements, World Bank structures, IMF conditions, and the need to maintain the confidence of financial markets, developing countries are increasingly deprived of the room to devise their own paths out of poverty." See Lester *et al* 35. It would thus be asked whether the protection of core labour standards is also affected by the crisis which the developing countries find themselves in which has led to questions as to whether such countries will ever advance. Perhaps it might be time developing countries devised their own approach to development which is suitable to them and their people.

8 There is overwhelming evidence on the relationship between productivity and wages. This relationship takes into account the level of development of the countries. The poor compliance with core labour standards in developing countries might be suggestive of inferior productivity levels as compared to high-income countries. See Wolf "Traumatized by Trade" in Wolf (ed) *Why Globalization Works* (2004). He notes that: "...one can be confident that the relationship between real wages and productivity per worker will hold: either real wages and

development? Considering the significant role that labour and trade play in ensuring economic gains for the world in general as well as the development of Third World countries and their people in particular, it is important to analyse legal and economic theories and empirical evidence related to trade practices in order to deal with the controversial issue of either including or excluding labour standards from multilateral trade agreements. It is crucial to address the question whether a lowered compliance with labour standards must be acknowledged as a competitive or comparative advantage in human rights driven global era, and if at all it is, to whom.[9] Ascertaining whether such an approach is productive or counter productive may inform developing countries of a dynamic route to industrialisation or development.[10]

This chapter will undertake an evaluation of the importance of legal and economic theories and empirical evidence to today's global trading environment. Since most trade models are designed to answer questions as to what goods countries trade in and why, the main focus of this chapter will be on the causes of trade and how patterns of trade are related to compliance or non-compliance with core labour standards by global trade partners. Such an approach may give guidance on whether there is need for an effective regulation of core labour standards in multilateral trade agreements or not. According to Van Liemt, the rationale behind incorporating a social clause in multilateral trade would be to:

> "...promote fair competition between developing country exporters by ensuring that those who respect minimum labour standards are not penalized for their efforts to promote social development. For another, it would enable working people to benefit from increased trade. Without such a clause increased international competition might lead to a 'destructive downward spiral in the conditions of work and life of working people all over the world'. Worse, Western countries would be collaborating in the exploitation of workers in Third World countries if they failed to press for the adoption of universal minimum labour

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productivity per worker will rise slowly for a long time or real wages rise rapidly and so will productivity per worker."

[9] See Chartes and Mercurio "A Call for an Agreement on Trade-related Aspects of Labour: Why and How the WTO Should Play a Role in Upholding Core Labour Standards" 2012 *North Carolina Journal of International Law and Commercial Regulation* 672. Chartes and Mercurio have argued that: "...any comparative advantage gained by non-compliance with theses standards (core labour standards) is not an advantage that should be shielded or trumped by liberalized trade." Chartes and Mercurio's argument could be deemed radical by economists and developing countries as their remarks could be regarded as protectionist. However, should a human rights approach be taken in interpreting Chartes and Mercurio's argument, proposals for a trade-labour linkage in multilateral trade could be viewed as pro-developmental.

[10] See Lester *et al* 69. It is accepted that developing countries have particular vulnerabilities and special structural difficulties which they are facing in the global era. This calls for innovative and systematic methods to reduce developing countries' vulnerabilities. Perhaps a trade-labour linkage could be one such route to driving forward the development agenda of developing countries.

standards. Finally, it is argued that, without a social clause, the pressure for increased protectionism would be much harder to resist."[11]

Van Liemt's view may perhaps assist developing countries to realise that a social clause could be a necessary tool to advancing their people's interests. However, for one to be able to understand how the economic theoretical and empirical evidence relate to labour and trade standards there is a need to first appreciate the existing arguments in respect of proposals for a trade-labour linkage.

4 2 KEY ARGUMENTS IN THE TRADE-LABOUR LINKAGE DEBATE

The proposal for making rights to trade conditional on the promotion of labour standards is one that currently stimulates a great deal of disagreement in the global era**.**[12] There are so many views concerning the issue whether or not to include a social clause in multilateral trade agreements. Strong disagreements relating to interpretation and adaptation of a social clause into an enforceable trade principle amongst trade partners exist. Such disagreements have been advanced on the basis of constant differences in opinions held by developed and developing countries. The differences are largely attributed to the differences in the levels of development of countries in the world.

The most notable justifications for linking trade practices to core labour standards have been given as the need to avoid social dumping as well as attaining fairness in trade.[13] This would ensure that no partner in a trade agreement obtains competitive or comparative advantage from inadequate labour standards.[14] This view is generally viewed by developing countries as part of a western agenda for protectionism**.**[15] So prevalent amongst developing countries is the view that low labour standards are a competitive advantage that the violation of labour standards is now a common feature in trade practices amongst developing countries themselves. Fast

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[11] See Van Liemt "Minimum Labour Standards and International Trade: Would a Social Clause Work?" 1989 *International Labour Review* 434.

[12] See Organisation for Economic Co-operation and Development (OECD) "Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade Organisation" http://www.economia.unimore.it/naghavi_alireza/LIT-OECD-Labor.pdf (accessed 30-01-2012).

[13] See Tsogas "Labour Standards in International Trade Agreements: An Assessment of the Arguments" 1999 *The Journal of Human Resource Management* 354.

[14] Ibid. See also Adams and Turner "The Social Dimension of Freer Trade" in Cook and Katz (eds) *Regional Integration and Industrial Relations in North America* (1994) 82.

[15] See Van Roozendaal *Trade Unions and Global Governance: The Debate on a Social Clause* (2002) 219.

developing countries like China consider lax labour standards as being a central component of their trade practices. In January 2012, there were reports of alleged violations of workers' rights in Chinese-run businesses in Zimbabwe.[16] A Human Rights Watch report published in November 2011 also documented cases of gross violations of labour standards at Chinese-run copper mines in Zambia resulting in growing hostility and distrust in Chinese trade practices.[17]

In South Africa, members of the Newcastle Chinese Chamber of Commerce (NCCC) threatened to retrench unskilled workers, shut down factories and relocate to Swaziland and Lesotho if a resolution to force clothing factories to comply with the applicable minimum wage within 16 months was implemented.[18] The chairman of the NCCC said the minimum wage, which was expected to increase to R336 a week by the end of March before rising to R465 by the end of the year 2011 and then topping R516 by April 2012, was not sustainable for members of the Chamber.[19] The Chinese stance comes on the backdrop of the obvious fact that workers in the clothing factories are already among the lowest paid workers at the entry level in South Africa. It has also been observed that China brings expatriate labour force into countries in which they operate with such workers being subjected to the same violations of labour standards as locals in the interest of trade gains.[20] This development shows that the trade-labour linkage debate is not only an issue between developed and developing countries but also amongst developing countries themselves. This may be a worrisome development as low labour standards may be naively referred to as a competitive or comparative advantage by developing countries. This may escalate into quick but short lived gains for developing countries with a likelihood of potential disappointment in their efforts to industrialise as this chapter will show.

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16 See Smith "Workers Blast Chinese Labour Practices" http://www.newzimbabwe.com/news-6838-Workers+blast+Chinese+labour+practices/news.aspx (accessed 03-01-2012). In a recent case reported on the 3rd of January 2012 in Zimbabwe, Smith makes reference to the gross violation of workers' rights by the Chinese. Ironically, China is one of the leading so-called developing countries who strongly resist the recognition of a social clause in trade agreements. Smith's report indicates that the Chinese work in cahoots with 'corrupt' government officials who benefit at the expense of the workers' suffering.

17 See Human Rights Watch "You'll be Fired if You Refuse: Labour Abuses in Zambia's Chinese State-owned Copper Mines" http://www.hrw.org/sites/default/files/reports/zambia1111ForWebUpload.pdf (accessed 03-11-2011). In the report, it is stated that, "Trade unions in Zambia have called for action... There are alarming, shocking human rights abuses in firms operated by the Chinese. There is empirical evidence... The Chinese are physically abusing the workers. They are psychologically terrorising the workers".

18 See Enslin-Payne and Khanyile "Chinese Threaten Job Cuts" http://www.iol.co.za/business/business-news/chinese-threaten-job-cuts-1.1014358 (accessed 03-11-2011).

19 Ibid.

20 ILO *Encyclopedia of Occupational Health and Safety* (1998) 24.9.

Perhaps it is time for the world to accept that profit maximisation in trade at the expense of workers' rights as human rights is now an outdated concept which is not consistent with the dominant values of a global era. There might be a need for a change in trade rules as profiteering may no longer be considered as the only central economic concept but human and technological development too.[21] It is hoped that such a development may work in the best interests of developing countries in their quest to industrialise. The improvement in the recognition of workers' rights and education levels must be the ideal key contributors to driving the growth path of businesses and resulting development in underdeveloped countries.[22] This approach is called the human motivation view[23] which, as this study contends, is deeply lacking in developing countries.

The human motivation view explains the effects of business owners' reaction to the performance of their businesses. According to Benzing and Chu, the social and psychological motive can significantly influence growth-seeking behaviour and therefore growth of the business.[24] Burke and Hopkins believe that organisations that learn faster on how to implement human development will be able to adapt quicker to the changes in the global era and thus avoid the economic evolutionary weeding-out process.[25]

Assuming that developing countries view the promotion of core labour standards as a key concept to human motivation, as would the rest of the world, would this not contribute to an advanced approach to the need to include a social clause in multilateral trade? The rationale for posing this question is that there are studies which have shown that a considerable relationship exists between the promotion of workers' interests and productivity in businesses. The studies sought to establish how workers' training impacted on productivity. Batt established that high-involvement practices such as autonomy, team collaboration, and training tended to reduce

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[21] See Gilley and Macunich *Beyond the Learning Organisation* (2000) 142. According to Gilley and Maycunich, forces such as globalisation, technological innovation, changing consumer preferences and deregulation are thought to be responsible for change initiatives.

[22] Ibid.

[23] See Maslow "A Theory of Human Motivation" 1943 *Psychological Review* 370. Maslow indicated that man is a perpetually wanting animal. Thwarting, actual or imminent, of man's basic needs provides a psychological threat that leads to psychopathy a factor which impacts negatively on development.

[24] See Benzig and Chu "A Comparison of the Motivations of Small Business Owners in Africa" 2009 *Journal of Small Business and Enterprise Development* 11.

[25] See Burke and Hopkins *Investment in the Education and Training of Adults* (2000) 5.

employee turnover, resulting in an increase in productivity.[26] In supporting Batt's findings, Bradley, Petrescu and Simmons have argued that untrained workers change jobs more often than trained workers, a factor which hinders growth.[27] Mudor and Tookson have also established that an increase in high-performance work practices resulted in a decrease in turnover.[28] Interestingly, the concept of low labour standards being a comparative or competitive advantage relies on cheap and unskilled labour with little emphasis being placed on their educational development. This raises questions as to how development in underdeveloped countries will be attained and when.

Further analysis of the concept of training at the workplace shows that training programs are often targeted because employee turnover is generally higher during times of economic uncertainty.[29] Mudor and Tookson have argued that even in good times, organisations must decide how much to invest in employee training, balancing the benefits of increased productivity against the costs of training.[30] An organization with untrained or poorly trained employees runs significantly more risk of accidents and injuries, costing the company more money in compensation of workers.[31] Oloyede has argued that human assets grow and increase in value and hence by maintaining as well as upgrading employees' skills, not only will there be increases in productivity but also in commitment and levels of motivation.[32] Shadare has indicated that multinational firms in Nigeria had invested heavily in human resource development programmes

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[26] See Batt "Managing Customer Services: HR Practices, Quit Rates and Sales Growth" 2002 *Academy Management Journal* 56.

[27] See Bradley, Petrescu and Simmons "The Impacts of Human Resource Management Practices and Pay Inequality on Workers' Job Satisfaction" Paper presented at the Western Economic Association 79th Annual Conference Vancouver 2004 47.

[28] See Mudor and Tookson "Conceptual Framework on the Relationship between Human Resource Management Practises, Job Satisfaction and Turnover" 2011 *Journal of Economics and Behavioural Studies* 43.

[29] Ibid.

[30] Ibid.

[31] Mudor and Tookson 43.

[32] See Oloyede "Diversity in Workers Empowerment for Competitive Advantage in Work Organisation" Paper Presented at the National Workshop on Human Resource Development Organized by the Nigeria Institute of Personnel Management 2005 38. See also Lester *et al* 38. Lester *et al* observed that apart from human capital development, higher incomes could also improve productivity. They question why...workers in high-income countries are so much more productive than those in China or other developing countries. One explanation is that workers in high-income countries have, "...far more capital at their command than a Chinese worker (or worker from a developing country)."

to develop their workers' talents and skills and had significantly impacted positively on employee performance levels as well as organizational productivity.[33]

Assuming that the same approach is used in addressing the protection of workers' in trade, would there be economic growth in developing countries? With little interest, if any, being channeled towards the protection of workers in trade related matters as much impetus is being placed on quick profiteering which pays little regard to the future, it is doubtful if Oloyede and Shadare' views will be a reality for most developing countries. It is unquestionable that the ethos behind trading is to make economic gains but it must also be accepted that this concept must not be cast in stone. It is necessary to create a balance between trade and the development of countries as well as their people. Supporters of the trade-labour linkage agenda argue that the emergence of an increasingly integrated world economy requires an integrated world labour market, based on universally applied minimum standards.[34] Failure to reach this minimum standard, they argue, would lead either to a general down-scaling of labour conditions or to major job losses in the industrialised countries.[35] This view may be justified by closely monitoring developments surrounding the current Great Recession[36] and the related economic cycles that have impacted the world in the aftermath of the recession.[37] Almunia *et al*[38] have compared the severity of the Great Recession with the Great Depression of 1929.[39] They argued

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[33] See Shadare "Influence of Workers' Training Programmes on Conflict Reduction in Industrial Organisations in Nigeria" 2010 *African Journal of Business Management* 12.

[34] Tsogas 354.

[35] Sengenberger "Restructuring at the Global Level: The Role of International Labour Standards" in Sengenberger and Campbell (eds) *Creating Economic Opportunities: The Role of Labour Standards in Industrial Restructuring* (1994) 395.

[36] WTO and ILO *Making Globalisation Socially Sustainable* (2011) 85. The origins of the financial crisis lay with the excessive expansion of credit by financial institutions in some countries in the 1990s and early part of this century. Due to the growth of complex financial derivatives and the global extension of capital markets, it became difficult for governments, regulators and the banks themselves to measure the underlying risks associated with their loan books. Fears that some institutions were holding large amounts of bad debt led to a collapse in the supply of credit as financial institutions tried to rebuild their balance sheets. To remain solvent, some had to be recapitalized by their governments jeopardizing public finances. The financial crisis led to a rapid contraction of demand.

[37] Ibid. There was a sharp reduction in the availability of trade finance. Banks and suppliers reported that lack of finance was the second major cause of the collapse in trade. However, trade finance recovered rapidly, partly as a result of the US$ 250 billion additional financing announced at the April 2009 G20 meeting.

[38] See Almunia, Benetrix, Eichengreen, O'Rourke and Rua *From Great Depression to Great Credit Crisis: Similarities, Differences and Lessons* (2009) 15.

[39] Ibid 20.

that trade flows fell faster in the Great Recession than they did during the Great Depression.[40] The declines in trade across countries were more coordinated that by the end of 2008, more than 90 per cent of the Organisation for Economic Co-operation and Development (OECD) countries had experienced a decline in trade exceeding 10 per cent.[41]

The World Trade Organisation (WTO) and the ILO indicate that employers in different countries have responded in a variety of ways to a fall in product demand.[42] This has depended on the nature of employment contracts, human capital investment, the existing policy environment and any changes introduced specifically to combat the recession.[43] Employees' responses have also depended on the nature of their contracts, joint investment in human capital and on their valuation of the next best alternative to employment.[44] The simple conclusion from the WTO and ILO perspective is that the lesser the value that is attached to a worker, the lesser the options that are available to such a worker to cushion them from the hardships associated with globalisation**.**[45] Elsby *et al* have argued that a rapid fall in employment in the United States (US) during 2009 was associated with a surge in productivity, causing a breakdown of Okun's Law.[46] In economics, Okun's law is an empirically observed relationship relating unemployment to losses in a country's production.[47]

The "gap version" in Okun's law states that for every 1% increase in the unemployment rate, a country's Gross Domestic Product (GDP) will be roughly 2% lower than its potential GDP.[48] The breakdown of Okun's law is consistent with firms using recessions as an opportunity to enhance efficiency but is clearly not consistent with the view that productivity is procyclical.[49] Bauer and Shenk argue that in eight of the last nine global economic downturns, US productivity

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40 WTO and ILO 85.
41 Ibid.
42 Ibid 93.
43 Ibid.
44 Ibid.
45 Ibid.
46 See Elsby, Hobijn and Sahin "The Labour Market in the Great Recession" http://www.brookings.edu/~/media/Files/Programs/ES/BPEA/2010_spring_bpea_papers/ 2010a_bpea_eslby.pdf. (accessed 21-11-2012).
47 See Knotek "How Useful Is Okun's Law" 2007 *Economic Review, Federal Reserve Bank of Kansas City, Fourth Quarter* 73.
48 See Gordon *Productivity, Growth, Inflation and Unemployment* (2004) 220.
49 See Van Rens "Organizational Capital and Employment Fluctuations" Economics Working Paper No. 944 2004. See also Koenders and Rogerson "Organisational Dynamics over the Business Cycle: A View on Jobless Recoveries" 2005 *Federal Reserve Bank of St. Louis Review* 555.

fell due to labour-hoarding behaviour by firms.[50] Reich suggests that a possible explanation of the very rapid decline in employment is that the willingness of US employers to accumulate labour has fallen.[51] During the downturn, employers were shedding workers more rapidly than reducing their output, leading to short-term productivity gains.[52] At the same time, investment was falling, limiting the potential for further productivity growth.[53] Is the experience in the US a classical example of what developing countries are likely to face if they do not seriously revise their policies concerning their attitude to workers' rights and interests in trade-related matters?

Opponents of a trade-labour linkage argue that low labour standards do not necessarily translate into low wages and even if they did, competitiveness does not necessarily depend on low wages or weak labour standards.[54] If low labour standards are indeed the source of any competitive advantage, then they should be correlated with low labour costs.[55] Bhagwati contends that raising labour standards in some cases would only imply minor increases in labour costs and thus in total production costs.[56] The ILO has reported that as far as workers' safety standards are concerned, a stricter observance of existing regulations or the introduction of more stringent labour standards may indeed lead to cost savings, contrary to the views held by those who resist the inclusion of a social clause in multilateral trade agreements.[57] In this connection, the ILO noted that:

> "In fact, one needs to consider not only the cost of repairs to installations and equipment, financial compensation to the worker involved and/or the necessity of providing benefits in kind in the form of medical care or medicines, but also more indirect burdens such as possible disruptions in supply or low capacity utilization due to workers' absence, also the necessity to retrain replacement employees and the possibility that a firm with a bad reputation for safety may become unable to attract good and productive employees."[58]

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[50] See Bauer and Shenk "Productivity in the Recession and Going Forward" 2009 *Federal Reserve Bank of Cleveland* 8.
[51] See Reich "High Unemployment after the Great Recession: Why? What can we do?" Center on Wage and Employment Dynamics Policy Brief 2010 3.
[52] WTO and ILO 93.
[53] Ibid.
[54] Tsogas 354.
[55] Ibid.
[56] See Bhagwati "Free Trade, 'Fairness' and the New Protectionism" Institute of Economic Affairs Occasional Paper No. 96 1994 26.
[57] ILO *The Cost of Occupational Accidents and Diseases* (1986) 15.
[58] Ibid.

Implementing labour standards in trade would thus not be merely regarded as an economic issue but also a concept having important cultural and social implications that need to be taken into careful consideration. It is necessary to discuss some of the issues raised by opponents of a trade-labour linkage which may have an effect on the cultural and social structure of any country to establish whether the inclusion of a social clause in multilateral trade agreements is justified or not.

4 2 1 A trade-labour linkage is self-defeating or inconsequential

The anti-protectionist argument advanced by opponents of a trade-labour-linkage includes the claim that a trade-labour linkage will either be insignificant or that it will go wrong and have the opposite of its intended effect of improving the social levels of underprivileged persons in the world.[59] Whilst acknowledging that a trade-labour linkage is well intentioned, this group nevertheless proceeds to argue that it will hurt those it is meant to help.[60] They also argue that countries will opportunistically misuse the possibilities for restricting imports provided by a trade-labour linkage in order to protect their domestic producers and harm those in other countries.[61] In particular, influential interests such as labour unions and employers in some industries in developed countries would benefit from reduced competition from countries with low-cost labour and therefore press for such opportunistic misuse.[62] The resultant effect would be that opportunities to trade available to poor countries will diminish.[63] Furthermore, this group contends that the world trading system will gradually become subordinated to powerful interests, and gains from trade will contract.[64] The trade-labour linkage agenda will be used as an excuse to limit the access of developing country exporters to developed country markets through the imposition of tariffs or quotas or impose cost-raising improvements to labour standards that will diminish the income of developing countries, since they will reduce their gains from trade by

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[59] See Barry, Sanjay and Reddy "International Trade and Labour Standards: A Proposal for Linkage" 2006 *Cornell International Law Journal* 555.

[60] Ibid.

[61] See Bhagwati "Policy Perspectives and Future Directions: A View from Academia" in Schoepfle and Swinnerton (eds) *International Labour Standards and Global Economic Integration* (1994) 57.

[62] See Srinivasan "International Trade and Labour Standards from an Economic Perspective" in Dijck and Faber (eds) *Challenges to the New World Trade Organization* (2003) 219, 239.

[63] Ibid.

[64] See Bhagwati "Free Trade and Labour" http://www.columbia.edu/~jb38/ft_lab.pdf (accessed 15-01-2012).

interfering with the basis of those gains, namely the reallocation of production according to comparative advantage.[65]

The opponents of a trade-labour linkage also argue that it will have an insignificant effect on the living standards and working conditions of most workers because of its limited reach.[66] They argue that a trade-labour linkage will only affect export-producing sectors, which may account for only a small fraction of the labour force in most developing countries.[67] They also believe that a trade-labour linkage is likely to have a negligible or negative impact on the working conditions, employment, and wages of many workers in export production.[68] Such a development will thus allegedly most likely drive bad practices in export oriented production out of sight rather than out of existence.[69]

Opponents of a trade-labour linkage argue that the imposition of labour standards will cause a reduction of employment.[70] As a result, the living conditions of displaced workers would worsen since they will either become unemployed or will be employed in sectors with employment conditions that are no better and possibly worse than those they formerly enjoyed.[71] Also, a trade-labour linkage as the opponents proceed to argue could increase relative inequalities in working conditions or in command over resources, creating a "labour aristocracy".[72] This may be undesirable under certain interpretations of the objective.[73] In particular, it will be undesirable according to those views which hold that the level of advantage is directly or indirectly influenced by the extent of inequalities for example, in working conditions or command over resources.[74]

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65 See Dehejia and Samy "Trade and Labour Standards-Theory, New Empirical Evidence, and Policy Implications" 2002 CESifo Working Paper No. 830 20.

66 Barry, Sanjay and Reddy 555.

67 See Carnegie "Endowment for International Peace, Breaking the Labour-Trade Deadlock Carnegie Endowment" 2001 Working Paper No. 17 3.

68 See Maskus "Should Core Labour Standards be Imposed through International Trade Policy" 1997 World Bank Working Paper No. 1817 33.

69 Barry, Sanjay and Reddy 556.

70 See Squire and Suthiwart-Narueput "The Impact of Labour Market Regulations" 1995 World Bank Policy Department Working Paper No. 1418 7.

71 Barry, Sanjay and Reddy 556.

72 Ibid.

73 Ibid.

74 Ibid.

Lastly, opponents of the trade-labour linkage have also argued that introducing labour standards in trade reduces the advantages of individuals by impeding them from entering into contracts through which they expect to enhance their wellbeing.[75] For example, Srinivasan has argued that:

> "Parents would allow their children to be employed in their own economic enterprise or as wage workers only if, given their market and non-market constraints, family welfare is enhanced by the use of children's time in such employment rather than in other activities, including being in school. Thus proscription of such labour, if strictly enforced without compensation, would lower family welfare of those who are already desperately poor."[76]

What is lacking though from this view is what the impact of low labour standards would do in future to developing countries. For now, people in developing countries are clinging to the little that is there but is that little sustainable into the future? Could we say that the current situation is an indication of the complexity of the issue at hand or the existence of other underlying issues? Possible answers to this question will be given later in this chapter. The opponents of a trade-labour linkage also advance another argument to the effect that a trade-labour linkage proposal is an inferior means of achieving the goals it aims to achieve.

4 2 2 Trade-labour linkage as an inferior means of protecting labour standards

It is sometimes argued that there are superior means of achieving the goals of a trade-labour linkage.[77] Such arguments do not entail a denial that a trade-labour linkage may achieve its objectives but rather involve an insistence that there are other, better means of achieving them.[78] In particular, opponents of a trade-labour linkage claim that alternative approaches perform at least as well as linkage in promoting the ultimate ends of improved labour standards and improved levels of advantage for the globally less privileged.[79] Examples of alternative approaches include moral persuasion to bring about voluntary compliance with ILO standards.[80] Critics of a trade-labour linkage claim that they and other trade-labour linkage opponents are concerned with the promotion of two distinct objectives which are, maximizing the gains from

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75 Barry, Sanjay and Reddy 556.
76 Srinivasan 34.
77 Barry, Sanjay and Reddy 557.
78 Ibid.
79 Ibid.
80 See Singh and Zammit "Labour Standards and the 'Race to the Bottom'" 2004 *Oxford Review of Economic Policy* 102.

trade and reducing disadvantage by promoting improved labour standards as well as higher employment.[81]

The best approach for achieving these goals, they contend, would be to dedicate an independent institution to pursue each one of them.[82] They argue that, at the international level, the concerns of workers are best served by promoting them through an independent agency, such as the ILO, rather than by confusing the mandate of the WTO which is presently charged with fostering the growth of world output through trade by charging it additionally with promoting labour standards.[83] However, this approach does not address how instances of the overlapping functions of these two institutions will be dealt with. The approach ignores the fact that the ILO lacks jurisdiction in trade matters. It also ignores the fact that the WTO has been instrumental in environmental and agricultural issues related to trade.[84] The WTO environment is not static. It has development as one of its key agendas. Labour standards are a key feature of trade practices and are crucial to the development of any society. In that sense, the WTO in the global context may assume a role concerning labour matters as it has done in agricultural and environmental issues. In the global era, it must be borne in mind that organisations are fast becoming multidisciplinary with the WTO not being an exception. The existence of a joint WTO and ILO Committee to try and address challenges posed by globalisation bears testimony to this contention.[85] Opponents of a trade-labour linkage also argue that a social clause could lead to an unfair distribution of burdens.

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81 See Tsogas *Labour Regulation in a Global Economy* (2001) 27.

82 Barry, Sanjay and Reddy 558.

83 Ibid 558.

84 See the WTO Agreement on Agriculture of 1 January 1995. See also Charnovitz "The Role of Trade Measures in Treaties" in Fijalkowski and Cameron (eds) *Trade and the Environment: Bridging the Gap* (1998). Sustainable development and protection and preservation of the environment are fundamental goals of the WTO. They are enshrined in the Marrakesh Agreement, which established the WTO, and complement the WTO's objective to reduce trade barriers and eliminate discriminatory treatment in international trade relations. While there is no specific agreement dealing with the environment, under WTO rules members can adopt trade-related measures aimed at protecting the environment provided a number of conditions designed to avoid the misuse of such measures for protectionist ends are fulfilled.

85 The WTO Secretariat maintains technical exchanges with the International Labour Organization with a view to helping members' global economic policies. Activities range from compiling statistics, research, technical assistance and training.

4 2 3 Trade-labour linkage and unfair distribution of burdens

As already noted in this chapter, opponents of a trade-labour linkage argue that a loss of jobs caused by the imposition of labour standards in trade is likely to harm most those persons who are most in need, such as poor children, women, and men.[86] It is bad that less advantaged persons throughout the world, those that a trade-labour linkage is intended to help will disproportionately bear the burdens imposed by such linkage.[87] The imposition of labour standards is likely to create a loss of livelihood and perhaps even of lives in developing countries, while consumers in developed countries will likely experience only a relatively small increase in prices.[88]

Opponents of a trade-labour linkage also argue that such a linkage would arbitrarily and unfairly target only some of the sectors and firms in developing countries that practice poor labour standards.[89] In particular, only export producing firms belonging to the formal sector and therefore effectively subject to state regulation will be directly targeted, despite others being equally or more guilty of seriously objectionable labour practices.[90] It is argued that the so-called violations of labour standards may occur for morally justified reasons, in which case penalizing violators of labour standards would be unfair.[91] In particular, employers who violate labour standards are in fact offering exploited workers the opportunity to improve their life circumstances.[92] Given the difficult background conditions faced by these workers, it is alleged that employers act well by offering them work, and deserve credit rather than punishment.[93] It has been suggested in this vein that labour standards violations may be morally justified because such violations may enable some agent to fulfill moral obligations to other agents or that it may help him or her further other ends which he or she has reason to value.[94]

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86 See Kristof and WuDunn "Two Cheers for Sweatshops" New York Times Magazine 24 September 2000.
87 See Brown *Labour Standards: Where do they belong on the International Trade Agenda?* 2001 *Journal of Economic Perspectives* 105.
88 Barry, Sanjay and Reddy 560.
89 Ibid.
90 Singh and Zammit 95.
91 Barry, Sanjay and Reddy 561.
92 Kristof and WuDunn 70.
93 Bhagwati (2004) 172.
94 Barry, Sanjay and Reddy 561.

For example, by being inattentive to labour standards an employer may be able to hire more employees than otherwise, or realize profits which ultimately generate benefits for poorer persons, by enabling voluntary transfers to such persons to be increased or by augmenting the demand for domestic goods and services produced by employing such persons.[95] Disregard for labour standards could also enable an employer to increase the amount of goods produced.[96] The employer may be able to pursue other ends that he or she has reason to value, such as providing his or her children with a sound education.[97] It may be argued that an employer can plead some justification for his or her indifference to labour standards if the good that is produced by that indifference is significant.[98] In practice, the regrettable necessity to "do bad in order to do well" may arise due to competitive pressures.[99] A factory owner in a developing country, for example, may be compelled to disregard labour standards in order to compete effectively with other firms that do the same.[100] Moral dilemmas of this kind are prevalent in the contemporary world, and are frequently unavoidable.[101] However it is necessary to address whether such moral dilemmas are suitable for the future economic growth of developing countries and if not what course of action must be taken to address these dilemmas. Another argument advanced by opponents of a trade-labour linkage is that it is politically imperialistic and context-blind.

4 2 4 Trade-labour linkage is politically imperialistic and context-blind

There are two senses in which it is widely argued that a trade-labour linkage is context-blind. First, opponents of a trade-labour linkage argue that it ostensibly prevents a country from choosing policies that appropriately reflect its level of development.[102] Such a view would mean that the urgency of improving the living standards of people in poor countries requires that priority be given to rapid development, even though this may lead to the violation of labour standards.[103] The narrower objective of promoting basic labour standards for those who are employed will in this case allegedly conflict with the broader objective of improving the level of

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95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid.
100 Barry, Sanjay and Reddy 561.
101 Ibid.
102 Barry, Sanjay and Reddy 563.
103 Ibid.

advantage of less advantaged persons more generally.[104] The implicit premise of the argument is that the gain in attaining the latter objective justifies the loss in not attaining the former.[105] Although regrettable, such violations would thus be viewed as a necessary evil.

Two distinct reasons are offered by opponents of a trade-labour linkage for prioritizing development over promotion of labour standards. First, the premature imposition of labour standards can act as an obstacle to the development process.[106] It may even be that development can only take place through the 'violation' of 'labour standards.'[107] The fact that even so-called 'basic' labour standards were widely violated in factories during the European industrial revolution is well known.[108] Second, the importance that is attached by the citizens of a country to labour standards may change as their country develops.[109] Fulfilment of labour standards may be a "luxury good," for which the intensity of the preference increases with income.[110] It is asserted that to fail to respect the preferences that individuals have for themselves is to act paternalistically, imposing the preferences of the currently rich on those who are currently poor.[111] It is claimed that endorsing universal human rights is wholly compatible with insisting that the weight attached to the improvement of labour standards relative to other goals such as the fulfilment of other rights, or the improvement of aggregate welfare should vary with context.[112] Such critics claim that whereas opponents of a trade-labour linkage are context-sensitive proponents of human rights, proponents of a trade-labour linkage are (at best) context insensitive proponents of human rights and (at worst) context-insensitive proponents of satisfying the preferences of the rich.[113]

Another sense in which a trade-labour linkage is said to be context-insensitive is that it is a form of cultural imperialism. It is alleged to unfairly impose a moral vision that is specific to a

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[104] Ibid
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] See Srinivasan *Developing Countries and the Multilateral Trading System: From GATT to The Uruguay Round and the Future* (2000) 10.
[110] See Basu "Child Labour" 1999 *Journal of Economic Literature* 1100.
[111] Barry, Sanjay and Reddy 563.
[112] Ibid.
[113] See Shaffer "WTO Blue-Green Blues" 2000 *Fordham International Law Journal* 608.

single cultural sphere.[114] It is asserted that even when stated at a high level of generality, any set of purportedly "basic" labour standards, such as the 'core' labour standards defined by the ILO, is culturally specific.[115] This objection challenges the very idea that there is a universally binding set of standards, since by definition such standards are not culturally specific.

It is argued that these standards are influential merely because great importance is attached to them in the developed countries, many of which happen to share a specific cultural tradition.[116] Such critics claim that there is no universally acceptable rationale that can be provided for any given set of basic labour standards, nor is it possible to develop an "overlapping consensus" among different parties who might be imagined to have distinct rationales for accepting these standards in favour of accepting such standards.[117] Even if it is agreed that there are some basic standards, stated in an adequately general way, that are universally relevant, these must be defined further in order to be practically applied.[118] But this further step cannot be taken; it is therefore maintained, without appealing to the preconceptions and priorities of a specific culture.[119] Detailed interpretations of standards are thus likely to conflict.[120] Indeed, it is sometimes asserted that the practices that constitute so-called "violations of labour standards" are in fact sometimes an integral part of traditional family and work life in certain societies.[121] It is suggested, for example, that "child labour" can offer a humane and effective form of teaching and apprenticeship.[122] The imposition of 'basic labour standards' in such a situation is alleged therefore to amount to nothing less than cultural imperialism.[123]

Lastly, it is argued that linkage is a form of political imperialism. State sovereignty guarantees the right of the citizens of a country to choose their domestic institutions and policies, including the organization of work and production.[124] It is argued that linkage significantly limits

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[114] Barry, Sanjay and Reddy 564.
[115] Ibid.
[116] Ibid.
[117] Srinivasan 73.
[118] Brown 91.
[119] Ibid.
[120] Ibid.
[121] Barry, Sanjay and Reddy 564.
[122] Basu 1089.
[123] Barry, Sanjay and Reddy 564.
[124] Ibid.

such rights and is therefore a violation of state sovereignty.[125] Whether these arguments are justifiable or not is a matter which an analysis of theoretical views and empirical evidence advanced on the subject may address. As has been observed, most of the arguments made by opponents of a trade-labour linkage relate to labour standards giving a competitive or comparative advantage to poor countries. The arguments also centre on the concept of a social clause being part of a protectionist agenda of western countries.

4 3 ECONOMIC THEORIES CONCERNING LABOUR MARKET FUNCTIONS AND TRADE

4 3 1 Comparative advantage

Opponents of a trade-labour linkage have largely centred most of their arguments on the view that low labour standards are a source of comparative advantage for developing countries. The theory of comparative advantage was first advanced by Ricardo in 1817.[126] In illustrating the concept of comparative advantage, Ricardo used the example of England and Portugal. Portugal could produce both wine and cloth with less labour than England could produce the same goods.[127] However the relative costs of producing wine and cloth were different in Portugal and England.[128] England found it very hard to produce wine, and only moderately difficult to produce cloth.[129] In Portugal, both products were easy to produce. Therefore, Ricardo concluded that while it was cheaper to produce cloth in Portugal than England, it was cheaper still for Portugal to produce excess wine, and trade that for English cloth.[130] Conversely, England could also benefit from this trade because the cost for producing cloth did not change but it could get wine at a lower price, closer to the cost of cloth.[131] The conclusion drawn was that each country could gain by specializing in the good where it has comparative advantage, and trading that good for the other.[132] Ricardo explicitly based his argument on an assumed immobility of capital and stated that:

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[125] Ibid.
[126] See Ricardo *On the Principles of Political Economy and Taxation* (1817) 7.1. See also Jackson 14.
[127] Ricardo 7.1.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid.

> " ... if capital freely flowed towards those countries where it could be most profitably employed, there could be no difference in the rate of profit, and no other difference in the real or labour price of commodities, than the additional quantity of labour required to convey them to the various markets where they were to be sold."[133]

However, from a development economics perspective, the theory of comparative advantage, and the deduction that nations should specialize, has been subject to some criticism.[134] Such criticism has been necessitated by the formulation of the import substitution industrialization (ISI) theory of development economics.[135] The ISI has been applied to many developing countries of the world, especially in Latin America, where it was implemented with the intention of such countries becoming more self-sufficient and less vulnerable by creating jobs and relying less on other nations.[136] The ISI is based primarily on the internal market.[137] It works by having the state

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[133] Ibid.

[134] See Lowenfeld *International Economic Law* (2008) 7. Lowenfeld argued that: "…the theory of comparative advantage has never been wholly satisfying. One major shortcoming, even when expanded beyond the two-country, two-product, two-factor model is that it would lead to the expectation that countries with similar levels of economic development would trade little with each other apart from goods directly linked to geography, such as products of agriculture or mining. In fact, industrial countries trade in great volume with one another, often in the same sector and products." Lowenfeld proceeds to observe that: "...the rise of multinational enterprises has led to vast amounts of trade among affiliated firms in different countries, and to international investment as an alternative and supplement to trade, to a degree wholly unforeseen by the economists who developed and explored theories of international trade. Perhaps a more serious concern for policy-makers has been that while the theory of comparative advantage predicts, with fair accuracy, that global welfare will be enhanced over time by expanded exchange of goods and services, it gives less assurance to individual countries and particularly to comparatively disadvantaged sectors within countries. In the long term, the answer is adjustment, that is commitment to factors of production to economic activity in which they are comparatively more advantaged...How to give some time for adjustment without creating permanent distortions is one of the themes of the law of international trade. The comparative advantage theory also fails to acknowledge that factor endowments that make up comparative advantage can be altered by government intervention. For example, if technical skill and innovation are important factors would governments sponsor research and development targeted to particular industries? What about making university education free to students? Should other countries be permitted to counteract such efforts to alter comparative factor endowments?...if trade is free should it be limited by a proviso that it must be fair?....what is, and what is not fair?" The theory of comparative advantage does not offer guidance to international economic law concerning the issues raised by Lowenfeld. These issues are central to the trade-labour linkage debate. For example, if wages rise in line with productivity (the real exchange rates remain unchanged), the unit labour costs remain constant. Unit labour costs are deemed to influence productivity. The comparative advantage theory does not address the issue of the exchange rate. It is an important issue for proponents of low labour standards in that if productivity increase through rapidly increasing employment of...cheap labour, increase in productivity per worker will remain low yet growth in industrial employment will be rapid. See Lester *et al* 39. This approach is what developing countries refer to as their comparative advantage.

[135] See Brian *A Comprehensive Dictionary of Economics* (2009) 88. ISI is a trade and economic policy that advocates replacing imports with domestic production. It is based on the premise that a country should attempt to reduce its foreign dependency through the local production of industrialized products. The term primarily refers to 20th century development economics policies, though it has been advocated since the 18th century.

leading economic development through nationalization, subsidization of vital industries including agriculture, power generation, increased taxation to fund development programmes and a highly protectionist trade policy.[138] Even though ISI is a development theory, its political implementation and theoretical rationale are rooted in trade theory.[139] It has been argued that all or virtually all nations that have industrialized have followed the ISI.[140]

Korean economist Chang has argued, based on economic history, that all major developed countries, including the United Kingdom (UK), used interventionist economic policies to promote industrialization.[141] They protected their national companies until they had reached a level of development in which they were able to compete in the global market, after which those countries adopted free market discourses.[142] These free market discourses were directed at other countries to achieve two objectives, open their markets to foreign products and prevent them from adopting the same development strategies that led to the developed nations' industrialization.[143] Chang then criticized the comparative advantage principle, contending that it may have helped developed countries to maintain relatively advanced technology and industry compared to developing countries.[144] Chang has argued that all major developed countries used interventionist, protectionist economic policies in order to get rich and then tried to forbid other countries from doing the same.[145] Chang asserts that premature free trade has been one of the fundamental obstacles to the alleviation of poverty in the developing world.[146] Asian countries such as South Korea, Japan and China have utilized protectionist economic policies in their economic development. However, most developing countries have not realized this. They have

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[136] See Baer "Import Substitution and Industrialization in Latin America: Experiences and Interpretations"1972 *Latin American Research Review* 95.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Baer 96.
[141] See Chang *Kicking Away the Ladder: Development Strategy in Historical Perspective* (2002) 31.
[142] Baer 96.
[143] Baer 96.
[144] Chang 32.
[145] Ibid. Chang makes the following statement: "For example, according to the comparative advantage principle, developing countries with a comparative advantage in agriculture should continue to specialize in agriculture and import high-technology widgets from developed countries with a comparative advantage in high technology. In the long run, developing countries would lag behind developed countries, and polarization of wealth would set in."
[146] Ibid.

resisted the ISI as they want to follow the western countries' path to industrialization including the violation of the core labour standards of their workers which may not be profitable as this chapter will show.

The major unifying basis of the ISI can thus be described as an attempt to reduce foreign dependency of a country's economy through local production of industrialized products, whether through national or foreign investment, for domestic or foreign consumption.[147] It should be noted, as well, that import substitution does not mean import elimination due to the fact that as a country industrializes, it begins to import other kinds of goods which become necessary for its industry, such as petroleum, chemicals, and the raw materials it may lack.[148] The real objective of import substitution is therefore not to eliminate trade but to lift it to a higher stage, that of exporting value-added products, not as susceptible to economic fluctuations as raw materials, according to the Singer and Prebisch thesis.[149]

The Singer and Prebisch thesis provides that specialization in primary commodities, combined with a relatively slow rate of technical progress in the primary sector and an adverse trend in the commodity terms of trade, had caused developing economies to lag behind the industrialized world.[150] Reference to the views of Singer and Prebisch has been necessitated by development economists who have long debated whether developing countries should be as specialized as they are in the production and export of primary commodities for trade purposes.[151] They rested their case on three facts: first, that developing countries were indeed highly specialized in the production and export of primary commodities; second, that technical progress was concentrated mainly in industry; and third, that the relative price of primary commodities relative to manufactures had fallen steadily since the late 19th Century.[152] Together these facts suggested that, because of their specialization in primary commodities, developing

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[147] Ibid.
[148] Ibid.
[149] See Singer "U.S. Foreign Investment in Underdeveloped Areas: The Distribution of Gains between Investing and Borrowing Countries," 1950 *American Economic Review, Papers and Proceedings* 473. See also Prebisch "The Economic Development of Latin America and its Principal Problems" 1950 reprinted in *Economic Bulletin for Latin America* 1962 22.
[150] Ibid.
[151] Chang 32.
[152] Baer 96.

countries had obtained little benefit from industrial technical progress, either directly, through higher productivity, or indirectly, through improved terms of trade.[153]

The major advantages claimed for ISI include increases in domestic employment (reducing dependence on labour non-intensive industries such as raw resource extraction and export); resilience in the face of global economic shocks (such as recessions and depressions); less long-distance transportation of goods (and concomitant fuel consumption and greenhouse gas and other emissions).[154] However, a disadvantage claimed for the ISI is that the industries that it creates are inefficient and obsolete as they are not exposed to internationally competitive industries, which constitute their rivals, and that the focus on industrial development impoverishes local commodity producers, who are primarily rural.[155] To address the limitations of the ISI and comparative advantage theories, the absolute advantage theory was developed.

The economist Paul Craig Roberts notes that the comparative advantage principles developed by Ricardo do not hold where the factors of production are internationally mobile.[156] Limitations to the theory may exist if there is a single kind of utility.[157] Yet the human need for food and shelter already indicates that multiple utilities are present in human desire.[158] The moment the model expands from one good to multiple goods, the absolute may turn to a comparative advantage.[159] The opportunity cost of a forgone tax base may outweigh perceived gains, especially where the presence of artificial currency pegs and manipulations distort trade.[160] Much has been written since Ricardo's comparative advantage theory was advanced as commerce has evolved and cross-border trade has become more complicated. Today trade policy tends to focus more on free mobility of capital in a globalized world.[161] Some scholars, notably Herman Daly, an American ecological economist and professor at the School of Public Policy of the University of Maryland, have voiced concern over the applicability of Ricardo's theory of comparative advantage in light of the increase in the mobility of capital: "International trade

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[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] See Marrewijk "Absolute Advantage" (2007) 50.
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] See Harrington "International Trade Theory" http://faculty.washington.edu/jwh/349lec03.htm (accessed 10-01-2012).
[161] Harrington 10.

(governed by comparative advantage) becomes, with the introduction of free capital mobility, interregional trade (governed by absolute advantage)".[162]

4 3 2 Absolute advantage

In economics, the principle of absolute advantage refers to the ability of a party (an individual, or firm, or country) to produce more of a good or service than competitors, using the same amount of resources.[163] Adam Smith first described the principle of absolute advantage in the context of international trade, using labour as the only input.[164] Since absolute advantage is determined by a simple comparison of labour productivities, it is possible for a party not to have absolute advantage in anything;[165] in that case, according to the theory of absolute advantage, no trade will occur with the other party.[166] It can be contrasted with the concept of comparative advantage which refers to the ability to produce a particular good at a lower opportunity cost.

Adam Smith has argued that it was impossible for all nations to become rich simultaneously by following mercantilism because the export of one nation is another nation's import and instead stated that all nations would gain simultaneously if they practiced free trade and specialized in accordance with their absolute advantage.[167] Adam Smith also stated that the wealth of nations depended upon the goods and services available to their citizens, rather than their gold reserves.[168] While there are possible gains from trade with absolute advantage, the gains may not be mutually beneficial.[169] Comparative advantage is the concept that focuses on the range of possible mutually beneficial exchanges.[170] However, as already indicated in this chapter, the theory of comparative advantage has its limitations. An attempt to address these limitations apart from resulting in the ISI and absolute advantage theories also led to the formulation of the competitive advantage theory.

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[162] Ibid.
[163] See O'Sullivan and Sheffrin "Economics: Principles in Action" 2003 *The Wall Street Journal: Classroom Edition* 443.
[164] Ibid.
[165] See Milberg "Absolute and Comparative Advantage" 2004 *International Encyclopedia of the Social Science* 1, 2.
[166] Ibid.
[167] O'Sullivan and Sheffrin 443.
[168] Harrington 11.
[169] O'Sullivan and Sheffrin 443.
[170] Milberg 2.

4 3 3 Competitive advantage

Competitive advantage is based on the theory that seeks to address some of the criticisms of the idea of a comparative advantage.[171] Michael Porter proposed the theory in 1985. The competitive advantage theory suggests that states and businesses should pursue policies that create high-quality goods that can be sold at high prices in the market.[172] Porter emphasizes productivity growth as the focus of national strategies.[173] Competitive advantage rests on the notion that cheap labour is ubiquitous and natural resources are not necessary for a good economy.[174] On the other hand, the comparative advantage theory could lead countries to specialize in exporting primary goods and raw materials that trap countries in low-wage economies due to terms of trade.[175] Competitive advantage attempts to correct this by stressing maximizing scale economies in goods and services that garner premium prices.[176]

Competitive advantage occurs when an organization acquires or develops an attribute or combination of attributes that allows it to outperform its competitors.[177] These attributes can include access to natural resources, such as high grade ores or inexpensive power, or access to highly trained and skilled personnel or human resources.[178] The term competitive advantage is the ability gained through attributes and resources to perform at a higher level than others in the same industry or market.[179] The study of such advantage has attracted profound research interest due to contemporary issues regarding superior performance levels of firms in the present competitive market conditions. A firm is said to have a competitive advantage when it is implementing a value creating strategy not simultaneously being implemented by any current or potential player.[180] Successfully implemented strategies will lift a firm to superior performance by providing the firm with competitive advantage to outperform current or potential players.[181]

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[171] See Stutz and Warf *The World Economy* (2009) 12.
[172] Stutz 13.
[173] Ibid.
[174] Ibid.
[175] Stutz and Warf 12.
[176] Ibid.
[177] Ibid.
[178] Ibid.
[179] See Chacarbaghi and Lynch *Sustainable Competitive Advantage: Towards a Dynamic Resource-based Strategy* (1999) 45.
[180] See Clulow, Barry and Gerstman "The Resource Based View and Value: The Customer-based View of the Firm" 2003 *Journal of European Industrial Training* 221.
[181] See Passemard and Calantone *The Competitive Advantage of Nations* (2000) 18.

To gain competitive advantage the business strategy of a firm manipulates the various resources over which it has direct control and these resources have the ability to generate competitive advantage.[182] Superior performance outcomes and superiority in production resources reflects competitive advantage.[183]

The above writings signify competitive advantage as the ability to stay ahead of present or potential competition, thus superior performance reached through competitive advantage will ensure market leadership.[184] Also, it provides the understanding that resources held by a firm and the business strategy employed will have a profound impact on generating competitive advantage.[185] Business strategy is the tool that manipulates the resources and creates competitive advantage hence viable business strategy may not be adequate unless it possesses control over unique resources that have the ability to create such a unique advantage.[186] Summarizing the view points, competitive advantage is a key determinant of superior performance and it will ensure survival as well as prominent placing in the market. Superior performance being the ultimate desired goal of a firm, competitive advantage becomes the foundation highlighting the significant importance of developing the same.[187]

The analysis of the competitive advantage theory thus leaves the critical question of whether or not low labour standards can give a competitive advantage. Tsogas established that there is no empirical evidence either refuting or proving that lax workers' rights lead to a competitive advantage.[188] As far back as 1996, an OECD report made a critical assessment of the possible impact of differences in labour rights on international trade and foreign investment flows.[189] The conclusion of this exercise was that it is impossible to prove the existence of an empirical link between labour standards and overall trade performance or foreign investment.[190] Tsogas in view of this conclusion stated that:

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[182] See Rjamampianina *Sustainable Competitive Advantage* (2003) 362.
[183] See Lau "The Macroeconomics of Economic Development" www.stanford.edu/~ljlau/Courses/Eco (accessed 12-01-2012).
[184] Ibid 125.
[185] Ibid
[186] Ibid
[187] Ibid.
[188] Tsogas 355.
[189] See OECD "Trade Employment and Labour Standards: A Study of Core Workers' Rights and International Trade" www.oecd.org/dataoecd/2/36/1917944.pdf (accessed 14-01-2012).
[190] Ibid.

> "Contrary to what is thought by those who subscribe to the unfair competition view, failure to observe core labour standards can hamper a country's economic efficiency and the growth of its exports. Exploitation of labour and discrimination in employment are liable to perpetuate an inefficient economic situation over the long term. Child labour exploitation, for example, hinders the development of human capital and thus retards productivity gains. Discrimination in employment results in situations in which certain workers are not employed in the positions where they would be most productive. And the lack of freedom of association undoubtedly makes it more difficult to introduce modern methods of human-resource management and generates an unstable social climate which does not encourage productive investment. It follows, therefore, that countries with low standards can strengthen them without having an adverse impact on their long-term economic development."[191]

Tsogas' conclusion seems to suggest that the protection of labour standards in trade related matters poses no harm to any country, developing or developed.

Another argument that has been advanced concerning the trade-labour linkage debate is that of the correlation between lax labour standards and low wages. Assuming a correlation between lax labour standards and low wages could be established, Tsogas notes that competitiveness does not at all depend solely on low wages. Tsogas observed the following:

> "Much of the difference in wages is simply the result of differences in labour productivity, in turn resulting from differences in educational standards, availability and reliability of infrastructure, communication services, technology...."[192]

The issue of wages is clearly a critical point of conflict concerning the debate over a social clause in multilateral trade. This is why countries like China vehemently resist the inclusion of a social clause in trade. Developing countries' governments view low wages as being a legitimate comparative advantage.[193] However, Tsogas indicates that:

> "...proponents of a trade-labour linkage claim that it is not low wages that create unfair trade. It is the combination of low wages and possibly other poor working conditions such as unhealthy and dangerous working environments, with high productivity...coupled with the suppression of basic worker rights...by authoritarian regimes that create cut-throat competition."[194]

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[191] Tsogas 355.
[192] Tsogas 356.
[193] Ibid.
[194] Ibid.

In 1985, Zachary observed that,

> "It is not countries in general that are to be blamed but rather actions and policies generated by Transnational Corporations (TNCs) and local political and economic elites; they acknowledge that countries do not trade, firms do."[195]

If the views held by Tsogas and Zachary are accepted as correct, it may be proper to conclude that the resistance to a social clause is a planned agenda by a few world elites among whom are leaders of developing countries. Perhaps the benefits they receive are far greater than the genuine interests to develop their countries and resultantly ensure the social protection of their peoples.[196]

Clearly problems emanating from trade and related to labour standards are not exclusive to developing countries. There is undisputed evidence that trade is a source of unemployment and declining wages, particularly for low-skilled young males in developed countries.[197] It may therefore not be prudent for developing countries to resist measures which will in the long run develop their communities in favour of trade practices which will give them a few dollars today but economic downturns and aggravated poverty tomorrow. The views of the neo-Institutionalists and neo-Keynesian economists support this assertion.

4 3 4 Neo-institutionalist and neo-Keynesian economists

The neo-Institutionalist and Neo-Keynesian economists regard labour standards as a critical tool which may influence the social progress of development rather than promoting lax labour standards.[198] They emphasize the importance of structural and historical developments as well as government mediation in the labour-relation processes.[199] Banuri indicates that:

> "...the objective of government policy is neither to promote economic growth, not create a free market, nor to protect some interests and destroy others, nor even to plan or run the entire economy. Rather the objective is to create an environment in which people (or groups) who need to cooperate with each other despite mutually conflicting or incompatible interests can forge credible and enforceable compromises with each other. It

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[195] See Zachary "Multinationals Can Aid Some Foreign Workers" 1985 *The Wall Street Journal of Europe* 1.

[196] See Barnathan "Damping Labour's Fires" 1994 Business Week 40. Some political and economic elites as Barnathan observed are more than happy to go along with the current state of affairs concerning the trade-labour linkage debate. They have prospered on foreign capital that is invested and the new business opportunities that arise.

[197] See Wood *North-South Trade: Employment and Inequality* (1994) 19.

[198] See Hezernberg, Perez-Lopez and Tucker "Labour Standards and Development in the Global Economy" in Hezernberg and Lopez-Perez (eds) *Labour Standards and Development in the Global Economy* (1990) 4.

[199] Tsogas 361.

means the management of conflict, not the elimination of conflict, and not even the postponement of conflict."[200]

Hezernberg also commented concerning the role of a government in developing the levels of protection of labour standards. He stated that:

"Labour standards do not inevitably improve as a reflection of individual preferences when income grows. Instead, organized political action is often necessary to bring about substantial changes in labour market rules and outcomes. In most OECD countries, for example, expanded worker rights and social welfare policy emerged following the strengthening of the labour movement after depression."[201]

The neo-Institutionalist also addressed the issue of whether low wages promote development. They sought to address the issue of whether low labour costs as a result of low wages and sub-standard conditions of employment help in the creation of jobs in developing countries. Advocates for the trade-labour linkage debate observe that the majority of workers in developing countries working in export-oriented firms were employed in unskilled jobs.[202] In such sectors, employers do not provide any training and offer no upward mobility possibilities.[203] Oloyede and Shadare, as already discussed in this chapter, established the significance of education and on the job training on the future development of businesses and countries. Tsogas notes that cheap unskilled labour can be easily replaced or complemented when production requirements increase.[204] Subsistence wages are inadequate for savings and often are below or near the poverty datum line.[205] Could such a scenario lead to any form of development?

In 2012, South Africa approved the entry wage in the clothing industry in the Western Cape at a miserly R700 in a bid to compete with China for the production of clothing and to ensure employment creation. This amount is way below the poverty datum line. It brings into mind the developments in the 1990s in Indonesia when Nike shoe-manufacturing company employed more than thirty thousand workers in Jakarta to produce athletics shoes for export to

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[200] See Banuri "Comments on Fields" in Hezernberg and Lopez-Perez (eds) *Labour Standards in the Global Economy* (1990) 59.
[201] See Hezernberg "Institutionalizing Constructive Competition: International Labour Standards and Trade" *Bureau of International Affairs Economic Discussion Paper 32* 1988 5.
[202] Tsogas 361.
[203] Ibid.
[204] Ibid.
[205] Ibid.

the US and elsewhere.[206] In 1994, the minimum wage of $2.25 for the workers remained 20% below the poverty datum line for the country. Labour activists tried to address this matter but could not succeed as Indonesia is a country where human rights violations of labour activists are all too frequent.[207] The perpetrator of such violence upon labour activists and workers in developing countries is always the government through its state instruments such as the police.[208] This raises a crucial question of how much the developing countries benefit from labour violations in trade to the extent of silencing any critics of such a practice. It should be acknowledged that most trade practices in developing countries are implemented by multinational companies. As such, it would also be proper to enquire whether foreign direct investment and factories such as the Nike in Indonesia do benefit developing countries in anyway.

Tsogas notes that proponents of a trade-labour linkage indicate that machinery, technology, most raw material and know-how are imported.[209] Profits are in most instances repatriated, often tax-free.[210] Tsogas also raised an important observation:

> "Corporations can easily move out when labour costs become cheaper somewhere else and the incentives better. What remains for the country is 'a-few-dollars-a-day' wages for the impoverished, unskilled workers but big profits for the local political and economic elites: the sweat-shop owners and subcontractors of the TNCs, the latter's host country managers, the corrupt authorities and the bribed politicians, and company or government trade unionists (if they exist)."[211]

The above clearly indicates that violations of labour standards in trade might not be wholly beneficial to developing countries after all. If anything, it maybe the western countries from which the multinational companies originate who benefit from the repatriated profits. China has shown South Africa that if lax labour standards are not made a primary feature of trade, they will relocate to other desperate developing countries such as Lesotho and Swaziland which are eager to subject their people to sub-minimum wages in order to subdue unrest over demands for jobs. Most of this joblessness would have come up as a result of poor government policies concerning

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[206] See Press for Change "Nike in Indonesia" 1995 *Newsletter* 1(2).
[207] See Hainsworth "Labour Activists under Fire" 1995 *International Union Rights 2(1)* 7.
[208] Ibid.
[209] Tsogas 362.
[210] Ibid.
[211] Ibid.

job creation and alleviation of poverty. In most instances, the abuse of state funds may be at the centre of such a crisis. It is no wonder that countries such as Zimbabwe have come up with the nationalization legislation, a key feature of the ISI, to try to protect their national resources and to ensure that trade benefits Zimbabweans and not western countries. However, the careless over-reliance on the Chinese in their Look-East Policy may just undo all their good intentions as the Chinese have a poor record of protecting labour standards and have questionable trade practices as has already been alluded to in this chapter. There have been calls for South Africa to follow suit, albeit in a different way from the chaotic and haphazard approach to a noble cause, which was taken by Zimbabwe.

As already indicated, most developing countries resisted the ISI, which could have been their ideal tool to industrialization as opposed to the violation of labour standards in trade practices. The ISI was advanced to disprove the theory of the comparative advantage. Perhaps such an approach would ensure that developing countries such as Nigeria do not have western institutions such as the World Bank and the International Monetary Fund dictating to them how they should use their natural resources at the expense of their people. Developing countries may soon realize that the exclusion of a social clause in trade actually works to the best interest of the western countries than they think it is to them. However, free traders and neo-classical economists do not seem to agree with the neo-institutionalist and neo-Keynesian economists.

4 3 5 Free traders and neo-classical economists

Like developing countries, neo-classical economists and free traders believe that people should just have employment regardless of the levels of wages or other labour standards.[212] They believe in the self-regulatory mechanism of free markets.[213] Interestingly though, Fields notes that a pre-condition for the free traders and neo-classical economists' theory is the achievement of a minimalist list of conditions in the labour relations process such as prohibition of slavery and employment of children, freedom of association and relatively safe working conditions.[214] After which, Fields believes that labour standards might then be best gauged in terms of labour

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[212] Tsogas 360.

[213] See Fields "Labour Standards, Economic Development, and International Trade" in Hezernberg and Perez-Lopez (eds) *Labour Standards and Development in the Global Economy* (1990) 19.

[214] Ibid 20.

market outcomes.[215] This view appears to suggest that the protection of labour standards in trade may not after all be resisted. What could be a challenge is how it is done. Fields cited the economies of Hong Kong, Singapore and Taiwan as possible examples to follow as they indirectly promote labour standards on the basis of employment creation made possible by their growing economies.[216]

The general argument is that once full employment is attained, increased demand for scarce labour would lead to the bidding-up of wages. Fields commented that:

> "To those who judge labour standards by process, the lack of collective bargaining and protective labour legislation would appear as an abuse of labour standards which is getting no better in the course of economic growth. But to others who are more outcomes oriented, the attainment of full employment and the creation of new jobs at substantially higher rates of pay than those workers had been able to earn before is a sign that labour standards are improving. Abuse of labour standards is in the eye of the beholder."[217]

It may be questionable however if Fields' perception is applied to Southern African economies whose economic growth is so minimal that unemployment will be the norm in future than employment would be.[218] Also, the theory assumes that increased demand for scarce labour which would lead to bidding-up of wages is contingent upon full employment. The challenge with developing countries, especially those in Southern Africa, is that most of those working in export related industries are unskilled workers who are untrained and not marketable in anyway. Their skills are unlikely to be on demand at anytime as cheap labour is almost everywhere and is easily accessible. This implies that full employment is unlikely to be achieved in developing countries. As such, a different approach other than the one proposed by free traders would be ideal.

4 3 6 Child labour and economic development

The use of child labour has been viewed as culturally specific. It is not strange to observe that in Africa where there is endemic poverty, the use of child labour is regarded as necessary for the

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[215] Ibid.
[216] See Fields "Employment, Income Distribution and Economic Growth in Seven Small Economies" 1984 *The Economic Journal* 74.
[217] Fields 31.
[218] See United Nations "World Economic Situation and Prospects 2012" http://www.un.org/../2012wesp_prerel.pdf (accessed 21-11-2012).

development of the child.[219] Poor regions such as Southern Africa have many children working in the agriculture sector in order to assist their impoverished families.[220] Opponents of the trade-labour linkage debate argue that children and their families in developing countries are regrettably too poor to afford not going to work.[221] The entire family would be worse off if children did not work.[222] Such an argument seems to be the basis of the argument that people in developing countries are too poor to be able to afford human rights protection in the manner in which the western countries do.[223] In fact the arguments advanced in relation to the use of child labour emanate from the perception that even western countries industrialized in part through the use of child labour. In this connection, Nichols stated that:

> "We know of no case where a nation developed a modern manufacturing sector without first going through the sweat-shop phase. How long ago was it that children could be found working in the textile factories of Lowell, Massachusetts, of Manchester, England, or Osaka, Japan? Should the developing economies of today be any different? If child labour is a necessary evil of industrialization, then a nation should be judged on how quickly it passes through this phase."[224]

Tsogas notes that child labour is an unpleasant, yet natural stage in the process of capitalist accumulation.[225] The reason for this is that there is a dilemma between child labour or having impoverished children and families.[226] A fascinating observation was made by The Economist, which:

> "...drew the line between legal rights over terms of employment and slavery, child labour and the rights of assembly and free speech, which, unlike the former, are not freely modified as circumstances: 'You do not need to be rich to outlaw slavery or grant the rights of free speech and assembly; education is costly, but curbing the cruelest sorts of child labour is widely affordable'".[227]

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[219] Tsogas 367.
[220] See Mwaniki "Achieving Food Security in Africa: Challenges and Issues" http://www.un.org/africa/osaa/reports/Achieving%20Food%20Security%20in%20AfricaChallenges%20and%20Issues.pdf (accessed 23-01-2012).
[221] Tsogas 367.
[222] Ibid.
[223] Tsogas 367.
[224] See Nichols "Third-World Families at Work: Child Labour or Child Care?" 1993 *Harvard Business Review* 20.
[225] Tsogas 367.
[226] Ibid.
[227] See Tsogas 367-368.

The above quotation may just signify that the so called dilemma between child labour or impoverished children and families is not authentic or serves only the purposes of those who benefit economically from such exploitation. Tsogas seemingly puts finality to the issue of using child labour by stating that:

> "...the economies of countries that use child labour will suffer. Employment of children depresses wages, which in turn hinders increases in productivity that could stimulate economic growth. Good national education policies and enforced prohibition of child labour are not only justifiable but also make good economic sense. Countries that have experienced rapid economic development, such as East Asian NICs, have not allowed child labour. Sound economic development and employment of children simply do not go together. Moreover, child labour is not necessarily inexpensive labour. Economizing on wages and working conditions is not the only means of achieving competitiveness. Productivity improvement and treatment of employees as valuable assets rather than as replaceable factors of production enhance long-term competitiveness and sustainable growth."[228]

Developing countries seem to have lost sight of creating a balance between long term and short term gains due to their need to address colonial imbalances. Perhaps it is time for them to realize that the past will not change but the future can.

4 4 THE RELEVANCE OF ECONOMIC THEORIES IN THE GLOBAL ERA

The WTO and ILO have observed that empirical evidence taking the link between trade and employment seriously is still relatively scarce, certainly if compared to the large body of evidence examining how trade affects relative or absolute wages.[229] On the positive side, however, both the WTO and ILO correctly observe that given that the theoretical developments are relatively recent, the empirical evidence is as well.[230] Dutt *et al* have examined the link between trade protection and unemployment rates using cross-country data for 90 countries over the period 1985-2004.[231] Their empirical estimation was based on a theoretical model with search-induced unemployment embedded in a Heckscher-Ohlin[232] or Ricardian setting.[233] The

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[228] Tsogas 368.
[229] WTO and ILO 24.
[230] Ibid.
[231] See Dutt, Mitra and Ranjan "International trade and unemployment: Theory and Cross-national Evidence" 2009 *Journal of International Economics* 32.
[232] See Blaug *The Methodology of Economics or How Economists Explain* (1992) 286. The Heckscher-Ohlin model is a general equilibrium mathematical model of international trade developed by Eli Heckscher and Bertil Ohlin at the Stockholm School of Economics. It builds on Ricardo's theory of comparative advantage by predicting

theoretical prediction for the Heckscher-Ohlin model is that in a relatively capital-abundant country, trade liberalization leads to increases in unemployment, while employment should increase in a relatively labour-abundant country.[234] In the Ricardian model, trade openness and unemployment are negatively related.[235] The empirical analysis is particularly interesting because the authors attempt to distinguish short and long run effects of increasing trade on unemployment. Their evidence shows that trade liberalization is associated with decreases in unemployment; hence, there is a positive long-run relationship between trade and employment. However what they do not address is whether such relationship between trade and employment results in an improved protection of workers' rights in trade related matters. They also do not address why their findings are not consistent with the situation prevailing in developing countries.

An insight into the relationship between trade openness and the protection of workers' rights may be observed in how trade openness affects workers' wages. Greater openness to international trade raises the sensitivity of labour demand to changes in domestic or foreign wages, that is, the wage elasticity of labour demand.[236] This sensitivity of employment to both domestic and foreign wage movements is further increased as global supply chains become more developed.[237] According to Anderson and Gascon, "disaggregating the value chain has allowed US business to substitute cheaper foreign labour, increasing firms' own price elasticity of demand for labour, raising the volatility of wages and employment, which increases worker insecurity".[238] There have been very few estimates of the relationship between trade openness

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patterns of commerce and production based on the factor endowments of a trading region. The model essentially says that countries will export products that use their abundant and cheap factors of production and import products that use the countries' scarce factors.

233 WTO and ILO 24. See also Lowenfeld 8. Lowenfeld questions the relevance of traditional economic theories to the modern world. However he is quick to observe that, "But it would be wrong to dismiss the theory (of comparative advantage) as too abstract, too removed from the 'real world' to matter. In fact a good case can be made that most of the rules of international economic law have been developed against the backdrop of the theory of international trade...One significant factor-generally not considered in discussion of the theory of comparative advantage-has been omitted thus far-the role of money, exchange rates, and the balance of payments."

234 Ibid.

235 Ibid.

236 WTO and ILO 162.

237 Ibid.

238 See Anderson and Gascon "The Perils of Globalization: Off shoring and Economic Security of the American Worker" Working Paper No. 2007-004A Research Division Federal Reserve Bank of St. Louis 2007 2.

and the wage elasticity of labour demand.[239] Slaughter studied manufacturering enterprises in the US over the period 1960-91 and found that the labour demand elasticity rose for US production workers (a proxy for lower-skilled workers) and not for non-production workers over this period.[240] The demand for production workers rose most in those sectors with the greatest increases in offshoring,[241] as well as those with more technical change in the form of more computer-related investment. Scheve and Slaughter found that foreign direct investment is the key aspect of globalization that raises the elasticity of labour demand.[242] In a study of outward foreign direct investment by firms in the UK, Scheve and Slaughter found that more foreign investment was associated with higher labour-demand elasticity, and more volatility of wages and employment.[243]

The WTO and ILO have also observed that the higher elasticity of labour demand can have an indirect effect on wage formation, since it enhances the threat effect, whereby the mere threat by companies to move production overseas influences wage demands.[244] This development has already been noted concerning the labour practices of China in South Africa in the Newcastle area in 2011. Freeman commented that:

> "It isn't even necessary that the West import the toys. The threat to import them or to move plants to less-developed countries to produce toys may suffice to force low skilled westerners to take a cut in pay to maintain employment. In this situation, the open economy can cause lower pay for low-skilled westerners even without trade."[245]

A few researchers have explored the importance of firms' threats to move production abroad on the bargaining power and demands of labour, with the issue receiving considerable attention by theorists, but undergoing little empirical analysis.[246] Choi looked at detailed sectoral data on outward foreign direct investment by US manufacturers and found that increased outward investment was associated with lower wage premiums for union members during the period 1983

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[239] WTO and ILO 162.
[240] See Slaughter "International Trade and Labour-demand Elasticities" 2001 in *Journal of International Economics* 27.
[241] Offshoring refers to the relocation by a company of a business process from one country to another. Such business process is typically an operational process such as manufacturing or supporting processes.
[242] See Scheve and Slaughter *Economic Insecurity and the Globalization of Production* (2003) 10.
[243] Ibid.
[244] WTO and ILO 163.
[245] See Freeman "Are your Wages set in Beijing?" 1995 *Journal of Economic Perspectives* 21.
[246] WTO and ILO 163.

to 1996.[247] Bronfenbrenner and Luce, studying the US between 1993 and 1999, focussed more narrowly on unionization campaigns as opposed to wages.[248] They found that a firm's mobility did raise the credibility of the threat to move production offshore and that this influenced union elections, with unionization drives having a much lower rate of success in firms with a credible threat of mobility than in those considered immobile.[249]

The collapse of the Soviet Union and of communist governments throughout Eastern Europe and East Asia, the capitalist turn of communist China's (and Viet Nam's) economic planning, and even the opening and liberalization of India's economy, have all served to expand global productive capacity, international trade, foreign investment and international subcontracting.[250] Freeman has characterized these developments as "the great doubling" of the world capitalist system's labour force, as it had added 1.3 billion people to the pool of labour seeking work under competitive conditions.[251] Such labour supply expansion alone, Freeman argues, is enough to dampen wage growth in the rest of the world, including in the industrialized countries.[252] Glyn puts an even finer point on this, noting that: "Increasing opportunities for capital to shift production overseas has given a huge bargaining advantage to employers in most of the OECD."[253] Glyn notes that national income has fallen in many industrialized nations.[254]

The WTO and ILO then pose the question as to whether or not the rise in offshoring played a significant role in this. Reference was made to a number of recent papers which have tried to address the question of trade and the labour (or profit) share at the aggregate or industry level, and they have generally found globalization to be associated with a decline in labour's share of income.[255] Milberg and Winkler found that offshoring is significantly and negatively

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[247] See Choi "Threat Effect of Foreign Direct Investment on Labor Union Wage Premium" Political Economy Research Institute Working Paper No. 27 20011.

[248] See Bronfenbrenner and Luce "The Changing Nature of Corporate Global Restructuring: The Impact of Production Shifts on Jobs in the US, China, and around the Globe" 2004 *US-China Economic and Security Review Commission Washington DC* 25.

[249] Ibid. See also WTO and ILO 163.

[250] WTO and ILO 164.

[251] See Freeman "The Expansion of the Global Labor Supply" in Paus (ed) *Global Capitalism Unbound: Winners and Losers from Offshore Outsourcing* (2007) 12. See also WTO and ILO 164.

[252] Ibid.

[253] WTO and ILO 164. See also Glyn "Explaining Labor's Declining Share of National Income" http://www.gei.it/EVENTI/Momigliano/2008/pbno4.pdf. (accessible 14-01-2012).

[254] Ibid. See also WTO and ILO 164.

[255] WTO and ILO 164.

associated with movements in the labour share of value added in thirty-five US manufacturing and service sectors over the period 1998 to 2006.[256] Harrison studied the relation between trade openness and the functional distribution across a large number of developing countries and found that openness is generally associated with a lower labour share of national income.[257] Harrison concludes that "rising trade shares and exchange rate crises reduce labour's share while capital controls and government spending increase labour's share".[258] Guscina finds globalization (measured by trade openness, and the share of Foreign Direct Investment (FDI) in GDP) to be associated with a lower labour share.[259] The effect of trade openness was especially strong from 1985 to 2000. Guscina describes the effects of technological change and globalization as contributing to a new (lower) equilibrium level of the labour share in the industrialized world.[260] As a result, low-skilled workers were found to be more sceptical about globalization and trade liberalization than workers with higher skills.[261]

The fears of unskilled workers are justified by the Stolper-Samuelson mechanism. The Stolper-Samuelson mechanism suggests that increased relative demand for skilled labour in countries abundant with skilled labour occurs as a result of shifts in the relative demand for skilled labour across industries.[262] Labour-intensive industries using skilled labour expand and those using unskilled labour contract, with all industries employing an increasing share of less-skilled labour.[263] However, the employment shifts across industries have not been sufficiently large to account for the large increase in wage inequality.[264] Most of the observed increase in demand for educated labour in countries such as the US is driven by increased relative demand for skilled labour within industries.[265] For example, the wage and employment share of skilled workers increased in virtually all industries during the 1980s and 1990s in the US, including the

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[256] See Milberg and Winklre "Financialisation and the Dynamics of Offshoring in the USA" 2010 *Cambridge Journal of Economics* 275.
[257] See Harrison "Has Globalization Eroded Labor's Share? Some Cross-country Evidence" 2002 *Department of Agricultural and Resource Economics University of California* 15.
[258] Ibid. See also WTO and ILO 164.
[259] See Guscina "Effects of Globalization on Labor's Share in National Income" IMF Working Paper 06/294 2006 2.
[260] Ibid.
[261] WTO and ILO 188.
[262] Ibid 242.
[263] Ibid 242.
[264] Ibid.
[265] Ibid.

non-traded sectors, which is at odds with the Hecksher-Ohlin mechanism.[266] There is also evidence of a within-industry shift in the relative demand for skilled workers for several OECD countries.[267]

In addition, studies have documented that, contrary to the predictions of the simple Hecksher-Ohlin model, many developing countries that liberalized their trade during the 1980s and 1990s also observed an increase, rather than a decrease, in wage inequality between education groups.[268] Some developing countries such as Colombia and Mexico tended to protect industries employing unskilled labour intensively, so tariff-induced price declines would be expected to be largest in those sectors.[269] As a result, the observed increase in wage inequality was in principle consistent with the Stolper-Samuelson mechanism.[270] However, as in the developed economies, the increased relative demand for skilled labour in many developing countries was predominantly driven by increase in the relative demand for skilled labour within industries rather than across industries.[271] Krugma has recently suggested that international trade accounts for a larger share of the growth in wage inequality in the United States in the 1990s and 2000s because of the rapid increase in the share of imports coming from low-wage countries such as China and India during this period.[272]

All developing countries appear to have become more "globalized".[273] They have phased out remaining quantitative restrictions on imports, slashed tariffs, encouraged direct foreign investment and exports and, in many cases, opened up to cross-border financial flows.[274] So it is natural to think that globalization has played an important behind-the-scenes role in driving the patterns of structural change.[275] However, it is also clear that this role could not have been a direct, straightforward one.[276] First, some countries (mostly in Asia) have continued to experience rapid, productivity-enhancing structural change, while others (mainly in Latin

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[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] WTO and ILO 188.
[270] Ibid.
[271] Ibid.
[272] Ibid.
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid.

America and sub-Saharan Africa) have begun to experience productivity-reducing structural change.[277] A common external environment cannot explain such large differences.[278] Second, as important as agriculture, mining and manufacturing are, a large part, perhaps a majority, of jobs are still provided by non-tradable service industries.[279] So whatever contribution globalization has made, it must depend heavily on local circumstances, choices made by domestic policy-makers and domestic growth strategies.[280]

Import competition has caused many industries to contract and release labour to less-productive activities, such as agriculture and the informal sector.[281] One important difference among countries may be the degree to which they are able to manage such downsides.[282] A notable feature of Asian-style globalization is that it has had a two-track nature: many import-competing activities have continued to receive support while new, export-oriented activities were spawned.[283] For example, until the mid-1990s, China had liberalized its trade regime at the margin only.[284] Firms in special economic zones (SEZs) operated under free-trade rules, while domestic firms still operated behind high trade barriers.[285] State enterprises still continue to receive substantial support. In an earlier period, the Republic of Korea and Chinese Taipei pushed their firms onto world markets by subsidizing them heavily, and delayed import liberalization until domestic firms could stand on their feet.[286] Strategies of this sort have the advantage, from the current perspective, of ensuring that labour remains employed in firms that might otherwise be decimated by import competition.[287] Such firms may not be the most efficient in the economy, but they often provide jobs at productivity levels that exceed their employees' next-best alternative (that is, agriculture or the informal sector).[288]

A related issue concerns the real exchange rate. Countries in Latin America and sub-Saharan Africa have typically liberalized in the context of overvalued currencies, driven either

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[277] Ibid.
[278] Ibid.
[279] Ibid.
[280] Ibid.
[281] Ibid.
[282] Ibid.
[283] Ibid.
[284] WTO and ILO 188.
[285] Ibid.
[286] Ibid.
[287] Ibid.
[288] Ibid.

by disinflationary monetary policies or by large foreign aid inflows.[289] Over-valuation squeezes tradable industries further, damaging especially the more modern ones in manufacturing that operate on tight profit margins.[290] Asian countries, by contrast, have often targeted competitive real exchange rates with the express purpose of promoting their tradable industries.[291] Empirical evidence on the role played by the real exchange rate in promoting desirable structural change does exist. Globalization promotes specialization according to comparative advantage.[292] Here there is another potentially important difference among countries. Some countries, many in Latin America and sub-Saharan Africa, are well-endowed with natural resources and primary products.[293] In these economies, opening up to the world economy reduces incentives to diversify towards modern manufactures and reinforces traditional specialization patterns.[294]

Some primary sectors such as mining do operate at very high levels of labour productivity.[295] As such in economies with a comparative advantage in natural resources, the positive contribution of structural change associated with participation in international markets to be limited is expected.[296] Asian countries, most of which are well endowed with labour but not natural resources, have a natural advantage here.[297] The rate at which structural change in the direction of modern activities takes place can also be influenced by the ease of entry and exit into industry and by the flexibility of labour markets.[298] Intersectoral re-allocation within manufacturing industries is slowed down by entry barriers.[299] When employment conditions are perceived as "rigid", say because of firing costs that are too high, firms are likely to respond to new opportunities by upgrading plant and equipment (capital deepening) rather than by hiring new workers.[300] This slows down the transition of workers to modern economic activities.[301]

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[289] WTO and ILO 76.
[290] Ibid.
[291] Ibid.
[292] Ibid.
[293] WTO and ILO 76.
[294] Ibid.
[295] Ibid.
[296] Ibid.
[297] Ibid.
[298] Ibid.
[299] Ibid.
[300] Ibid.
[301] Ibid.

There is a very strong and negative association between a country's reliance on primary products and the rate at which structural change contributes to growth.[302] Countries that specialize in primary products are at a distinct disadvantage.[303] Agriculture's share in employment now becomes statistically significant.[304] This indicates the presence of conditional convergence: conditional on not having a strong comparative advantage in primary products, but starting out with a large countryside of surplus workers does help.[305] Once the comparative advantage indicator is entered, the co-efficients on regional models are slashed and they are no longer statistically significant.[306] In other words, comparative advantage and the initial agricultural share can jointly fully explain the large differences in average performance across regions.[307] Countries that do well are those that start out with a lot of workers in agriculture but do not have a strong comparative advantage in primary products.[308] That most Asian countries fit this characterization explains the Asian difference highlighted above.[309] Developing countries such as those in the Southern African region might do well to follow the holistic approach to development followed by the Asians. Greater care though must be placed on not rushing to follow the current Chinese trade practices where labour standards are involved. However, what must be embraced is the notion that industrialisation goes beyond the reliance on poor labour standards as a competitive advantage but is determined by holistic national policies that complement free trade to ensure development.

4 5 LEGAL THEORIES AND THE TRADE-LABOUR LINKAGE PROPOSALS

As already alluded to in this chapter, developing countries view proposals to establish linkages between trade and social policies as part of developed countries' protectionist agenda whereas developed countries regard such an approach as a mechanism for improving the social welfare of citizens of developing countries and of the world by avoiding a race to the bottom.[310] This

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[302] Ibid 78.
[303] See Autor, Levy and Murnane "The Skill Content of Recent Technological Change: An Empirical Exploration" 2003 *Quarterly Journal of Economics* 1279.
[304] WTO and ILO 76.
[305] Autor *et al* 1279.
[306] WTO and ILO 78.
[307] Ibid.
[308] Ibid.
[309] Ibid.

divergence in opinions has not undermined the long-standing concern regarding the potential negative effects of trade with countries which have policies that are considered to violate basic human rights.[311] Whilst it may be argued that there are many different understandings of what constitute human rights, such concerns are not implausible.[312] One such concern is founded on a need to protect workers from economic exploitation. Social reformers in the first half of the 19th century at the early stages of the Industrial revolution were the first to promote a trade policy-labour standards linkage in attempts to protect workers from economic exploitation and redistribute economic gains.[313] The social reformers' proposals resulted in the argument that workers' rights, to the extent that they are conceived of as basic human rights, should be protected in trade.[314] Workers' rights which have increasingly come to be viewed as a fundamental element of customary international law are known as core labour standards.[315]

The fact that core labour standards are human rights is uncontroversial.[316] This could be regarded as implying that if core labour standards are human rights then there is a need to protect them by way of incorporation into the legal framework of the WTO.[317] The basis of such a proposal could rest in the argument that the collective supply of public goods, such as the global division of labour, may not be politically feasible without comprehensive package deals including solitary responses to market failures and redistributive justice.[318] Liberal trade rules must be supplemented by competition and social rules promoting fair opportunities and the

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[310] Trebilcock *Understanding Trade Law* (2011) 170.

[311] Lester, Mercurio and Davies *World Trade Law: Text, Materials and Commentary* (2012) 879.

[312] A prime example of such concerns is the global revulsion at South Africa's Apartheid Policy. Apartheid South Africa's racial discrimination and segregation practices in the 1980s were regarded as inhumane resulting in widespread boycotts of South Africa and of foreign companies doing business in the country. Another example is that of the United States of America's decision not to purchase from companies doing business in Burma/Myanmar because of the government's alleged human rights abuse. See Lester *et al* 879.

[313] Trebilcock 170.

[314] Trebilcock 172.

[315] Core labour standards were outlined in the 1998 International Labour Organisation Declaration of Fundamental Principles and Rights at Work as well as the United Nations (UN) Universal Declaration of Human Rights and the UN Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. They are as follows: 1) Freedom of association and the right to engage in collective bargaining; 2) the elimination of forced labour; 3) the elimination of child labour; and 4) the elimination of discrimination in employment.

[316] Lester *et al* 878.

[317] Petersmann "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration" 2002 *European Journal of International Law* 621.

[318] Lester *et al* 883.

equitable distribution of gains from trade.[319] This conceptual framework would thus require that global trade integration law must pursue not only economic efficiency but also democratic legitimacy and social justice as defined by human rights.[320] To achieve the universal recognition and legal protection of inalienable human rights at national, regional and global levels, there might be a need to develop a new human rights culture and a citizen-oriented national and international constitutional framework different from the power-oriented, state-centred conceptions of traditional international law.[321] This proposition is underpinned by the understanding that human rights are:

> "…distinct from…constitutional rights, or rights of democratic citizenship, or from other kinds of rights that belong to certain kinds of political institutions, both individualist and associationist…They are a special class of universal application and hardly controversial in their general intention. They are part of a reasonable law of peoples and specify limits on the domestic institutions required of all peoples by that law. In this sense they specify the outer boundary of admissible domestic law of societies in good standing in a just society of peoples. They have these three roles: 1) They are a necessary condition of a regime's legitimacy and of its legal order; 2) By being in place, they are also sufficient to exclude justified and forceful intention by other peoples, say by economic sanctions, or in grave cases, by military force; and 3) They set a limit on pluralism among peoples."[322]

A conceptual framework that considers liberal trade rules supplemented by competition and social rules promoting fair opportunities and the equitable distribution of gains from trade is substantiated by proposals for establishing a trade policy-labour standards linkage within the legal framework of the WTO. It is submitted that such a linkage is complex and controversial.[323] Julius Nyerere, the late former president of Tanzania once argued that, "Universal social principles are possible; but universal social standards are not."[324] According to Nyerere:

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[319] Ibid.
[320] Ibid.
[321] Lester *et al* 884.
[322] Freeman *Introduction to Jurisprudence* (2008) 655.
[323] Collier and Bamu "Linking Trade and Labour Standards: A Promising Synergy or a Double-Edged Sword" http://www.sabinet.co.za/abstracts/ju_jur/ju_jur_2012_a17.html (accessed 13-02-2013).
[324] Nyerere "Are Universal Social Standards Possible?" 1999 *Development in Practice* 583. Nyerere opined: "For if there is no effective restraint upon the rich and the strong, then their interests will prevail, regardless of the needs (let alone the interests) of the poor. In this fact lies the almost unanimous Southern hostility to the proposal that 'Trade Related Social Standards' be brought into the orbit of the WTO rather (or as well as) the ILO. For, compared with the WTO, the ILO is democratic in structure, and it does not seek to usurp the national sovereignty of any state [Sic]." While Nyerere's opinion might on the whole be plausible from an African perspective, it begs the question of how the poor in Africa would be protected from a collusion of rich self serving politicians and executives of multinational corporations seeking to maximise profits in Africa. It also

> "When you have…cultural and resource diversity, on what basis is a 'universal' standard to be worked out, and who is to decide on it? The assumption is that what we have in mind is the universalisation of Western concepts and standards. But why? Those concepts and standards are based on Western history and Western, on high (and rapidly changing) technology, and on levels of personal and communal consumption which are not universal now and which the world's resources cannot sustain on a global basis."[325]

Whether Nyerere's opinions are plausible can only be evaluated through an analysis of legal theories which could qualify or nullify proposals for a global approach to protecting core labour standards in trade.[326]

4 5 1 Utilitarian Theory

Utilitarianism is a normative ethical theory that places the locus of right and wrong solely on the outcomes of choosing one action or policy over other actions or policies.[327] As such, it moves beyond the scope of one's own interests and takes into account the interests of others.[328] There are many kinds of utilitarianism but Bentham's classical utilitarianism theory is commonly used. Bentham's Principle of Utility:

> "1) Recognizes the fundamental role of pain and pleasure in human life; 2) approves or disapproves of an action on the basis of the amount of pain or pleasure brought about i.e,

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raises serious questions about the value placed on human rights in developing countries. However, Nyerere appears to suggest, from inference, that a reformed WTO which does not interfere with the sovereignty of countries could be in a position to promote and protect the interests of the poor. See Nyerere 586.

[325] Nyerere 583. Nyerere contends: "Developing countries see no need for further international intervention beyond the existence and the present powers of the International Labour Organisation. And, furthermore, past experience in other areas has demonstrated that if the WTO is given powers to apply sanctions on this matter they will be used exclusively against the developing countries-and even then not with any consistency. They will become another stick to use against a developing country (democratic or otherwise) which tries to determine its own domestic policies in any area, and to implement them." See Nyerere 586. However, Nyerere appears to avoid addressing the question of how domestic policies adopted by developing countries and which do not work in the best interests of the poor are to be dealt with, how and by whom.

[326] Nyerere makes a startling remark regardless of his apparent anti-global protection of social standards. He states, "Finally, a word on solidarity. In this struggle against the injustice of poverty and the powerlessness of the poor, the solidarity of the people in the North is essential for ultimate success. Indeed, the poor in the developing countries will not be able to achieve decent living conditions for themselves without active solidarity from people in the North who believe in justice and equality but are themselves not necessarily poor, and who have some power in their own countries. These are the people who have access to the media of the North, who have democratic power to influence the policies of their governments, and who can influence the actions of transnational corporations based in the North." See Nyerere 586-7. Nyerere's remarks appear to suggest that regardless of his sentiments regarding an anti-global approach to the application of social standards, he realises the importance of global cooperation for poverty alleviation. This is a role that a human rights approach to multilateral trade could play.

[327] Twining *General Jurisprudence: Understanding Law from a Global Perspective* (2009) 133.

[328] Ibid.

> consequences; 3) equates good with pleasure and evil with pain; and 4) asserts that pleasure and pain are capable of quantification (and hence 'measure')."[329]

In measuring pleasure and pain, Bentham introduces the following criteria: intensity, duration, certainty (or uncertainty), and its nearness (or fairness).[330] He also includes its "fecundity" (will more of the same follow?) and its "purity" (its pleasure will not be followed by pain and vice versa).[331] In considering actions that affect numbers of people, they must also account for its extent.[332] Mill adjusted the more hedonistic tendencies in Bentham's philosophy by emphasizing:

> "(1) It is not the quantity of pleasure, but the quality of happiness that is central to utilitarianism, (2) the calculus is unreasonable-qualities cannot be quantified (there is a distinction between 'higher' and 'lower' pleasures), and (3) utilitarianism refers to "the Greatest Happiness Principle" it seeks to promote the capability of achieving happiness (higher pleasures) for the most amount of people (this is its "extent")." [333]

The principle of utility can be applied to either particular actions or general rules. The former is called "act-utilitarianism"[334] and the latter is called "rule-utilitarianism."[335] With act-utilitarianism, the principle of utility is applied directly to each alternative act in a situation of choice.[336] The right act is then defined as the one which brings about the best results (or the least amount of bad results).[337] This view which points to the difficulty of attaining a full knowledge and certainty of the consequences of our actions nevertheless forms a basis of criticism since it is possible to justify immoral acts using act-utilitarianism.[338] For example it would be plausible to end a regional war by torturing children whose fathers are rebel soldiers in order to compel them to reveal the hide outs of the fathers. It would also be plausible to reject a trade-labour linkage and opt for the continued violation of workers' rights in the interest of maximising short-term gains from trade. It would thus be imperative to question whether or not it is the right action to

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[329] Bentham *Introduction to the Principles of Morals and Legislation* (1970).
[330] Ibid.
[331] Ibid.
[332] Ibid.
[333] Cavalier "Utilitarian Theories" http://caae.phil.cmu.edu/Cavalier/80130/part2/sect9.html (accessed 15-02-2013).
[334] According to act-utilitarianism, it is the value of the consequences of the particular act that counts when determining whether the act is right or wrong.
[335] Instead of looking at the consequences of a particular act, rule-utilitarianism determines the rightness of an act by a different method. It uses the best rule conduct. This is done by finding the value of the consequences of following a particular rule. The rule the following of which has the best overall consequences is the best rule.
[336] Cavalier 10.
[337] Ibid.
[338] Ibid.

exclude a social clause from the WTO legal framework in the interest of maximising short-term economic gains. It must further be established as to whether or not doing so would promote the achievement of happiness for the majority of people in the world. It would appear that the miserable majority of workers in the world would prefer a trade-labour linkage as opposed to the capitalists and some political leaders who prefer a trade regime which does not emphasise the need to protect workers' interests as this study will argue.

As regards rule-utilitarianism, the principle of utility is used to determine the validity of rules of conduct (moral principles).[339] A rule like promise-keeping is established by looking at the consequences of a world in which people broke promises at will and a world in which promises were binding.[340] Right and wrong are then defined as following or breaking those rules.[341] This would imply that if countries commit themselves to protecting human rights in international law, they must fulfil such an obligation to the best extents possible without advancing any excuses (such as their levels of development or otherwise). This could lead to the incorporation of core labour standards as human rights into the WTO legal framework. Critics of this position point out that if the rules take into account more and more exceptions, rule-utilitarianism collapses into act-utilitarianism.[342]

More general criticisms of this view are that it is possible to generate "unjust rules" according to the principle of utility.[343] For example, slavery might be right if it led to an overall achievement of cultivated happiness at the expense of some mistreated individuals.[344] The utilitarian theory allows decisions, that when made, can be contradictory in nature.[345] If breaking a law would result in greater satisfaction, should the law be broken? If so there would be no purpose or value of any law. If one finds satisfaction by his own twisted or cruel morals, should such individual be allowed to act in such a way? If the answer to these questions is no, it might be plausible to argue that a social clause might be necessary in regulating international trade practices, especially where the violation of core labour standards is concerned.

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339 Ibid.
340 Ibid.
341 Ibid.
342 Ibid.
343 Ibid.
344 Ibid.
345 Ibid.

4 5 2 Natural Law Theory

Natural law, or the law of nature (*lex naturalis*), is a system of law that is purportedly determined by nature, and thus universal.[346] It is a law or body of laws that derives from nature and is believed to be binding upon human actions apart from or in conjunction with laws established by human authority.[347] Classically, natural law refers to the use of reason to analyze human nature (both social and personal) and deduce binding rules of moral behavior.[348] Natural law is contrasted with the positive law (meaning "man-made law," not "good law") of a given political community, society, or nation-state, and thus serves as a standard by which to evaluate the said positive law.[349] According to natural law theory, which holds that morality is a function of human nature and reason, valid moral principles can be discovered by looking at the nature of humanity in society.[350]

Theories of natural law are reflective critical accounts of the constitutive aspects of the well-being and fulfilment of human persons and the communities they form.[351] The propositions that pick out fundamental aspects of human flourishing are directive (that is, prescriptive) in humanity's thinking about what to do and refrain from doing (practical reason).[352] They are, or provide, more than merely instrumental reasons for action and self-restraint.[353] When these foundational principles of practical reflection are taken together (that is, integrally), they entail norms that may exclude certain options and require other options in situations of morally significant choosing.[354] Natural law theories, then, propose to identify principles of right action (moral principles) specifying the first and most general principle of morality, namely, that one should choose and act in ways that are compatible with a will towards integral human fulfilment.[355] Among these principles is a respect for the rights people possess simply by virtue

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[346] Strauss "Natural Law" 1968 *International Encyclopedia of the Social Sciences* 10.
[347] Ratnapala *Jurisprudence* (2009) 122.
[348] Ibid.
[349] Ibid.
[350] Ibid.
[351] George "Natural Law" 2007 *Harvard Journal of law and Public Policy* 172.
[352] Ibid.
[353] Ibid.
[354] George 172.
[355] Finnis, Boyle and Grisez *Nuclear Deterrence, Morality and Realism* (1987) 281.

of their humanity, rights which, as a matter of justice, others are bound to respect and governments are bound not only to respect but, to the extent possible, also to protect.[356]

The law of nations (*ius gentium*) provides that travellers may carry on trade so long as they do no harm to the citizens; and second, in the same way it can be proved that this is lawful in divine law.[357] Therefore any human enactment (*lex*) which prohibited such treatment would indubitably be unreasonable.[358] James argues that a liberal international economic order (the result of market-led globalisation) cannot rest, simply or even mainly, on "utilitarian" or "realist" foundations.[359] Utilitarianism, at its crude "economistic" extreme, holds that the material prosperity globalisation generates is ample justification and political realism stresses the framework of power relations that keeps an open, peaceful international order in place.[360] But these arguments invite an anti-globalisation backlash, for material prosperity is not enough ("Man does not live on bread alone"), and globalisation is in any case rigged in favour of big powers (so its detractors believe).[361] Missing is a defence of a liberal international economic order grounded in ideas and shared values, relating the processes of globalisation and the institutions of international order to the fundamentals of, *inter alia*, property rights, individual freedom and individual dignity.[362] James further argues that the natural-law tradition is the right framework for such an undertaking, and that it should lead all the way to policy inferences for today and tomorrow.[363]

The policy inferences could start with an investigation of the idea of the theory of labour law as a tool for social engineering subject to reason. One could start by making efficiency or welfare considerations, in order to justify rules that address market failures caused by transaction costs and asymmetric information, problems arising in the governance of contracts of

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[356] George 172-73. George notes that, "By reflecting on the basic goods of human nature, especially those most immediately pertaining to social and political life, natural law theorists propose to arrive at a sound understanding of principles of justice, including those principles we call human rights."

[357] Sally "Natural Law and International Trade: What Lessons for Trade Policy Today?" http://www.ecipe.org/media/external_publication_pdfs/Natural%20law%20and%20international%20trade%20Razeen%20Sally.pdf (accessed 15-02-2013).

[358] Ibid.

[359] See James "Globalisation, Empire and Natural Law" 2008 *International Affairs* 421.

[360] De Vittoria "On the American Indians" in Brown, Nardin and Rengger (eds.) *International Relations in Political Thought: Texts from the First World War* (2002) 235.

[361] Sally 1.

[362] Ibid.

[363] James 421.

employment such as coercion and opportunism, and more generally the desirability of promoting productive efficiency and competitiveness through a well coordinated and flexible division of labour.[364] From this perspective Collins argues that:

> "…labour law addresses the idiosyncratic problems that arise in relation to contracts of employment through a mixture of special contract law and market regulation. The other predominant strand of justification for labour law appeals to considerations of a fair distribution of wealth, power, and other goods in a society. On this view, the principal aim of labour law is to steer towards a particular conception of social justice, such as a more egalitarian society, and the norms of labour law are required primarily for the instrumental purpose of securing that goal. This second strand of justification tends to support the practice of collective bargaining and the imposition of basic labour standards such as a minimum wage, because these interventions in the labour market are calculated to improve the position of poorer and weaker members of the society."[365]

However, these justifications for labour law are evidently vulnerable to critiques that question whether the goals justify the means used in labour law. The problem is that the efficiency-based justifications for labour law can be deployed in ways that propose the dismantling of most of the special rules for employment.[366] At the same time, the social justice justifications for labour law have been challenged both on the ground that they lack merit and for the reason that, even if they possess some worthwhile aims, these goals should be pursued through other, less intrusive, governmental measures involving taxation and expenditure on welfare, leaving the market free to maximize the wealth of a society as a whole.[367] Combining this two-pronged critique of traditional justifications for labour law, it seems possible to justify the elimination of labour law altogether and to replace it with a general freedom of contract regime.[368] One can, of course, take issue with this sort of conclusion as workers are already the weaker party to the employment relationship and require more protection at law.

Using a different economic analysis and a more complex conception of social justice than welfare maximization, one can produce a different outcome that justifies quite an elaborate

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[364] Collins "The Theories of Rights as Justifications for Labour Law" http://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/collins/ch9.pdf (accessed 15-02-2013).
[365] Ibid.
[366] Spector "Philosophical Foundations of Labor Law" 2006 *Florida State University Law Review* 119.
[367] Ibid.
[368] Ibid.

labour law system.[369] For example, a combination of an appreciation of the persistence of certain kinds of market failures in the labour market combined with the insights of behavioural economics that individuals do not make rational assessments of risks in contracting can lead to justifications for fairly detailed mandatory protections for workers.[370] Even such efficiency-based theories remain vulnerable to the further charge from the New Right[371] of excessive paternalism: employers and workers are adults and should be permitted to fashion their contracts according to their preferences, whether or not they invariably reach the most efficient outcomes.[372] It could be better, on this anti-paternalist view, to permit the market to experiment, than to attempt to regulate these arrangements on the basis of imperfect information.[373] Such challenges to the existence of labour law based upon considerations of efficiency and welfare are not merely theoretical. Legal regimes steer markets or capitalist societies through many legal measures designed to protect their economic institutions and mechanisms.[374] Not only does the law vindicate private property rights and contractual agreements, it also ensures that the competitive market cannot be subverted by participants through anti-competitive measures.[375]

Regardless of the challenges in understanding the theory of natural in social and economic matters, natural law thinking has occupied an all-encompassing role in the realms of ethics, politics and law.[376] It has formed an important weapon in political and legal ideology.[377] Essentially it has afforded moral justification for existing social and economic systems and their legal systems.[378] By arguing what is, the law is based on a higher law dictated by reason and so

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369 Ibid.

370 Epstein "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation" 1983 *Yale Law Journal* 1357.

371 Murray *Losing Ground: American Social Policy* (1984) 5. New Right is used in several countries as a descriptive term for various policies or groups that are right-wing (Right-wing describes an outlook or specific position that accepts or supports social hierarchy or social inequality. Social hierarchy or inequality is viewed by those affiliated with the right-wing as inevitable, natural, normal, or desirable, whether it arises through traditional social differences or from competition in market economies). It has also been used to describe the emergence of Eastern European parties after the collapse of Soviet Union and systems using Soviet style communism. The New Right embraces classical liberal economics, traditional social values, and an ardent anti-communism.

372 Epstein "In Defence of the Contract at Will" 1984 University of Chicago Law Review 947.

373 Ibid.

374 Collins 138.

375 Ibid.

376 Freeman *Introduction to Jurisprudence* (2008) 83.

377 Ibid.

378 Ross *On Law and Justice* (1958) 258.

is also what law ought to be.[379] Natural law is thus a rational foundation for moral judgement. Could natural law then be the theoretical basis upon which a trade-labour linkage could be founded? This question remains controversial. However, an analysis of other legal theories may indicate whether there is a legal rationale for establishing a trade-labour linkage to improve the welfare of workers in the world using natural law as its basis.

4 5 3 Sociology of Law

Sociology of law constitutes an immense field of study embracing all aspects of the relations and interactions between law and society.[380] Sociological jurists tend to espouse relativism and reject the belief of naturalism that an ultimate theory of values can be found.[381] They see reality as socially constructed with no natural guide to the solution of many conflicts.[382] The sociologist of law approaches law from the view point of society and its diverse forms of social control.[383] Sociological jurists also believe in the importance of harnessing the techniques of the social sciences, as well as the knowledge culled from sociological research, towards the formulation of a more effective science of law.[384]

Max Weber was the first to develop a systematic sociology of law.[385] His discussion of the relationship between law and capitalism is interesting. Weber was not prepared to explain law as in any way determined by economic forces but as relatively autonomous.[386] Though influenced by economic forces, the law also influences economic and other processes in the society.[387] Weber was of the opinion that economic situations do not automatically give birth to new legal forms but merely provide the opportunity for the spread of legal technique if it is invented.[388] For example, Weber showed how modern rational capitalism needed not just a technical means of production but also a calculable legal system.[389] He argued that the modern capitalist enterprise rests primarily on calculation and presupposes a legal and administrative

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379 Ibid.
380 Ratnapala *Jurisprudence* (2009) 185.
381 Pound *Interpretations of Legal History* (1923) 7.
382 Freeman 834.
383 Ratnapala 188.
384 Ibid.
385 Freeman 839.
386 Weber *Law and Economy in Society* (1954) 131.
387 Ibid. Weber emphasised that though law is not determined by economic forces, it is crucially related to them.
388 Ibid.
389 Weber *The Protestant ethic and the Spirit of Capitalism* (1930) 25.

system whose functioning can be rationally predicted.[390] Using England as a case study, Weber realised how it provided him with some proof of the non-determinant role of economic factors in the development of law.[391] On his part, Pound argued that a sociological jurist:

> "…holds that legal institutions and doctrines are instruments of a specialised form of social control, capable of being improved with reference to their ends by conscious, intelligent effort. He thinks of a process of social engineering, which in one way or another is a problem of all the social sciences. In sociological jurisprudence it is a special problem of achieving this engineering task by means of the legal order…It is treated as a problem of jurisprudence, and yet in its larger aspects as not merely a problem of that science. Law in all its senses is studied as a specialized phase of what in a larger view is a science of history."[392]

Karl Marx also advanced his theory of sociology. He produced an elaborate theory of how society progresses from its ancient tribal roots to feudal society and then to industrial and commercial society.[393] Marx argued that the means of producing livelihood determines the nature of society.[394] In market theory, Marx argued that specialisation and division of labour is an unambiguous good as it leads to greater efficiency, and hence to the production of more goods that are better and cheaper.[395] Marx acknowledged that advantage, but argued that:

> "…the division of labour inevitably leads to the exploitation of some groups by others. He thought that the process would lead to the concentration of property and capital in an ever smaller group, at the expense of an ever larger population of propertyless and exploited workers…called the proletariat. This would lead to 'alienation' of the latter group and to class conflict."[396]

Marx's observations mirror the developments between the employer and employee in the global era. The ever enlarging gap between the rich and the poor has led to tensions between the two classes with industrial actions being a common feature of the workplace. However, Marx rightly observed that:

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[390] Weber *Economy and Society* (1978) 1394.
[391] Ibid.
[392] Pound "Sociology of Law and Sociological Jurisprudence" 1943 *The University of Toronto Law Journal* 20.
[393] Ratnapala 190.
[394] Ibid. Marx opined, "There is no concept of private property and the laws are determined by the conditions of primitive existence."
[395] Marx and Engels *The German Ideology* (1973) 43.
[396] Marx and Engels 56.

> "The law of a society changes to reflect the ways in which people produce the means of their livelihood. Every social system has a base and a superstructure. The economic relations constitute that base of the society. Law, state and the popular consciousness (understanding) of the base constitute the superstructure. The base and the superstructure are inter-dependent. The base gives rise to the superstructure and the superstructure protects and reinforces the base. The superstructure changes to reflect the changes in the base…the emergence of industrial and commercial modes of production brings about further dramatic changes in the law, state and beliefs. The whole system of law, including contract and property law and labour law, is adapted to facilitate commerce and industry."[397]

From Marx's argument, it could be argued that the economic performance of a society determines how the law protects its people. If there was to be an increase in the economic output of a society, then the protection levels of the law to the people should improve. What happens if this does not occur, with profits continually remaining in the hands of a few capitalists? Marx had a simple answer to this question. The capitalist society would inevitably come to an end. Marx predicted that, "The concentration of capital in an ever diminishing class would worsen the condition of the proletariat to the point at which they would naturally rise in revolt, overthrow the capitalist state and establish a dictatorship of the workers. The dictatorship would be transitory…would abolish capitalism and class divisions, and bring about a communist society…"[398] Marx's views are plausible if one considers the conflict between the capitalists and workers in the modern world.

Marx's views are however contradicted by social anthropologists who argue that Marx's top down "law as domination" view hardly fits the modern democracy.[399] Law making is viewed as a messy process with outcomes determined by the interplay of interest group politics, often against the interests of the ruling elites.[400] Ratnapala argues that, "In conceiving the role of law purely in terms of enforcement of capitalist economic relations, Marx overlooked the law's value in facilitating cooperation within and across classes."[401] However, it is important to observe that

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[397] Marx and Engels 81.
[398] Marx and Engels 94.
[399] Ratnapala 191.
[400] Ibid.

[401] Ratnapala 191-192. See also Rock "The Sociology of Deviancy and Conceptions of Moral Order" 1974 British Journal of Criminology 144. Rock argued that Marx's perspective, "…offers no understanding of law as a

whilst Marx's views regarding the alienation of the proletariat did not occur in the industrialised democracies since their workers became property owners and shareholders and the welfare state taxed capital and profits and distributed wealth,[402] the same cannot be said of workers in developing countries. Marx's views appear to be plausible regarding the developments currently unfolding in developing countries. This might be indicative of the need to establish if the law is in order, with the objective of attaining solidarity in a society. Establishing whether the law is in order can only be achieved if one knows what the law means. Durkheim understood the broad view of law as referring to a rule of sanctioned conduct.[403] He viewed sanctions as changing according:

> "…to the importance of the rule within the community-the place the rule holds in the public consciousness. Laws can be classified according to the nature of sanctions. There are two types of sanctions: repressive and restitutive. Repressive sanctions are meant not to inflict suffering but to restore the parties to the position that they were in before the unlawful act was committed. Restitutive sanctions are characteristic of civil law, including commercial law, procedural law, administrative law and constitutional law."[404]

The position established from Durkheim's view according to Ratnapala is that, "The type of law in a society is the indicator of the type of social solidarity. The type of sanction is the indicator of the type of law."[405] If the law is a tool to achieve social solidarity through bringing people together in a diverse society much as to create a technologically advanced society, then there might be need to have laws that ensure a balance of interests between employers and employees. Durkheim concludes that:

> "Traders want their customers to prosper so that they can remain in business. This then is the bond or solidarity between producers and consumers…We are thus led to consider the division of labour in a new light. In this instance, the economic services that it can render are picayune compared to the moral effect that it produces, and its true function is to create

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complex and variegated rule-system whose origins are frequently as mysterious to elites as to the governed. It offers no vision of a legal system as a series of constraints upon law-giver and ruled alike. It does not refer to legitimacy and authority other than in the context of manipulation and mystification. It does not provide for elaborate patterns of accommodation that characterise many social situations of social control."

[402] Ratnapala 192.

[403] Durkheim *The Division of Labour in Society* (1964) 56.

[404] Durkheim 69.

[405] Ratnapala 200.

in two or more persons a feeling of solidarity. In whatever manner the result is obtained, its aim is to cause coherence among friends and to stamp them with its seal."[406]

Perhaps the views of the sociologists of law could be crucial in balancing the interests of business and that of workers regarding gains from trade. If not such a balance could be achieved through the distributive justice theory.

4 5 4 Distributive Justice Theory

The chasm between the rich and the poor has become unfathomable.[407] The aim of distributive justice is to bring about and maintain a just distribution of benefits and burdens in society.[408] Campbell has argued that, "…it remains illuminating to say that justice has to do with the distribution amongst persons of benefits and burdens, these being loosely defined so as to cover any desirable or undesirable experience."[409] Distributive justice is also known as social justice because the duty of bringing about a just distribution is thought to be a social obligation.[410] The starting point of most social justice theories is the proposition that all persons should share equally the benefits and burdens in society with any departure from the principle of material equality having to be justified.[411] Hayek argued that:

> "There is no reason why in a free society government should not assure to all protection against severe deprivation in the form of a minimum income, or a floor below which nobody needed to descend. To enter into such an insurance against extreme misfortune may well be in the interest of all; or it may be felt to be a clear moral duty of all to assist, within the organised community, those who cannot help themselves."[412]

Distributive justice is a far reaching goal which aims at reordering economic relations to achieve a just distribution of all benefits and burdens in society.[413] Rawls articulated his conception of distributive justice as demanding:

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[406] Durkheim 56.
[407] Stark "Jam Tomorrow: Distributive Justice and The Limits of International Economic Law" 2010 *Boston College Third World Law Journal* 3.
[408] Ratnapala 333.
[409] Campbell *Justice* (1988) 19. See also Barry *A Treatise on Social Justice* (1989) 355. Barry argued that, "When we ask about the justice of an institution we are inquiring into the way in which it distributes benefits and burdens."
[410] See Ratnapala 333. See also Roederer and Moellendorf *Jurisprudence* (2004) 393.
[411] Ratnapala 334.
[412] Hayek *Law, Legislation and Liberty* (1982) 87.

[413] Ratnapala 335.

> "1) The maximisation of liberty, subject only to such constraints as are essential for the protection of liberty itself; 2) equality for all, both in the basic liberties of social life and also in distribution of all other forms of social goods, subject only to the exception that inequalities may be permitted if they produce the greatest possible benefit for those least well off in a given scheme of inequality (the difference principle); and 3) 'fair equality of opportunity' and elimination of all inequalities of opportunity based on birth or wealth."[414]

Rawls's conception of distributive justice must not be misconstrued with utilitarianism. Freeman observed that Rawls's theory differs from utilitarianism in three significant ways in that:

> "First, utilitarians can accept inequalities, social arrangements in which some benefit at the expense of others, provided the benefits (or pleasures) exceed the costs (or pains), so that the outcome is the maximisation of overall welfare level ('the greatest happiness of the greatest number'). This may be thought unjust. Secondly, while utilitarians defend liberty and political rights, they have no objection to limiting liberty or restricting political rights, provided doing so would promote greater wellbeing. Rawls's first principle (the equal maximum liberty principle) means that there are some rights such as the right to freedom of speech and association which every system must respect. Such rights may not be sacrificed to increase aggregate welfare level. Rawls's conception of benefits is different from utilitarianism, which is concerned with welfare. Rawls by contrast, defines benefits in terms of 'primary goods' liberty and opportunity, income and wealth and the bases of self-respect. These need not be considered desirable in themselves but they give persons the opportunities rationally to further their own autonomy."[415]

However, it must be established whether existing international economic law can be used to bridge this chasm and implement the socio-economic policies implicit in the distributive justice theory. It must be questioned whether distributive justice can occur under the current international economic order. It must also be established whether neoliberalism can be relied upon to produce distributive justice. As a United Nations study explained, global wealth is distributed so that the richest two per cent of adult individuals in the world own half of all global

[414] Rawls *A Theory of Justice* (1972) 291.
[415] Freeman 584.

wealth.[416] While the number of people living in poverty has increased by almost 100 million, there are more billionaires than ever before.[417]

It might be plausible to argue that in the current state of international economic law (in particular WTO law), distributive justice might not occur as it is clearly not one of the objectives of international economic law. The reason for this view is that just as capitalist states shaped international law in the 1920s, and colonialism shaped early international conceptions of sovereignty, today neoliberal ideology shapes the institutions, such as the International Monetary Fund (IMF), the World Bank and the WTO.[418] These institutions, whose policies collectively account for international economic law, arose post-World War II.[419] In fact, the World Bank was established by those who met at Bretton Woods in 1944 to finance reconstruction in Europe after World War II.[420] In 1960, the International Development Association (IDA) was established within the World Bank to focus on the needs of the poorest states.[421] Although that objective was expressly defined, it is clear that distributive justice has never been the focus of international economic law. Rather, international economic law, operating through the institutions of the IMF and the WTO, has focused more on trade.[422] The premise behind this fixation on trade is that boosting economic growth through trade is key to reducing poverty and inequality.[423] This premise, however, has been criticized as the self-serving ideology of the developed states.[424]

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[416] See United Nations University World Institute for Development Economics Research, Discussion Paper No. 2008/03, 2008.

[417] Konigsberg "A New Class War: The Haves vs. The Have Mores" New York Times 19 November 2006. Konigsberg alluded to the statement made by Barack Obama the President of the United States of America who called the billionaires people who, "make more in ten minutes than a worker makes in ten months."

[418] Alvarez "Factors Driving and Constraining the Incorporation of International Law in WTO Adjudication" in Merit (eds) *The WTO: Governance, Dispute Settlement, and Developing Countries* (2008) 611. See also Carmody "A Theory of WTO Law" 2008 *Journal of International Economic Law* 527. Carmody argues that there is a general political liberal theory behind the WTO but no established legal theory. Such a development does not promote distributive justice. See also Escobar *Encountering Development: The Making and Unmaking of the Third World* (1995) 72.

[419] Stark 14.

[420] Ibid. See also Mandeville "United Nations Development Programme" in Forsythe (ed) *Oxford Encyclopedia of Human Rights* (2009) 150.

[421] Carter, Erwin, Kirsch, Lynn, Marazzi, Rajput and Singh *International Law* (2003) 483.

[422] Trachtman "Welcome to Cosmopolis, World of Boundless Opportunity" 2006 *Cornell International Law Journal* 477.

[423] Escobar 21.

[424] Stark 14.

According to Escobar, liberal ideology has shaped development discourse for its own purpose beginning with the "discovery" of poverty after World War II.[425]

4 5 5 Rational Choice Theory in Law and Economics

The great appeal of law and economics has been its use of a coherent theory of human decision making, rational choice theory,[426] to examine legal rules and institutions.[427] Law and economics can be defined as the application of economic theory primarily microeconomics and the basic concepts of welfare economics-to examine the formation, structure, processes, and economic impact of law and legal institutions.[428] The law and economics movement is an attempt to place economic theory alongside of or in place of the legal and political theory that presently informs law; to place efficiency alongside of or in place of the concepts of justice and/or fairness that presently help fashion legal rules and doctrines.[429]

The law and economics theory is important to the social clause construction if it is considered that the law and economics tradition has often taken a position which is largely hostile to labour market regulation.[430] There appeared to be a consensus developed by business according to which the solution to rigidities caused by labour law lay in deregulation of the labour market.[431] However, the law and economic theory has been rediscovering some of the benefits of market regulation.[432] A sophisticated view of contract suggests that in unregulated markets, there are significant barriers to both static and dynamic efficiency in situations of repeated or long-term exchange.[433] In particular, where workers invest in firm-specific skills, an appropriate incentive structure should incorporate a degree of protection of the employee against

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[425] Escobar 21.

[426] Mercuro "The Jurisprudential Niche Occupied by Law and Economics" 2009 *The Journal Jurisprudence* 61. The rational choice theory is at the heart of modern economic theory and in the disciplines contiguous to economics, such as some parts of political science, decision theory, sociology, history and law that have adopted the theory as their model of decision making.

[427] Black "Re-examining the Law and Economics Theory of Corporate Governance" 2003 *Challenge* 22.

[428] Mercuro 62.

[429] Ibid. Mercuro argued, "Today, much of the conventional study of law is organized around modern doctrinal principles and concepts drawn from legal theory and political theory…In order to understand the jurisprudential niche occupied by law and economics in law today, it is important to see Law and Economics as part of the evolution of law, more particularly, the evolution of ways to think about the law."

[430] Deakin and Wilkinson "Labour Law and Economic Theory: A Reappraisal" 1998 Economic and Social Research Council Centre of Business Research, University of Cambridge Working Paper No. 92.

[431] Ibid.

[432] Ibid.

[433] Ibid.

arbitrary treatment by management and some guarantee of continuing employment.[434] Such a view implies that the issue of regulation versus deregulation cannot be decided *a priori*, but requires instead a more detailed empirical analysis of the sources of transaction cost and of impediments to contractual cooperation.[435] This new labour market theory has the potential to influence public policy at an important juncture in the debate over labour flexibility and the future of the welfare state.[436]

4 6 CONCLUSION

The reliance on low labour standards as competitive or comparative advantage has been one of the central problems hindering the inclusion of a social clause in the multilateral trade agreements of the WTO.[437] Developing countries have been steadfast over the years in maintaining that low labour standards give them an advantage in trade.[438] They have even relied on the historical evidence of the use of cheap labour under poor conditions during the industrialization process in western countries. The developing countries have viewed any attempts to link trade with labour standards as part of a protectionist agenda which is not in the best interests of their countries. However, theories of law and economics as well as empirical studies have shown that there is no evidence which demonstrates that low labour standards give a country competitive advantage.[439] If anything, empirical evidence reveals that the reliance on

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[434] Ibid.
[435] Ibid.
[436] Ibid.
[437] Lester *et al* 872. Developing countries contend that a trade-labour linkage has no place in the WTO legal framework. Any proposals to bring labour issues into the WTO legal framework would be a bid by developed countries to undermine the comparative advantage of lower wage trading partners which developing countries regard as a direct affront to their efforts to industrialise and raise social standards through economic growth.
[438] Lester *et al* 28. It is submitted that the theory of comparative advantage provides a strong argument regarding how trade can improve global welfare. However, Lester *et al* observe that, "...by itself, it probably should not lead to the conclusion that all tariffs (and other trade barriers) should be removed. There are other factors to consider, and different countries may have different views on how to weigh and balance these factors...At the same time, many tariffs and barriers remain, and trade distorting measures such as subsidies, seem to be growing in number and amount (and others such as anti-dumping laws, are firmly embedded in the system). The answer of most economists is that free trade is the better policy, but this general statement leaves many important sub-issues in the trade debate-for example economic development, the role of subsidies-unanswered."
[439] See Lester *et al* 49. Lester *et al* make a telling observation concerning free trade and the world trading system. They have opined that, "To a great extent, people's views on the benefit of free trade are governed by their general world view. For example, those who have a general skepticism towards big business will often see existing trade agreements as merely a tool for creating a system that is based in their favour. And those who are not particularly concerned with environmental and labour protection will be skeptical of the criticisms made by

low labour standards to enhance trade gains usually leads to little short-term profits and future economic failure. This chapter's objective was not to entirely dismiss the developing countries' reliance upon low labour standards as their comparative advantage but to point out that there are flaws to the comparative advantage theory which developing countries should not ignore. Such shortfalls as this chapter established could reverse the intended gains of employing low labour standards as a comparative advantage in the global era so much that developing countries would have to establish a balance between cheap labour and the need to adjust to new models for development which improve the welfare of their workers.[440] Could this lack of knowledge and detailed research into the real benefits of the comparative advantage theory be the reason why developing countries are struggling to industrialise?

Theoretical studies of infant industry and Keynesian economics refute the efficacy of the theory of comparative advantage.[441] Comparative advantage has also been opposed by mercantilism and economic nationalism theorists who argued that while a country may initially be comparatively disadvantaged in a given industry, such as Japanese cars in the 1950s, countries should shelter and invest in such industries until they become globally competitive.[442] They have

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NGOs which specialize in these areas." Such an approach does not deal with what the fact is but what the interest at that point in time is.

[440] See Lester *et al* 851. Lester *et al* have made a key observation that: "When the modern trade debate began in the nineteenth century, trade policy was almost exclusively an economic issue. The free traders and protectionists each believed that their policies would improve their country's economic well-being (They did not recognise that there was a trade off among different groups within the country. The free traders focused on the benefits to consumers and to producers who used foreign inputs, whereas protectionists emphasised the benefits to specific producers who would be protected from competition)." There were additional aspects to the debate as well, such as national security (in relation to ensuring production of certain security related products). But on the whole, the debate centered on domestic economic policy...Today, by contrast, the trade debate is intimately linked to a wide range of social issues. This change is the result of a number of factors, including...the rise in importance of issues such as environmental protection and human rights, which were not prominent in the nineteenth century; and the general growth of the modern regulatory state." Lester et al's observation must be construed in the light of the fact that GATT Article XX and GATS Article XIV prescribe the need to balance trade and other non-trade related policies.

[441] Jackson 19. Jackson has added his voice to the criticism of the theory of comparative advantage. He argued that, "Often statements about economic theory, including theory of international trade, seem to imply a goal of maximizing 'real' wealth of more and better goods and services. Theorists note that, in a market-oriented, consumer-choice system,, there is room for choices to be non-'real' or non-material...it is purely worrisome that a purely market-driven system tends to reduce the opportunity of those choices, that somehow all the talk about efficiency or competitiveness or gross national product tends to overlook many of these non-material choices." See also Lowenfeld 8. Lowenfeld has already highlighted the inability of the theory of comparative advantage to deal with important issues such as exchange rates and their effect on productivity. These are issues which could potentially prompt developing countries to review their approach to trade, and in particular a trade labour-linkage.

also argued that comparative advantage, as stated, is a static theory which does not account for the possibility of advantage changing through investment or economic development, and therefore does not provide guidance for long-term economic development.[443] This perhaps is the reason why developing countries continue to struggle in their industrialization attempts. It appears as if the more they lower labour standards, the deeper they sink into the grave of economic failure. This might just be a reminder that having politicians pocketing a few dollars at the expense of the masses when TNCs are fast exhausting the mineral and human resources of these developing countries may not be a wise idea. Much of the money generated from the trade practices of TNCs does not often go to the governments of developing countries but to the countries of origin of the TNCs. So who is benefiting from low labour standards?

Is it may be time for developing countries, especially poor countries in regions such as Southern Africa, to reconsider their approach to the trade labour-linkage debate? The theoretical and empirical evidence seems to suggest so.[444] This chapter has shown that those who argue

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[442] The views of the mercantilists are supported by Rodrik who argued that the benefits of trade have been exaggerated by its proponents. See Rodrik "Globalization for Whom? Time to Change the Rules-and Focus on Poor Workers" 2002 *Harvard Magazine* 29. Rodrik noted that: "The captains of the world economy have conceded that progress in international trade and finance has to be measured against the yardsticks of poverty alleviation and sustainable development." Rodrik then argued that: "Policy-makers should 'focus on the fundamentals of economic growth-investment, macroeconomic stability, human resources, good governance-and not let international economic integration dominate their thinking on development'" Rodrik, whilst acknowledging that successful economies become more open, contends that opening an economy through lowering trade barriers does not guarantee success. He points that to the fact that, "...growth performance for most developing countries was better before 1973 than afterwards. The reason for the subsequent collapse....was the failure to sustain macroeconomic stability in response to a series of shocks, particularly the...oil shocks and the debt crisis of the early 1980s." Rodrik's views are critiqued by Easterly who argued that Rodrik's view that "...the level of investment *per se* is of overriding importance (to any country) can be strongly contested". Easterly in justifying his view observed that, "...both Nigeria and Hong Kong increased their physical capital stock per worker by over 250 per cent over the period 1960 to 1985." The results of the investments in the two countries were different as, "Nigeria's output per worker rose by 12 per cent from 1960 to 1985, while Hong Kong's rose by 328 per cent." See Lester *et al* 43. What must be learnt from Easterly's argument is that, countries must not only invest but must measure the returns to their investments. Whilst the benefits for developing countries (as producers) are potentially high, it must be appreciated that free trade, on its own, regardless of the circumstances, will not generate rapid growth. There is need for macro-economic stability, good governance and higher investment in human and physical resources. Governments must also work to ensure the profitability of exports with expanding their capacity for trade. Such a development is likely to improve the general welfare of their citizens.

[443] These views as already alluded to in this chapter have been echoed by Lowenfeld, who whilst avoiding dismissing the relevance of the theory of comparative advantage in the contemporary world, exposes its inability to address issues such a market rates. See Lowenfeld 7-8.

against a trade-labour linkage do not dispute its usefulness but believe that there should be other methods employed until developing countries industrialize. It is worth questioning whether such is the appropriate route to development that is productive for developing countries. Already free trade has resulted in a fall of wages instead of the anticipated rise.[445] The next chapter will undertake an analysis of the incorporation of social clauses in regional trade agreements. It will show that the principles envisaged in incorporating a social clause in the multilateral trade agreements is working in the regional system. Perhaps the integration of a social clause into regional trade agreements justifies the outcomes of the theoretical and empirical studies discussed in this chapter.

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[444] See Chartes and Mercurio 672. Chartes and Mercurio have argued that, "the imposition of fundamental worker rights can be pursued without necessarily injuring a nation's capacity to effectively export and trade with the world system. Furthermore, evidence suggests that many developing countries have (in taking a myopic view of a trade-labour linkage issue) completely ignored the benefits that acceptance of universal labour standards could bring and the correlative role that acceptance could play in the expansion of the world market...any comparative advantage gained by non-compliance with these standards is not advantage that should be shielded or trumped by liberalized trade."

[445] See WTO *Understanding the WTO* (2005) 8-13. It is not clear why trade in some developing countries should be related to low labour standards (including wages). The multilateral trading system has contributed significantly to economic growth, according to the WTO. If international trade can play a significant role in promoting economic development and the alleviation of poverty, why are developing countries (in particular African countries) not developing? Perhaps it could be a combination of poor policy options and pressure to implement policies which do not benefit them exerted by the international community. However it must be questioned whether developing countries do not have a choice to take their own decisions as sovereign nations. In all likelihood they do. Maybe they need to spend time in researching on policies which are suitable with their levels of development without dismissing initiatives such as a trade-labour linkage in multilateral trade. The spillovers of such arrangements could be of benefit to developing countries.

CHAPTER FIVE

The Incorporation of Social Clauses in Bilateral and Regional Trade Agreements

5 1 INTRODUCTION

A lack of agreement within the World Trade Organisation (WTO) concerning the need to incorporate a social clause in the multilateral trade system has led to the adoption of other systems of addressing violations of core labour standards in international trade.[1] Proposals to incorporate social clauses in trade negotiations receiving support from trade unions with employers opposing it have been part of the difference of opinion,[2] whilst in an identical way, developed countries have been and are supporting the insertion of social clauses in trade agreements whereas the majority of developing countries led by fast developing countries such as China and India are against them.[3] This difference in opinion has resulted in countries that are proponents of a trade-labour linkage in the international trade system resorting to unilateral, bilateral or regional trade agreements to include social clauses in their trade agreements.[4]

Leading the agenda in favour of establishing a unilateral system of trade legislation as well as bilateral and regional trade agreements which contain a social clause has been the United States of America (US).[5] The response to the US approach has been fairly positive as several countries in the world, developed or developing, have adopted the US model of incorporating a social clause when formulating their own bilateral or regional trade agreements.[6] The US started the practice of including a social clause in its unilateral trade legislation in 1983 through a law on preferential trade and tax benefits with respect to Caribbean countries.[7] This was followed in 1984 by regulations known as the Generalised System of Preferences (GSP).[8] In 1991, the US

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1 See Grandi "Trade and Labour: What is at Stake for Developing and Developed Countries?" 2011 *Trade Negotiations Insights* 10.

2 Grandi 10.

3 Ibid.

4 See Kolben "Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labour Regimes" 2007 *Harvard International Law Journal* 213.

5 Kolben 213.

6 Ibid.

7 See the Caribbean Basin Economic Recovery Act of 1983.

8 See Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" 2009 *International Centre for Trade and Sustainable Development* 7. The GSPs are guidelines developed by individual developed countries whose application is meant for the exclusive benefit of developing countries. GSPs are thus unilateral and not reciprocal. See also Kolben 2007 *Harvard International Law Journal* 213.

also passed a law on Preferential Trade in relation to Andean countries[9] which had as its objective, the recognition of core labour standards in trade practices between the US and the Andean countries. The rationale for such legislation was that in order for a signatory country to be entitled to benefits originating from a Free Trade Agreement (FTA), such country had to initially comply with internationally recognised labour rights namely, prohibition of all forced or obligatory labour,[10] the right to organise and collective bargaining,[11] the right to association,[12] minimum age for employment of children[13] and minimum working conditions in relation to minimum wage,[14] working hours,[15] health and occupational safety.[16]

This chapter seeks to explore the proposal for incorporating social clauses into unilateral, bilateral and regional trade systems. Possibly, this approach could be important in driving forward efforts to strengthen proposals for incorporating a social clause into the multilateral trade system of the WTO or equally for rejecting such proposals. Emphasis will be placed on the legal mechanisms employed in dealing with parties to unilateral, bilateral or regional trade arrangements which do not comply with core labour standards as envisaged in the FTAs. The North American Free Trade Agreement (NAFTA), which has a defined legal mechanism in this regard, will be critically analysed as regards its dispute resolution mechanism. Such legal mechanisms and the resultant case law emanating from the implementation of the North American Agreement on Labour Cooperation (NAALC), may possibly assist in addressing how the uniform recognition of core labour standards could be achieved in a world with unequal trade partners and where the possibility of sanctions is involved.

If in practice, the inclusion of a social clause in bilateral or regional trade agreements is regarded as a functional legal mechanism for both developed and developing countries, it could form the basis for developing such a legal mechanism into a universally applicable instrument whose framework emanates from the bilateral or regional trade system. It is essential to observe that most of the developed and developing countries which have been entering into the bilateral

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9 See the Andean Trade Preference Act of 1991. The Andean countries are Bolivia, Ecuador, Colombia and Peru.
10 ILO Conventions 29 and 182.
11 ILO Conventions 98 and 154.
12 ILO Convention 87.
13 ILO Convention 138.
14 ILO Convention 131.
15 ILO Convention C001.
16 ILO Conventions 155, 161 and 187.

and regional trade arrangements to be analysed in this chapter, are members of the WTO. This chapter will thus attempt to provide answers relating to the key question of why, regardless of their inequalities, developed and developing countries are entering into bilateral and regional trade agreements which are modeled after the WTO multilateral trade system, when the WTO cannot achieve the same objective. The difficulties faced in including a social clause in the bilateral and regional trade agreements will also be assessed and weighed against their advantages. The chapter begins with an analysis of the inclusion of social clauses in the unilateral trade legislation system of the US.

5 2 THE US UNILATERAL TRADE LEGISLATION SYSTEM

The US has developed a wide range of unilateral trade legislation that specifies special trade benefits and other economic incentives to developing countries which comply with specified labour requirements in their trade practices.[17] The US unilateral trade legislation system has in turn led to the drafting of GSPs[18]. The GSPs, as Compa and Vogt observed, have since become the main unilateral conditionality arrangement in US trade legislation for trading with developing countries.[19] The GSP legislation requires that for a country to be selected as a beneficiary, the US President should initially ascertain whether or not such a country is taking the necessary steps to give its workers internationally recognised workers rights.[20] Should the US President consider that a country is doing so, the US may then extend special tariff reductions above and beyond the standard Most Favoured Nation (MFN) tariff levels agreed to in the WTO.[21]

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[17] See section 2191(a) of the US Foreign Assistance Act of 1961 which governs loans granted by the Overseas Private Investment Corporation and the so called "301 Legislation" in section 2411(d)(3)(B)(iii) which designates violations of workers' rights as a form of unfair trade practice.

[18] Kolben 2007 *Harvard International Law Journal* 213.

[19] See Compa and Vogt "Labor Rights in the Generalized System of Preferences: A 20 Year Review" 2001 *Comparative Labour Law and Policy Journal* 199.

[20] 19 United States Code (USC) section 2462(c)(7) (2000). See also 19 USC section 2467(4) (2000 and Supplementary of 2002) which define internationally recognized worker rights as including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labour, a minimum age for the employment of children, and a prohibition on the worst forms of child labour and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."

[21] This approach may be problematic in the current global era as there are now debates on whether MFN clauses in bilateral trade agreements include only substantive rules or procedural rules of protection as well. See McClure and Smith "Most Favoured Nation Clauses-No favoured View on how they should be Interpreted"

It is questionable whether such an approach may be properly viewed as being transparent for the incorporation of a social clause in the multilateral trade system. As a matter of fact, one may regard it as being somewhat illegal by nature. It is especially doubtful whether a sole President, regardless of whether he is advised or not, would reach a decision which is not politically motivated. This could present a flaw in the US GSP system. However, it is important to observe that the US's GSP arrangement does not follow after the WTO MFN principles and is a different approach from the latter which usually considers differential tariff treatment between WTO members illegal.[22] Also, the US is not the only country that uses the GSP system to promote the recognition of core labour standards in trade practices. The European Union (EU) has also included labour standards as conditionality in its own GSP system.[23] The EU GSP system is nevertheless different from the US GSP system. The EU GSP system requires that the beneficiary country must apply for special incentives with the European Council determining if the applicant complies with the requirements of the EU GSP system whereas the US GSP requires that the President decides on the eligibility of a beneficiary country.[24] Whilst these systems are in place, it is important to establish their value. There appears to be some uncertainty concerning the efficiency of GSP systems in upholding core labour standards in trade practices. A fair measure of debate on the issue exists. A discussion of some of the criticisms advanced against the GSP systems follows.

5 2 1 Analysis of the US and EU GSP arrangements

The US GSP system, according to Kolben, has had little impact, if any at all, in improving workers' rights in Central America.[25] Frundt had also argued that the results of the use of the US GSP system in protecting core labour standards had not been overwhelming at all.[26] Frundt and

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http://kluwerarbitrationblog.com/blog/2011/07/25/most-favoured-nation-clauses-%E2%80%93-no-favoured-view-on-how-they-should-be-interpreted/ (accessed 02-02-2012).

22 See Article 1 of the 1947 General Agreement on Tariffs and Trade (GATT).

23 See Article 9(1)(a) of the EU Council Regulation 980/2005, Applying a Scheme of Generalized Tariff Preferences, 2005 O.J. (L169) 1. The EU GSP system however is slightly different from the US GSP system in that it creates an incentive program for beneficiary countries that grants additional tariff incentives, called "special incentives" if the country intended to benefit has ratified and implemented a list of specified human and labour rights conventions as provided for in Annexure III part A of the EU Council Regulation.

24 See Article 10(1) and (2) of the EU Council Regulation.

25 Kolben 2007 *Harvard International Law Journal* 214.

Kolben's views are strengthened by the results of attempts made to try and address Workers' Rights Petitions filed under the US GSP system in 2005 where ten were denied after review, one was decided, and one was afforded further review.[27] Compa and Vogt had also observed that there had only been one hundred US GSP labour rights petitions filed from the time of the inception of the US GSP system in relation to core labour standards and trade practices.[28] Of the one hundred, thirteen were suspended, while seventeen were placed on temporary extension with continuing review.[29]

Special mention is also made of the US-Bangladesh case of the year 2000 when the US attempted to compel Bangladesh to authorize collective bargaining and trade unions in its Export Processing Zones (EPZs) whereas both had been made unlawful by the Bangladesh government.[30] The US threatened to withdraw GSP benefits from Bangladesh if it did not authorize collective bargaining and trade unions in its EPZs.[31] Despite the demands from the US, Bangladesh rejected the former's proposals to make any alterations to its laws until 2004, when it finally passed a law providing for transitional Workers Representation and Welfare Committees, which did not have full collective bargaining rights.[32] Even though collective bargaining rights were granted,[33] the ILO found that workers in Bangladesh's EPZs were deprived of a range of other freedoms that are inherent in the right of freedom of association.[34] Furthermore, the operation of the transitional Workers Representation and Welfare Committees was extremely difficult, with reports that the EPZ officials prohibited members of these Committees from meeting with outside unions or with Committees at other factories, and that they intimidated and

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[26] See Frundt *Trade Conditions and Labor Rights* (2001) 100. Frundt argues, for example, that pressure from GSP petitions helped El Salvador effect some positive changes in the labour code, but that it made little difference in enforcement.

[27] Office of the US "Trade Representative, Results of the 2005 Annual Review of the Generalized System of Preferences"http://www.ustr.gov/assets/Trade_Development/Preference_Programs/GSP/asset_upload_file909_9601.pdf. (accessed 22-01-2012).

[28] Compa and Vogt 208.

[29] Compa and Vogt 209.

[30] Kolben 214.

[31] Ibid.

[32] See the Bangladesh Export Processing Zones Workers' Associations and Industrial Relations Act (BEPZWAIRA) No. 23 of 2004.

[33] See Article 45 of the BEPZWAIRA.

[34] ILO Committee of Experts on the Application of Conventions and Recommendations "Individual Observation Concerning Freedom of Association and Protection of the Right to Organize Convention 1948 (No. 87) Bangladesh (ratification: 1972) (2006)" http://www.ilo.org/ilolex/gbe/ceacr2006.htm. (accessed 25-02-2012).

abused workers attempting to elect Workers Representation and Welfare Committees.[35] Strangely, in spite of this ongoing problem, which the US made a particular attempt to address with Bangladesh, the US did not withdraw the GSP privilege from Bangladesh and is yet to do so, which is evidence of double standards on the part of the US.[36]

It is also important to observe that the enforcement of the labour provisions in the US GSP system is entirely optional on the part of the implementing country.[37] The implication of this observation is that determinations in respect of the US GSP system are founded primarily on political grounds rather than on the merits of an individual case or on any conception of due process.[38] The probable result of such an arrangement is that in a political climate where labour rights promotion is not a priority, GSP petitions will be given little or no hearing at all.[39] To illustrate a case in point, the American Federation of Labour and Confederation of Industrial Organizations (AFLCIO)[40] appealed to the US Trade Representative (USTR)[41] to hold the Democratic Republic of China liable for engaging in unfair trade practices, because of its lack of enforcement of internationally recognized core labour rights.[42] This was the second appeal in as many years after the first one had been rejected by the Executive branch without so much as an investigation, on the basis that initiating an investigation would not further the US administration's efforts to improve workers' rights in China.[43] Regardless of these negative developments, there is a positive case of US GSP operation in the form of the Dominican

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35 See section 6 of the US Department of State Bangladesh: Country Reports on Human Rights Practices 2005.

36 Kolben 2007 *Harvard International Law Journal* 215.

37 Ibid.

38 Compa and Vogt 235.

39 Kolben 215.

40 See Kaminski "What Labor Wants" 2009 *Wall Street Journal.* The American Federation of Labor (AFL) and Congress of Industrial Organizations (CIO), commonly AFLCIO, is a national trade union center, the largest federation of unions in the US, made up of 56 national and international unions, together representing more than 11 million workers, as of June 2008. It was formed in 1955 when the AFL and the CIO merged after a long estrangement. From 1955 until 2005, the AFLCIO's member unions represented nearly all unionized workers in the US.

41 See Masterson *International Trademarks and Copyright: Enforcement and Management* (2004) 18. The Office of the United States Trade Representative (USTR) is the United States government agency responsible for developing and recommending United States trade policy to the president of the United States, conducting trade negotiations at bilateral and multilateral levels, and coordinating trade policy within the government through the interagency Trade Policy Staff Committee (TPSC) and Trade Policy Review Group (TPRG).

42 See Section 301 Petition of American Federation of Labour and Congress of Industrial Organizations http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/china_petition.pdf. (accessed 28-02-2012).

43 See Petition under Section 302 on Workers' Rights in China, Decision Not to Initiate Investigation, 69 Fed. Reg. 26204, 26205 (May 11, 2004).

Republic in which US GSP demands assisted in influencing unions organizing, which led to higher wages and higher labour standards for workers in the Dominican Republic.[44]

The EU GSP system, like the US GSP system, is also totally discretionary on the part of the implementing country.[45] The determinations are also grounded more on political grounds than they are on the merits of an individual case or on any conception of due process as is the case with the US GSP system.[46] However, Compa and Vogt argue that the EU's GSP system is entirely discriminatory in its implementation.[47] Even a country like Colombia, mentioned by human rights organizations and the ILO as being one of the countries in which basic labour and human rights are largely violated,[48] is one of the present beneficiaries of the EU GSP system.[49]

The GSP determinations are in general biased, with the aim and incorporation of labour provisions in domestic trade legislation not being subject to negotiation between the implementing country and the beneficiary.[50] This deficiency in terms of the lack of a negotiated practice that is rooted in consent is especially challenging if an impartial application of a social clause in trade is to be accomplished in line with the goals of enhanced, sustainable labour rights enforcement adapted to the needs of a specific country's state of affairs.[51] It is elements such as the lack of consultation and negotiation that usually prompt disapproval from developing countries,[52] in the framework of the WTO.[53] India has unsuccessfully challenged the legality of such legislation in the WTO.[54] Regardless of the challenges faced in unilateral trade legislation concerning the social clause, it is still important to note that unilateral trade legislation is

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44 Frundt 207.

45 Kolben 215.

46 Compa and Vogt 235. Compa and Vogt concluded that foreign policy and geopolitics are the most trenchant concerns for the implementing government in making GSP determinations. Determinations under the US and EU GSP systems are made based on subjective decisions by the Executive in the case of the US and the European Council in the case of the EU.

47 Compa and Vogt 235.

48 ILO Committee on Freedom of Association Cites Cambodia, Colombia, the Islamic Republic of Iran, Myanmar and Zimbabwe http://www.ilo.org/public/english/bureau/inf/pr/2005/32.htm. (accessed 28-02-2012).

49 See the European Commission Decision 2005 OJ (L 337) 50 (EC).

50 Kolben 216.

51 Kolben 216.

52 Compa and Vogt 235.

53 See Kolben "The New Politics of Linkage: India's Opposition to the Workers' Rights Clause" 2006 *Indian Journal of Global Legal Studies* 225.

54 See WTO Appellate Body Report "*European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*" http://www.worldtradelaw.net/reports/wtoab/ec-preferences(ab).pdf (accessed 27-02-2012). The Appellate Body found that the non-discrimination provision in the GSP enabling clause does not prohibit differential treatment of different beneficiary countries.

distinctively centred on changes made by countries in incorporating certain labour and human rights conventions and standards into national law, and then ascertaining whether or not they are being enforced.[55] Such a restricted focus on state action, mostly in the context of low enforcement countries with poor regulatory ability, is not optimal.[56]

As Kolben observed, unilateral legislative approaches to trade and labour linkage are, too fixed, like other methods of linkage, on state enforcement of labour law; unsuccessful in engaging the beneficiary states in a significant participatory course of action; are not very useful in significant development of working conditions; and usually fall short of achieving material advancement in labour rights enforcement by states.[57] However, the challenges faced in implementing the GSP system in relation to labour rights and trade cannot be regarded as the end of all proposals to incorporate a social clause in trade agreements. Developed on the basis of the US GSP system has been the possibility of including trade sanctions in bilateral or regional trade agreements. The US has also been enthusiastically promoting the inclusion of labour agreements in its trade negotiations, a legal mechanism which is discussed below.

5 3 BILATERAL AND REGIONAL TRADE AGREEMENTS

Bilateral and regional trade agreements have materialized into a genuine legal option for linking core labour standards to trade practices. Bilateral and regional trade agreements can be defined as contracts between two or more countries (in respect of the later), usually but not necessarily in close geographical proximity.[58] The US has included labour rights provisions in most, if not all, of its negotiated bilateral and regional trade agreements.[59] The agreements rely on the so called "State Action-State Sanctions Model", as against focusing on the governments' enforcement of labour law to protect core labour standards in trade practices.[60] The "State Action-State Sanctions Model" has been implemented in the NAFTA entered into by Canada, Mexico and the US, through a side agreement called the NAALC.[61] The NAALC appears to have laid down the

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55 Kolben 216.
56 Kolben 216.
57 Kolben 216.
58 See Article XXIV of GATT 1947.
59 Kolben 216.
60 Kolben 216.
61 North American Agreement on Labour Cooperation (NAALC) between US, Canada and Mexico of 17 December 1992.

framework for labour rights conditionality in future trade agreements by instituting the so called "enforce-your-own-labour-law-model".[62] An analysis of the NAALC follows.

5 3 1 The NAALC

The NAALC provides signatory countries with a comprehensive system of filing grievances with country contact points to claim that a signatory country has failed in enforcing its own domestic labour law.[63] Although each country consents to ensuring that its labour laws and regulations afford high labour standards,[64] and strives to develop those standards,[65] the dispute resolution process will possibly be regarded as only addressing a very limited issue of whether or not a country is enforcing its own domestic labour law in the areas of occupational safety and health, child labour, and minimum wage laws.[66] In trying to describe the manner in which the NAALC operates, Verge stated that:

> "Parties to the NAALC brought to the agreement labour regulation systems that had developed out of their respective national traditions. These systems had both civil law and common law backgrounds. Constitutional differences prevented legislative jurisdiction from being as centralized in Canada as in the other two nations, and made the effects of international treaties felt less directly than in those countries. The NAALC accepted these national labour regulatory systems with their respective peculiarities, did not question potential comparative advantages that could derive from them, and relied on their effective enforcement and development based on the expected contribution from trinational free trade. As was the case with NAFTA, it did not guarantee transboundary mobility of workers."[67]

The NAALC provides for collaboration amongst the Parties to the agreement to ensure that the economic possibilities presented by NAFTA convert into human resources development, better working conditions and higher standards of living in their particular countries.[68] The safeguard of workers' fundamental rights is presented as an element of the high productivity economy that the countries which are party to the NAALC are seeking.[69] This clarifies the relevance of two

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62 Kolben 217.
63 See Article 3(1) of the NAALC.
64 See Article 2 of NAALC.
65 See Article 2 of NAALC.
66 See Article 29 of the NAALC.
67 See Verge "Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" http://white.oit.org.pe/cimt/nn/documentos/146eng.pdf (accessed 01-03-2012).
68 See the NAALC Preamble.

fundamental obligations assumed by the signatories: to make constant efforts to advance labour law and find ways to "provide for high labour standards, consistent with high quality and productivity workplaces",[70] on the one hand, and to "promote compliance with and effectively enforce its labour law",[71] on the other, whilst giving due observance to their legislative and jurisdictional independence.[72] The basis for the contemplated labour law is fairly comprehensive and matches generally with the eleven labour principles protected in the NAALC.[73]

Part Two of the NAALC lays out the countries' obligations. At first, the NAALC presents a broad scope of the countries' obligations. It provides that whilst confirming "full respect for each country's constitution," in this case their autonomy, each country "shall ensure that its labour laws and regulations provide for high labour standards, consistent with high quality and productivity workplaces, and continue to strive to improve those standards in that light."[74] Other provisions of the NAALC outline the administrative or governmental processes of upholding conformity with and in effect implementing domestic labour law[75]; the necessity to permit persons with a legally acknowledged interest the right to use administrative, quasi-judicial, judicial or labour tribunals for the enforcement of labour law[76]; the essential procedural assurances that these bodies have to make available[77] and the wide-ranging obligations

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[69] Ibid. See also Part One of the NAALC which stipulates the seven objectives of the NAALC which are to: 1. improve working conditions and living standards in each Party's territory; 2. promote, to the maximum extent possible, the labour principles set out in Annex 1; 3. encourage cooperation to promote innovation and rising levels of productivity and quality; 4. encourage publication and exchange of information, data development and coordination, and joint studies to enhance mutually beneficial understanding of the laws and institutions governing labour in each Party's territory; 5. pursue cooperative labour-related activities on the basis of mutual benefit; 6. promote compliance with, and effective enforcement by each Party of, its labour law; and 7. foster transparency in the administration of labour law.

[70] See Article 2 of the NAALC.

[71] See Article 3 of the NAALC.

[72] See the NAALC preamble which affirms the agreement's respect of the constitutions and laws of the signatory parties.

[73] The eleven labour principles are provided in Annex I of the NAALC and they are as follows: 1) freedom of association and protection of the right to organize; 2) the right to bargain collectively; 3) the right to strike; 4) prohibition of forced labour; 5) labour protections for children and young persons; 6) minimum employment standards; 7) elimination of employment discrimination; 8) equal pay for men and women; 9) prevention of occupational injuries and illnesses; 10) compensation in cases of occupational injuries and illnesses; and 11) protection of migrant workers.

[74] See NAALC Article 2.

[75] See NAALC Article 3.

[76] See NAALC Article 4.

[77] See NAALC Article 5.

conditional on the publication and dissemination of national standards linked to the contents of the NAALC.[78]

Part Three of the NAALC entitled "Commission for Labour Cooperation," sets up the different institutions for the operation of the NAALC, both at the trinational level and in each of the countries. The Commission for Labour Cooperation, first and foremost, is the principal body to take note of in the NAALC.[79] It is made up partly of a governing body, the Council, which consists of the NAALC Parties' labour ministers.[80] This Council generally has the duty to oversee the operation of the NAALC and establishing priorities for cooperative action, facilitating country-to-country discussions and attending to issues and disputes concerning the interpretation and enforcement of the NAALC, and promoting the generation of comparable data on labour standards and labour market indicators.[81]

Also incorporated in the Commission for Labour Cooperation is a Secretariat, which aids the Council in executing its obligations and is led by an Executive Director.[82] A cooperation centre called a National Administrative Office (NAO) should also be set up by each of the countries that is party to the NAALC, at the level of its central government, to sustain relations with the NAOs of the other parties and the Commission's Secretariat.[83] Each NAO is mandated to provide for the submission and receipt, and regularly issue a record of public communications on labour law taking place in another country's territory[84] and must re-evaluate the issues raised in the public communications, accordingly.[85] The establishment of National Advisory Committees (NACs) is also provided for by the NAALC.[86] The NACs consist of private labour-related bodies and representatives of central and local governments, to give advice to the NAALC Parties concerning the operation and progress of the NAALC.[87]

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78 See NAALC Articles 6-7.
79 See NAALC Article 8.
80 See NAALC Articles 8 and 9.
81 See NAALC Article 10.
82 See NAALC Article 12.
83 See NAALC Article 15.
84 See NAALC Article 16.
85 See NAALC Article 13 para 3.
86 See NAALC Article 17 of the NAALC.
87 See NAALC Article 18.

Also in the NAALC is a "Cooperative Consultations and Evaluations" provision found in Part Four. The Cooperative Consultations and Evaluations provision initially establishes the NAALC Parties' general obligation which is to undertake to agree on the interpretation and implementation of the NAALC and endeavouring to resolve any issue that may impinge on its processes through co-operation and consultations.[88] As a result, consultations may be done amongst the NAOs in relation to the other country's labour law, its management or labour market state of affairs.[89] A similar approach is taken with regards to ministerial consultations about any subject in the scope of the NAALC.[90] Should the subject remain undecided after ministerial consultations, a study and recommendations from an Evaluation Committee of Experts (ECE) established specifically for this reason, may be used.[91] This non-adversarial external intervention might be used at least in regard to "patterns of practice" by one of the parties concerning any of the eleven labour principles in the NAALC aside from those associated with freedom of association, the right to bargaining collectively or to strike, or certain other conditions.[92] The NAALC also stipulates the rules of procedure for the ECEs.[93]

Dispute Resolution is dealt with in Part Five of the NAALC. Regrettably, the NAALC's dispute resolution only deals with the enforcement of a country's occupational safety and health, the employment of minors or minimum wage legislation and regulations as already pointed out in this chapter.[94] A country which is signatory to the NAALC can call for consultations with the country pointed out by the ECE's report subsequent to its appearance before the Council.[95] The countries will then pursue a joint and reasonable resolution of their dispute.[96] Should this not succeed, one of the countries may then ask for the intercession of the Council.[97] Assuming that

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88 See NAALC Article 20.
89 See NAALC Article 21.
90 See NAALC Article 22.
91 See NAALC Article 23 para 1.
92 See NAALC Article 23 para 2.
93 See NAALC Article 24 para 2. It is interesting to note that this provision requires that the chair of the ECE shall be selected by the Council from a roster of experts developed in consultation with the International Labour Organisation (ILO). This seems to suggest that the objective of linking trade and ILO standards is never that of negating the role of the ILO but to establish how the ILO and the WTO could possibly work together to combat the challenges posed by globalisation of the labour markets in the world.
94 See NAALC Article 27 para 1.
95 See NAALC Article 27 para 1.
96 See NAALC Article 27 para 4 of the NAALC.
97 See NAALC Article 28 para 1.

the countries fail again at this level to reach an agreement, an arbitral panel will be set up under extremely specific conditions and procedures, by a two-thirds vote.[98]

In the event that the arbitral panel maintains that there is a "persistent pattern of failure by the Party complained against" subsequent to the study,[99] the countries can consent to pursue a satisfactory plan of action which usually goes along with the findings and recommendations of the arbitral panel which may establish a plan of action if none is available.[100] An inability to implement the findings and recommendations of the arbitral panel could lead to a monetary enforcement assessment by the arbitral panel, which, as per the directives of the Council, should be used in improving or enhancing labour law enforcement in the country complained against.[101] Inability to pay the monetary enforcement assessment can then result in the complaining countries suspending the application of the NAALC's benefits up to an amount equal to the monetary enforcement assessment, except in the case of Canada, in which the execution of the resolution of the arbitral panel will be imposed through an order of a national court of competent jurisdiction.[102]

Part Six of the NAALC contains several general provisions, such as those excluding the application of the labour law of one country in the territory of another[103] and the right of action under the domestic law of any country against another country that acted in a manner contrary to the NAALC,[104] as well as other definitions. The NAALC's Part Seven then sets out various final provisions, including the entry into force of the agreement on the 1st of January 1994, the possibility of other countries acceding to the agreement or for any country to withdraw from the agreement upon six months' written notice, and the official character of the texts of the NAALC in French, English and Spanish. Lastly, Annexure 46 of the NAALC establishes the extent to which the agreement gives rise to public communications and provides for modes of cooperative

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[98] See NAALC Article 29 para 1.
[99] See NAALC Article 39.
[100] See NAALC Article 38.
[101] See NAALC annexure 39 para 3. The monetary enforcement that can be imposed by the arbitration panel was given initially as US 20 million dollars in the case of the NAALC between the US and Mexico. This money is not just a punitive sanction but must be used for improving compliance with labour regulations in the offending country if failure to comply has repercussions on trade. If the financial compensations are not paid, they can be collected through tariffs.
[102] See NAALC annexure 41 A.
[103] See NAALC Article 42.
[104] See NAALC Article 43.

consultations and evaluations, as well as for the resolution of disputes against Canada, or at its request, with regard to the scope of central or provincial government participation in the agreement.

5 3 2 The Legal Context of the Countries which are Signatories to the NAALC

The frameworks of labour law in each of the three countries which are signatories to the NAALC are unique in a number of areas, a feature which highly influences both the adoption and enforcement of legislation in these countries.[105] Some of the principal areas of difference are discussed below.

5 3 2 1 Disparities in the labour market regulatory framework in countries that are parties to the NAALC

In the US, the moment the working environment is held to be linked with interstate trade, jurisdiction automatically rests with the federal government.[106] At this point, the federal government's legislation supersedes, if need be, state legislation which might have been applicable up to that instant.[107] Federal law's application is reliant, in principle, on a federal order that is different at both the administrative and judicial stages.[108] On the other hand in Mexico, the Mexican Constitution confers on the Federal Congress special power to legislate in the area of labour.[109] Nonetheless, the implementation of labour law is left to the authorities of Mexico's thirty-one States, apart from instances when a specific number of major economic sectors such as the petrochemical industry or the railway system are concerned.[110]

A different state of affairs from that presented by the US and Mexico exists in Canada. The power to legislate in the field of labour is delegated to Canada's ten provinces[111] although the central Parliament, at the national level, maintains its exclusive jurisdiction in cases where

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[105] See Verma and Elma "Labour Standards for a Fair Globalisation of Workers of the World" http://www.rotman.utoronto.ca/~verma/PapersForWeb/GoodSociety.VermaElman.proofs.pdf (accessed 26-02-2012).

[106] See Article 1 section 8 of the US Constitution. Article 1 section 8 provides for what is called the Dormant Commerce Clause, also known as the Negative Commerce Clause. The Commerce Clause expressly grants Congress the power to regulate commerce among the several states. See Goldsmith and Sykes "The Internet and the Dormant Commerce Clause" 2001 *Yale Law Journal* 110.

[107] See Article 1 section 8 of the US Constitution.

[108] See Burnham *Introduction to the Law and Legal System of the United States* (2006) 41.

[109] See Article 18 of the Mexican Constitution of 1917.

[110] See Article 123 of the Mexican Constitution.

[111] See section 132 of the Constitution Act of Canada 1867.

federal enterprises are concerned.[112] The key economic areas in Canada, such as interprovincial and international transport, broadcasting as well as banking all have their own administrative and legal regulatory bodies in the labour area. Such a constitutional separation of administrative and legislative jurisdiction in the labour field meant that NAALC signatories had to consider the involvement of provincial authorities in the application of the NAALC in Canada.[113] Ordinary tribunals in Canada however retain a general power to intervene in labour matters, at both the federal and provincial levels, to the extent that the legislature has not granted authority to a specific body that it has formed.[114]

The legal context in which labour law is implemented under the NAALC differs from one nation to another.[115] In practice, such a phenomenon generates considerable and well recognized disparities in the relative value given to the different sources of law, legislation, judicial authority, doctrine and, in general, in the spirit in which the law is applied.[116] Mexico is governed through the principle of civil law tradition,[117] while in both the US[118] and Canada,[119] common law reigns. There is however an exception as regards one of Canada's provinces, Quebec, where civil law applies to issues of private law.[120] For this reason, the degree of judicial interference when faced with interpretation challenges concerning the text of a piece of legislation may, depending on the circumstances, be established in an extra liberal manner in one system, more often than not in the common law system, than in another.[121]

The national systems also do not give the same treatment to international labour law. The dualist position of Canadian law could allow it to easily embrace international labour standards in the sense that its international obligations are binding on domestic law no more than to the

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[112] See sections 91, 93(4), 94, 100, 106 and 132 of the Constitution Act of Canada 1867.
[113] See annexure 46 of the NAALC.
[114] See annexure 46 of the NAALC. For a brief summary of jurisdictions in the labour area in each of the three countries, see also a study of the Washington Commission for Labour Cooperation "Labour relations law in North America" 2000 36 (Canada), 110 (Mexico) and 182 (US).
[115] See Washington Commission for Labour Cooperation "Labour Relations Law in North America" 39 (Canada), 113 (Mexico) and 183 (US).
[116] See Collins "'A Considerable Surgical Operation': Article lll, Equity, and Judge-Made Law in the Federal Courts" 2010 *Duke Law Journal* 291.
[117] See Vargas "Mexico and its Legal System" http://www.llrx.com/mexicolegalsystem.htm (accessed 01-03-2012).
[118] See Lieberman *Milestones! 200 Years of American Law: Milestones in Our Legal History* (1976) 16.
[119] See Canadian Department of Justice "Where Our Legal System Comes From: The Common-Law Tradition" http://www.justice.gc.ca/eng/dept-min/pub/just/03.html (accessed 01-03-2012).
[120] See the Civil Code of Quebec 1865.
[121] See the Washington Commission for Labour Cooperation 39 (Canada), 113 (Mexico), and 183 (US).

degree that the competent federal or provincial legislator translates this obligation into national law by legislating accordingly.[122] On the other hand, in the US, if the international law to be adopted is self-executing, depending on the tribunal, it will supersede the constitutional or legislative State law and co-exist with legislative federal law, but will be subject to the federal constitutional law.[123] In the case of Mexico, there appears to be a consensus to the effect that international law co-exists on the same footing with federal legislation.[124] Nevertheless, there are some uncertainties concerning the resolution of conflicts between the two types of mechanisms.[125] In practice, these general variations expose the likelihood of a disproportionate domestic scope for an international obligation adopted by the US, Canada and Mexico.[126] To a large extent, the disparities in the national situations with respect to international labour law are evidently directly correlated to the same countries' conduct in relation to the NAALC as a form of international law.[127]

As a result, the obligation assumed by each of the signatory countries to the NAALC to promote compliance with and effectively enforce its "labour law"[128] objectively refers to a given set of national "laws and regulations".[129] This does not however stop the said set of laws and regulations from being given a wider or narrower interpretation insofar as, in its own judicial system, the country in question recognizes a certain creative contribution to the jurisprudence from its tribunals, as well as an effect in its domestic law of the international commitments it undertakes through treaties.[130] Concerning legislated national law in the US, Canada and Mexico, they accepted it at the time of the agreement as a useful system of labour law in each relevant jurisdiction.[131] This does not stop the domestic labour laws from assuming a distinctive

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[122] See Weiss "Proceedings of the Seminar on International Constitutional Systems of the United States, Mexico and Canada: Labouring in the Shadow of Regional Integration" 1998 *Maryland Journal Of International Law and Trade* 202.
[123] Weiss 208.
[124] Ibid.
[125] Weiss 209.
[126] See Guerra and Torriente "The NAALC and the Labor Laws of Mexico and the United States" 1997 *Arizona Journal of International and Comparative Law* 503.
[127] Guerra and Torriente 526.
[128] See NAALC Article 3.
[129] See NAALC Article 49.
[130] Weiss 214.
[131] See Leary *International Labour Convention and National Law: The Effectiveness of Automatic Incorporation of Treaties in National Legal Systems* (1982) 170.

approach to different labour facets, whether it is legislation governing collective labour relations or legislation directly establishing labour conditions based on the pertinent social and political history.[132]

5 4 THE EFFECTIVENESS OF THE NAALC

Focusing on the application of domestic labour laws, the NAALC was not well received by US and Canadian trade unions.[133] Such a development is largely credited to the fact that the NAALC does not provide for a central body charged with correcting violations of labour standards.[134] Moreover, the NAALC's sanctions only assure respect for laws relating to child labour, health and safety at work and minimum wage.[135] In essence, these are the only labour matters in the agreement that can be brought before the arbitration panel. Issues related to collective bargaining can only be subject to ministerial consultation.[136] Regardless of this criticism, the Confederation of Mexican Workers appeared content with the NAALC since the agreement observes national sovereignty.[137] However, it is fascinating to note that although there have been a number of cases of co-operative consultations under the NAALC provisions, hardly any cases have gone further than the ECE level,[138] let alone coming before the arbitration panel.[139] To get an in-depth understanding of the effectiveness of the NAALC it is necessary to study its dispute resolution process and the cases that have been with dealt under its system.

5 4 1 The NAALC dispute resolution procedure

As already indicated in this chapter, the scope of the dispute resolution mechanism and process in the NAALC is extremely limited. The NAALC's dispute resolution procedure deals only with a specific set of labour principles which relate to the technical labour standards concerning occupational safety and health, employment security, the employment of minors and the

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[132] Weiss 214.
[133] Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" 8.
[134] Grandi 8.
[135] See NAALC Article 27 para 1.
[136] See NAALC Article 11.
[137] Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" 8
[138] See NAALC Article 22.
[139] See Bensusan "La Reforma Laboral desde una Perspectiva Regional: Experiences en America" paper presented at the McGill University Faculty of Law 29-30 September 2006.

minimum wage.[140] The scope of the questions dealt with the dispute resolution process is also not as wide. The questions must only relate to a "persistent pattern of failure" by a Party to "effectively enforce" one of the standards.[141] The question must also be "trade-related" and be "covered by mutually recognized labour laws".[142] This debatable process begins with efforts to resolve the dispute in accordance with the common intention of the NAALC.[143] After, the ECE submits its final report to the Council, any Party may, in writing, request a round of consultations with the Party complained against.[144]

A third Party may also participate in these consultations.[145] Then, "the Parties involved in the consultations will do their utmost to reach a mutually satisfactory solution by means of consultations".[146] If the Parties fail to achieve a settlement within sixty days or any other mutually agreed deadline, any of the Parties may in writing request an extraordinary session of the Council, which will, if necessary, call on experts or the conciliation or mediation machinery to help them "reach a mutually satisfactory resolution of the dispute".[147] If the case cannot be resolved within sixty days of the Council meeting, one of the Parties may request this body to call for the convening of an arbitral panel.[148]

There are some special considerations when convening an arbitration panel. First of all, it is difficult to explain the limits of its material or substantive jurisdiction.[149] Insofar as the first three labour principles are excluded,[150] the observations made with regard to their exclusion from the scope of the preceding intervention of the ECE apply here as well.[151] As for the additional exclusion of the technical labour standards, such as the general prohibition of forced labour; different minimum employment standards with the exception of the minimum wage; the elimination of discrimination in employment; equal pay for men and women; prevention of

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[140] See NAALC Article 29.
[141] See NAALC Article 27.
[142] See NAALC Article 23 para 3.
[143] See NAALC Article 23 para 2.
[144] See NAALC Article 23 para 3(6).
[145] See NAALC Article 23 para 5.
[146] See NAALC Article 27.
[147] See NAALC Article 28.
[148] See NAALC Article 28 para 1.
[149] See NAALC Articles 29 and 33.
[150] The first three labour principles are 1) freedom of association and protection of the right to organize; 2) the right to bargain collectively and; 3) the right to strike.
[151] See NAALC Article 36.

occupational injuries and illnesses; compensation for these conditions, and protection of migrant workers, their importance is obvious, either from a humanistic perspective, because of their effects on workers' conditions or in terms of the healthy competition that should prevail in trinational trade exchanges. It should be added that the signatories to the NAALC were careful to specify that the inclusion of the employment of minors within the jurisdiction of arbitration did not include the establishment of labour standards and minimum wage in this respect.[152]

The NAALC signatories also specified that "a Party has not failed to effectively enforce its occupational safety and health, child labour or minimum wage technical labour standards" when the action or inaction by agencies or officials "reflects a reasonable exercise of their discretion with respect to investigatory, prosecutorial, regulatory or compliance matters; or results from *bona fide* decisions to allocate resources to enforcement in respect of other labour matters determined to have higher priorities".[153] Chronologically, the arbitration stage does not follow immediately after the initial ministerial consultations; it is reached only after the intervention of an ECE, and of the other consultation stages that follow it, unless one of the Parties requests it, and after all the related deadlines have run out.[154] The dispute resolution procedures differ in this respect from those of NAFTA and the Agreement on Environmental Cooperation,[155] which allow for more immediate access to the arbitration stage.[156]

The same is true of the general procedural rules of the FTA signed by the US and Jordan in 2000, which also apply to its labour component.[157] The establishing of a special panel requires a two-thirds vote by the members of the Council.[158] In practice, this means it requires the cooperation of the third Party to support the request of the requesting Party.[159] The outcome of the request thus depends on political considerations on the part of this third Party (which will not be insensitive to the attitude that the Party complained against might take to it in similar

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[152] See NAALC Article 49.
[153] See NAALC Article 49.
[154] See NAALC Articles 22, 23 and 29.
[155] See the North American Agreement on Environmental Cooperation (NAAEC) which is an environmental side agreement to the NAFTA. The NAAEC was signed by Canada, Mexico and the US. It came into force on the 1st of January 1994.
[156] See Compa "NAFTA's Labor Side Accord: A Three-Year Accounting" (1997) *NAFTA: Law and Business Review of the Americas* 22.
[157] Compa 22.
[158] See NAALC Article 29.
[159] Weiss 86.

circumstances).[160] The fact that, after several years of applying the NAALC, not a single controversy is yet likely to arise and that, if it did, there are a number of opportunities for the Parties to settle it before deciding to set up a panel, reduces the utility here of a detailed reiteration of the relatively numerous and long provisions of the NAALC concerning the intervention of an arbitration panel.[161]

An arbitration panel consists of five members.[162] The NAALC stipulates that the Council shall establish a roster of up to forty-five individuals who are willing and able to serve as panelists.[163] These persons must meet the requirements of independence, knowledge and appropriate experience.[164] They are appointed by consensus for a period of three years.[165] Individuals shall be eligible for a given panel only if they have not previously intervened in the case as a member of an ECE, or as a conciliator, mediator or expert at the request of the Council; they must also have no personal or affiliated interest in the dispute.[166] The NAALC sets out the procedure for selecting the chair in the event the Parties fail to agree.[167] The Council must establish model rules of procedure for arbitration.[168] A third Party may participate in the arbitration process,[169] and the arbitration panel may also consult experts.[170] Within one hundred and eighty days following the appointment of its final member, the arbitration panel presents a preliminary report to the Parties.[171] In the event it determines there has been a failure on the part of the Party complained against in connection with the subject of the arbitration, it makes recommendations to resolve the conflict and normally recommends that the Party adopt and implement an action plan "sufficient to remedy the pattern of non-enforcement".[172]

The report may also contain observations from one of the disputing Parties, which could lead the arbitration panel to reconsider its report. Individual members of the arbitration panel

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[160] Weiss 86.
[161] Ibid.
[162] See NAALC Article 32.
[163] See NAALC Article 30.
[164] See NAALC Article 30.
[165] See NAALC Article 30.
[166] See NAALC Article 31.
[167] See NAALC Article 32.
[168] See NAALC Article 33.
[169] See NAALC Article 34.
[170] See NAALC Article 35.
[171] See NAALC Article 36 para 2.
[172] See NAALC Article 36.

may furnish separate opinions on matters not unanimously agreed.[173] Within sixty days after the presentation of the preliminary report, the arbitration panel shall issue a final report, unless the contending parties decide otherwise.[174] The Parties transmit the final report to the Council in a confidential manner within fifteen days of receiving the report, and the Council publishes it within the next five days.[175] If the arbitration panel finds that there has been a pattern of failure, the Parties may agree on a plan of action that is mutually satisfactory, which normally shall conform to the recommendations of the arbitration panel, and report this outcome to the Secretariat and the Council.[176] If these steps are not taken within sixty days of the release of the final report, the arbitration panel, reconvened at the request of any of the contesting Parties, shall approve an action plan proposed by the Party complained against or an alternative one.[177]

The arbitration panel may also meet again at the request of a contesting Party if, in its opinion, the Party complained against is not fully implementing the mandatory plan.[178] If the arbitration panel is convinced that this is the case, it imposes a monetary assessment for non-enforcement.[179] This monetary assessment shall not exceed a percentage (0.007%) of the total trade of goods between the Parties during the last year for which information is available.[180] The amount assessed takes various considerations into account, particularly the duration of the pattern of failure by the Party, the resources available to it, and its efforts to start correcting the pattern of failure since publication of the final report.[181] The payment of the assessment does not release the Party from the obligation to comply with the action plan.[182] The Party deposits the assessment in a fund established by the Council to "improve or enhance the labour law enforcement in the Party complained against, consistent with its law".[183] Thus, unlike a fine, the assessment lacks any punitive purposes. In fact, the assessment benefits the Party that paid it,

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[173] See NAALC Article 36.
[174] See NAALC Article 37.
[175] See NAALC Article 37.
[176] See NAALC Article 38.
[177] See NAALC Article 39.
[178] See NAALC Article 39.
[179] See NAALC Article 39 para 5(2).
[180] See NAALC annexure 39.
[181] See NAALC annexure 39.
[182] See NAALC Article 39 para 3 and Article 40.
[183] See NAALC annexure 39 para 3.

since it serves to enhance the enforcement of its labour law, consistent with its law.[184] The NAALC does not, however, provide for a method of monitoring the legitimacy of the final disposition of the funds by the Party that disbursed them.

If a Party fails to pay the monetary assessment within one hundred and eighty days following the decision of the panel, the complaining Party or Parties may suspend "the application to the Party complained against of NAFTA benefits to an amount no greater than that sufficient to collect the monetary enforcement assessment".[185] At this ultimate stage, the systematic failure to apply a technical labour standard produces a penalty that is directly tied to transnational trade.[186] However, this is not the case with Canada, since this country has rejected any trade sanctions against it.[187] In this case, compliance with the action and payment of the monetary assessment are ensured by a court order issued by the domestic court seized of the dispute.[188]

The efficiency of the monetary judgment in assuring the enforcement of the national labour law is not certain. The extent and diversity of steps that must be passed through before attaining access to it makes the result far from definite. Should this point be attained, one may query whether the methods of compulsion used have the potential to engender the approach of collaboration and consultation that should normally control the carrying out of the NAALC. It is furthermore important that one of the later labour cooperation agreements attached to a trade liberalization agreement, the April 2001 Costa Rica-Canada agreement, specifically disqualified resort to fines or any measure affecting trade to implement conformity with the conclusions and recommendations of the arbitration panel. Under the Costa Rica-Canada agreement, the complaining Party is entitled to take reasonable and appropriate measures to encourage the other Party to remedy that persistent pattern, in keeping with the panel's determinations and recommendation. As a result, diverse types of constructive actions can be foreseen.

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[184] See NAALC annexure 39 para 3.
[185] See NAALC Article 41 B.
[186] See NAALC Article 41 B.
[187] See NAALC annexure 41 A.
[188] See NAALC annexure 41 A para 8.

5 4 2 Free Trade Agreements that have included the social clause

5 4 2 1 US-Cambodia Free Trade Agreement (FTA)

The first agreement to incorporate labour rights concerns into its framework was the US-Cambodian Bilateral Textile Trade Agreement,[189] which provided a quota incentive to Cambodia if its garment industry working conditions were found to "substantially comply" with the Cambodian Labour Code and, by extension, international labour law.[190] Notably, the focus changed from state-level enforcement to an assessment of firm-level and industry-level compliance.[191] There had to be prior certification by the ILO of compliance with basic labour standards.[192] Initially there was some debate as to whether the ILO could accede to such requests but doubts were finally dispelled when the ILO agreed to participate in the project, an indicator that the ILO could also be willing to assist in the implementation of a social clause in trade agreements.[193] The US-Cambodia agreement signified a short-lived break in the State Action-State Sanctions approach of the NAALC.[194] However, the State Action-State Sanctions model of the NAALC was to be implemented in a free trade agreement that the US signed with Jordan a few months after the US-Cambodia agreement.[195]

5 4 2 2 US-Jordan FTA

In the US-Jordan agreement, labour matters were dealt with through an additional clause, appearing for the first time as a commitment to respect the 1998 ILO Declaration and equally as a commitment that national legislation would include such principles and protect them by domestic legislative means.[196] The labour rights language, though not strong, was directly incorporated into the body of the agreement[197] requiring the parties to strive to ensure that ILO core principles and internationally recognized labour rights were incorporated into domestic

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[189] See Article 10(D) of the US-Cambodia Agreement of 20 January 1999. See also Kolben 2007 *Harvard International Law Journal* 218.
[190] US-Cambodia Agreement Article 10.
[191] Ibid.
[192] Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" 9.
[193] See Polaski "Cambodia Blazes a New Path to Economic Growth and Job Creation. Trade Equity and Development Project" 2004 Carnegie Paper No. 51.
[194] Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" 9.
[195] See Agreement on the Establishment of a Free Trade Area US-Jordan of October 24 2000.
[196] See Agreement on the Establishment of a Free Trade Area US-Jordan Article 6.
[197] See Agreement on the Establishment of a Free Trade Area US-Jordan Article 6(1) and Article 6(2).

law.[198] Moreover, in language that was to become a model for future agreements, the US-Jordan FTA stated that, "a Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties".[199] The parties, however, would still retain "the right to exercise discretion" in their regulatory and enforcement decisions.[200]

Ultimately, the US-Jordan FTA provided that all its labour and environmental provisions be subject to the same dispute settlement procedures as commercial disputes,[201] but this equal dispute settlement provision would be diluted in future agreements.[202] A non-derogation clause was introduced.[203] However, the most important point of principle achieved by the US in the US-Jordan agreement was to submit labour matters to the same dispute settlement procedures as those negotiated for trade questions.[204] The relationship between labour standards and trade liberalisation thereafter gained considerable importance as a result of the US Trade Promotion Act.[205]

5 4 2 2 1 The US Bipartisan Trade Promotion Authority Act of 2002 (BTPAA)

The US BTPAA contains provisions requiring that labour rights protections be negotiated into trade agreements.[206] The core of the US BTPAA, as it relates to trade negotiations over labour issues, is its prescribed objectives, which are divided into two categories. First, there are "overall objectives," which are to (a) promote respect of "core worker rights and the rights of children consistent with core labour standards of the ILO";[207] (b) "seek provisions in trade agreements under which parties...strive to ensure that they do not weaken or reduce the protections afforded

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[198] See Agreement on the Establishment of a Free Trade Area US-Jordan Article 6(1).
[199] See Agreement on the Establishment of a Free Trade Area US-Jordan Article 6(4)(a).
[200] See Agreement on the Establishment of a Free Trade Area US-Jordan Article 6(4)(b).
[201] See Agreement on the Establishment of a Free Trade Area US-Jordan Article 17.
[202] See Bolle "Free Trade Agreements with Singapore and Chile: Labour Issues" 2003 *Congress Research Survey* 6. All of the agreements negotiated after the US-Jordan FTA contain a different dispute settlement system than the one applicable to commercial disputes and cap penalties for violation of the labour standards provisions at $15 million or more.
[203] This served as an obligation not to relax labour legislation for the purpose of obtaining an advantage in international trade or investment flows.
[204] See Article 17 of the US-Jordan agreement.
[205] See the US Bipartisan Trade Promotion Authority Act (BTPAA) of 2002.
[206] See BTPAA section 3802(a)(6). For a discussion of how the US BTPAA is used to protect labour rights see Pier "*Workers' Rights Provisions in Fast Track Authority, 1974-2007: An Historical Perspective and Current Analysis*" 2006 *Indiana Journal of Global Legal Studies* 77.
[207] See BTPAA section 3802(a)(6).

in domestic...labour laws as an encouragement for trade";[208] and (c) "promote universal ratification of ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour."[209] Second, there are principal negotiating objectives. It is important to note that it is only these objectives that may be subject to equivalent dispute settlement procedures and remedies.[210] Some of these objectives are to (a) "ensure that a party to a trade agreement does not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction in a manner affecting trade";[211] (b) recognize that parties have the right to exercise discretion with respect to labour law enforcement and regulation;[212] and, in a provision often overlooked by analysts, (c) "strengthen the capacity of US trading partners to promote respect for core labour standards."[213]

The final set of directives, albeit weaker ones than the overall and principal negotiating objectives, is the "promotion of certain priorities."[214] In this case, the regulatory capacity-building intention of the legislation, first expressed in the principal objectives, is reaffirmed. The section provides the following:

> "In order to address and maintain US competitiveness in the global economy the President shall (1) seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity...to promote respect for core labour standards... and (2) direct the Secretary of Labour to consult with any country seeking a trade agreement with the US concerning that country's labour laws and provide technical assistance if needed."[215]

The primary approach, therefore, of the US BTPAA is a State Action-State Sanctions Model that requires, as the only enforceable standard, that parties not fail to enforce their domestic labour law as an encouragement for trade.[216] However, there is also a secondary objective to build state capacity to promote respect for core labour standards.[217]

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[208] See BTPAA section 3802(a)(7).
[209] See BTPAA section 3802(a)(9).
[210] See BTPAA section 3802(b)(12)(G)(i)–(iii).
[211] See BTPAA section 3802(b)(11)(A).
[212] See BTPAA section 3802(b)(11)(B).
[213] See BTPAA section 3802(b)(11)(C).
[214] See BTPAA section 3802(c) (2000). See also Pier 84.
[215] See the BTPAA sections 3802(c)(2) and 3802(c)(7).
[216] See BTPAA sections 3802(c)(2) and 3802(c)(7).
[217] See BTPAA sections 3802(c)(2) and 3802(c)(7).

Regardless of Grandi's view that the US BTPAA was of considerable importance to the relationship between labour standards and trade liberalisation,[218] Weiss regarded it as "...a step or two back from the so-called 'gold standard' of the Jordan model".[219] It is important to note that before the promulgation of the US BTPAA, there had been extensive evidence of a strong resistance from a number of sectors which were not desirous to open the US's economy and rejected trade liberalisation as well as free movement of capital.[220] The American Federation of Labour and Confederation of Industrial Organisations, which is the largest trade union organisation in the US, strongly objected to the initiatives of the US BTPAA, fearing negative consequences for US workers, especially regarding their employment and working conditions.[221] However through the Trade Adjustment Assistance (TAA)[222] system, a new programme was established up to help people affected in their employment as a consequence of trade liberalisation.[223] It was this new development that led to Congressmen of the US consenting to the promulgation of the US BTPAA. At the same time as setting up consultation and bilateral cooperation mechanisms for protecting workers' rights in each country with which the US has free trade agreements, the US BTPAA required that the labour impact of the future agreements in the territory of the US must be researched and the results made available to the public.[224] It was on that basis that negotiations on labour questions took place in the context of the US-Chile FTA.

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[218] The BTPAA granted authority to the president of the US to conduct trade negotiations with other countries, more so developing countries, whether in multilateral or bilateral contexts. The move was regarded as a measure to fast track the US's trade liberalisation process.

[219] Weiss 700.

[220] Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" 9.

[221] Ibid.

[222] See the US Trade Expansion Act of 1962 and the US Trade Act of 1974. See also Charnovitz "Worker Adjustment: The Missing Ingredient in Trade Policy" 1986 *California Management Review* 157. Trade Adjustment Assistance (TAA) is a program of the US Department of Labor, US Department of Commerce, and the US Department of Agriculture. Trade Adjustment Assistance for Workers provides a variety of reemployment services and benefits to workers who have lost their jobs or suffered a reduction of hours and wages as a result of increased imports or shifts in production outside the United States. The TAA program aims to help program participants obtain new jobs, ensuring they retain employment and earn wages comparable to their prior employment.

[223] Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" 9.

[224] Ibid.

5 4 2 3 The incorporation of social clauses by Chile in FTAs

The experience of Chile concerning issues of linking trade and labour is one worth noting. Chile has been able to include a social clause in its trade agreements with both developed and developing countries.[225] The outcomes for Chile have been positive with best practices having been learnt across the most diverse fields.[226] The following are some of the FTAs which Chile has entered into which include a social clause:

5 4 2 3 1 US-Chile FTA

The US-Chile FTA displays an alternative model of including labour matters in trade agreements.[227] Under the US-Chile FTA, the most important obligation requires a Party's compliance with its own domestic labour legislation.[228] This is the only commitment in the FTA for which an inability to fulfil would lead to the convening of an arbitration panel. The principle of sovereignty is explicitly safeguarded with respect to the modification of domestic legislation and determination of supervisory regimes for labour matters by the administration.[229] Respect for the autonomy of both Parties' judicial branches is also recognised in that the provisions of the US-Chile FTA do not allow decisions by the courts to be revised or re-opened in the light of provisions of the treaty.[230] The US and Chile in the FTA also reaffirmed their commitments to the ILO.[231] The protection of labour standards in national legislation is not supposed to be weakened or reduced in the interest of trade according to the US-Chile FTA.

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[225] Some of the instances in which Chile was able to include social clauses in its trade agreements are as follows: 1) Incorporating labour matters in its internal trade agenda since the signing of an FTA with Canada by means of an Agreement on Labour Cooperation; 2) Including labour commitments in its Association Agreement with the European Union; 3) Concluded a demanding clause on labour in Chapter XVII of the US-Chile FTA and 4) Agreed a Labour Cooperation Memorandum of Understanding in parallel with the Trans-Pacific Strategic Economic Partnership with Brunei Darussalam, New Zealand and Singapore amongst other agreements.

[226] Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" 24.

[227] The US-Chile FTA was concluded on the 6th of June 2003. Labour matters are included under a chapter of the FTA and are subject to dispute settlement procedures similar and equivalent to those provided for with regard to trade questions.

[228] See Article 18.2 (1) (a) of the US-Chile FTA. The Article provides that: "A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement".

[229] See the US-Chile FTA Article 3.16.

[230] Grandi "Trade Agreements and their Relation to Labour Standards: The Current Situation" 24.

[231] Particular emphasis is placed on the Parties committing themselves to fulfilling their commitments to the 1998 ILO Declaration.

If a dispute were to occur between the US and Chile concerning the protection of labour standards in one country, a dispute settlement mechanism is provided for.[232] If an arbitration panel is set up and preliminary as well as final reports have been drawn up stating that one of the parties has not complied with its obligations under Article 18. 2(1)(a), the parties can reach an agreement within forty-five days of receiving the final report. Should the parties not be able to reach an agreement within forty-five days or if they have reached an agreement but the complaining Party feels that the agreement has not been complied with, the aggrieved Party may request that a new arbitration panel be set up and that it should impose a monetary compensation on the other Party.[233] The compensation must be paid in equal quarterly quarters beginning sixty days after notification of the relevant decision.[234]

If the assessment is not paid within the time limit, the complaining Party can adopt other appropriate steps to collect the assessment or otherwise secure compliance.[235] Such other steps may include the suspension of tariff benefits by the complaining Party, under the US-Chile Agreement, as a means necessary to collect the assessment.[236] However, in doing so, the complaining Party must avoid unduly affecting parties or interests not party to the dispute.[237] If the Party being complained against feels that it is now complying with its obligations in terms of the US-Chile Agreement, it can at anytime request that the arbitration panel be convened to revoke the suspension of benefits or cancel the monetary assessments.[238]

5 4 2 3 2 Chile-European Union Association Agreement

The Agreement between Chile and the European Union contains a number of provisions on cooperation in the field of labour. The Agreement indicates a clear objective of promoting social development,[239] and a requirement that Parties to the Agreement must give special priority to respect for fundamental social rights.[240] There is also emphasis on the importance of social

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[232] See the US-Chile FTA Chapter 22 and Article 22.16.
[233] See the US-Chile FTA Article 22. 16(2). The maximum assessment amounts to 15 million US dollars.
[234] See the US-Chile FTA Article 22. 16(2).
[235] See the US-Chile FTA Article 22. 16(2).
[236] See the US-Chile FTA Article 22.16(4).
[237] See the US-Chile FTA Article 22. 16.5.
[238] See the US-Chile FTA Article 22.17.
[239] See the Chile-European Association Agreement Part III Article 16 1(b).
[240] Under the heading V of the Chile-European Association Agreement titled "Cooperation in Social Matters", the Parties deal with social matters in Articles 43, 44 and 45. In Article 43, parties recognise that they must promote

development.[241] Chile and the European Union (EU) undertook to give priority to job creation and respect for fundamental social rights, promoting ILO conventions relating to freedom of association and the right to collective bargaining and non-discrimination, abolition of forced labour and child labour, and equal treatment between men and women.[242] This Agreement also includes obligations concerning the participation of civil society in consultations on cooperation in various areas of the Agreement.[243]

5 4 2 3 3 Chile and China FTA

Chile has signed a Memorandum of Understanding (MoU) on Labour Cooperation and Social Security with China.[244] The MoU requires both parties to commit themselves to carrying out activities in respect of employment, decent work, labour legislation, work inspection, improvement of working conditions and worker training, globalisation and its impact on employment, the working environment, labour relations and social security. Not much though can be learnt from this Agreement as it centres only on exchange of information and experiences, visits, events such as seminars and workshops, and meetings of specialists. To date much emphasis has been placed in the field of social security with Chinese authorities meeting their Chile counterparts on a number of visits to Chile. However, that labour aspects of the MoU have not been given much emphasis, thus bringing into question the commitment of the Chinese to improving labour rights in trade practices.

5 4 2 4 European Union (EU)

The inclusion of a social clause in the EU has as its basis the need to promote lasting and balanced social and economic progress.[245] The EU Treaty states that its objectives consist in:

> "...the harmonious and balanced development of economic activity, sustainable non-inflationary growth, which should respect the environment, a high degree of convergence in the behaviour of their economies, a high level of employment and social protection,

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the participation of social partners as well as avoid discrimination in the treatment of citizens of one country legally resident in the territory of the other Party.

[241] See the Chile-European Association Agreement Article 44.

[242] See the Chile-European Association Agreement Article 44.

[243] See the Chile-European Association Agreement Article 45.

[244] The Ministries of Labour and Social Security of Chile and China concluded the MoU on the 2nd of November 2005 in Santiago.

[245] See Article 3 of the Treaty of Maastricht signed on 7 February 1992.

improvement in the level and quality of life, economic and social cohesion and solidarity between member States."[246]

The ideology behind the EU's inclusion of a social clause in its treaties on trade related matters, has thus not been limited to EU members' interests. It has been applied in the EU's relations with developing countries on a unilateral level.[247] Emphasis was placed on the protection of workers' rights by developing countries who wanted to benefit from the EU GSP system in the following areas: elimination of all forms of forced or obligatory labour,[248] liberty of association and effective recognition of the right to collective bargaining,[249] elimination of discrimination with regards to employment and profession[250] and the elimination of child labour.[251] The EU has also entered into association agreements in which the social clause has been included to protect labour standards in trade related matters. The first of such agreements is the Cotonou Agreement.[252] The Parties to the Cotonou Agreement re-affirm their commitment to internationally recognised fundamental labour standards, as defined in the relevant ILO conventions.[253]

The EU also entered into another association agreement called the EU-CARIFORUM Agreement.[254] In the introductory section of the EU-CARIFORUM Agreement, one of its key objectives is given as the following:

"...the necessity of promoting social and economic progress for its citizens in harmony with sustainable development, and respecting fundamental labour rights in accordance with

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[246] See Article 2 of the EU Treaty.

[247] See the EU Council Regulation 980 of 27 June 2005. This regulation relates to the application of a system of general preferential tariffs in which a system of labour standards for developing countries was developed for the purpose of allowing the movement of certain goods with lower tariffs or even exemptions. The system became known as the GSP Plus.

[248] See ILO Conventions 29 and 105.

[249] See ILO Conventions 87 and 98.

[250] See ILO Conventions 100 and 11.

[251] See ILO Conventions 138 and 182.

[252] This is an Association Agreement signed by the African, Caribbean and Pacific States and the European Community on the 23rd of June 2005. Its predecessor is the Lome Convention of 1975 whose original purpose was to establish a cooperation agreement and preferential tariffs.

[253] See Article 50 of the Cotonou Agreement entitled "Trade and Labour Standards". Particular emphasis in this agreement is also placed on the liberty of association and the right to collective bargaining, abolition of the worst forms of child labour, abolition of forced labour and non-discrimination in employment.

[254] The Agreement was entered into in 2006. CARIFORUM is an association of developing countries which include states such as Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Surinam, Trinidad and Tobago, Saint Lucia, Saint Kitts and Nevis and the Grenadines.

the commitments they have undertaken under the auspices of the International labour Organisation...”[255]

The EU-CARIFORUM Agreement deals with various social issues key among them being the reiterated commitment to comply with fundamental labour standards recognised at the international level, as laid down in the ILO Conventions and in their commitments to the ILO.[256] Parties to this agreement must also:

> “...recognise the beneficial role that core labour standards can have on economic efficiency, innovation and productivity, and they highlight the value of greater policy coherence between trade policies, on the one hand, and employment and social policies on the other.”[257]

Furthermore, the Parties to the Agreement included a provision referring to “...the benefits of commerce in fair and ethical trade products and the importance of facilitating such commerce between them”.[258] As such, fair and ethical trade could be read to imply trade in products obtained from fair labour practices. Anything short of that would possibly amount to unfair and unethical trade. Another key provision to this Agreement relates to the drafting of countries’ own regulations and policies in accordance with their social development priorities. The Agreement binds them to guarantee that:

> “...their own social and labour regulation and policies provide for and encourage high levels of social and labour standards consistent with the internationally recognised labour rights...and shall strive to continue to improve those laws and policies.”[259]

Whilst no definition is given in the Agreement of what high levels of social and labour standards are, it may be inferred that reference is being made to the ILO standards. Also, concerning the levels of protection, Article 193 gives guidance by laying down that:

> “...the Parties agree not to encourage trade or foreign direct investment to enhance or maintain competitive advantage by:
> a) lowering the level of protection provided by domestic social and labour legislation:
> b) derogating from, or failing to apply such legislation and standards”.[260]

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[255] See the EU-CARIFORUM Agreement preamble.
[256] See the EU-CARIFOFUM Agreement Article 191. Particular emphasis is placed on the ILO Declaration of 1998.
[257] See the EU-CARIFOFUM Agreement Article 191.3.
[258] See the EU-CARIFOFUM Agreement Article 191.5.
[259] See the EU-CARIFOFUM Agreement Article 192.
[260] See the EU-CARIFOFUM Agreement Article 193.

In principle, the Agreement recognises the importance of establishing policies for social cohesion and measures to encourage decent work at the regional level.[261] However, unlike the NAALC, the EU-CARIFORUM Agreement does not contain guarantees for the due process of law.[262] It also does not contain provisions guaranteeing access to administrative or judicial procedures for the interested Parties.[263] Article 195 of the Agreement emphasizes:

> "...the importance of monitoring and assessing the operation of the Agreement on decent work and other areas of sustainable development through their respective participative processes and institutions, as well as those set up in the Agreement".[264]

As such, Article 195 requires that Parties to the Agreement mutually consult with each other to address social questions raised concerning the implementation of the Agreement. The Agreement's dispute settlement procedures explicitly exclude the adoption or trade sanctions in the event of a failure to comply with the EU-CARIFORUM Agreement regulations.[265] This is in stark contrast with the NAALC which advocates for a penalty or sanctions in the event of non-compliance.

The EU-CARIFORUM Agreement however does allow the parties to consult with the ILO if they need to establish the best practices in a particular case, assuming there would be a dispute or the parties seek to avoid a dispute. Article 195.3 provides that:

> "On any issue covered by Articles 191 to 194 the Parties may agree to seek advice from the ILO on best practice, the use of effective policy tools for addressing trade related social challenges such as labour market adjustment, as well as the identification of any obstacles that might impede the effective implementation of core labour standards".[266]

As regards the interpretation of Articles 191 to 194 of the Agreement, Article 195.4 provides that:

> "A party may request consultations with the other party on matters concerning the interpretation and application of Articles 191 to 194. The consultations shall not exceed three months. In the context of this procedure, any Party may independently seek advice

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[261] See the EU-CARIFOFUM Agreement Article 194.
[262] See the EU-CARIFOFUM Agreement Article 195.
[263] See the EU-CARIFOFUM Agreement Article 195.
[264] See the EU-CARIFOFUM Agreement Article 195.
[265] See the EU-CARIFOFUM Agreement Article 213.2. It provides that "...appropriate measures shall not include suspension of trade concessions under this agreement."
[266] See the EU-CARIFOFUM Agreement Article 195.3.

from the ILO. In this case, the limit for the period for consultations is extended by a further period of three months".[267]

Assuming that the consultations have failed, "any Party to the consultations may request that a Committee of Experts be convened to examine such a matter".[268] Within three months of being set up, the Committee of Experts, made up of three members with specialist knowledge, will present a report to the Parties involved in the matter.[269] It is however important to observe that on the possibility of applying consultation and mediation procedures concerning labour matters emanating from the Agreement, there may be an exception to the effect that no labour matter goes to the review panel without referral to the ILO.[270] Also, the Agreement allows room for the possibility of referring a matter to a mediator to resolve a dispute.[271] Where a matter has been referred to a review panel, the panel will present a provisional report which will consist of a descriptive section, a verification section and conclusions.[272] Notification of the findings must then be made within one hundred and fifty days from the nomination of the panel.[273]

5 4 3 Have the Bilateral and Regional agreements been effective?

The best way to establish the effectiveness of bilateral and regional FTAs in observing core labour standards is to analyse some of the cases in which disputes have been filed by one Party against the other. A number of such cases exist, mostly under the NAALC dispute resolution system. This study will now look at some of these cases.

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[267] See the EU-CARIFOFUM Agreement Article 195.4.
[268] See the EU-CARIFOFUM Agreement Article 195.5.
[269] See the EU-CARIFOFUM Agreement Article 195.6.
[270] See the EU-CARIFOFUM Agreement Article 206.6. According to this exception, the consultation procedure can lead to a review panel stage only if it has already passed through the procedures provided for in sections 195.3, 195.4 and 195.5. In other words the ILO must be part of the consultations if a matter is to be referred to the review panel.
[271] See the EU-CARIFOFUM Agreement Articles 205.1, 205.2 and 221.
[272] See the EU-CARIFOFUM Agreement Article 208. As a general rule, the provisional report will be issued within 120 days from the date on which the panel is set up. Any Party will then be able to make observations on concrete aspects of the provisional report within 15 days.
[273] See the EU-CARIFOFUM Agreement Article 208.

5 4 3 1 Analysis of cases heard under the NAALC

Through public communications[274] and ministerial consultations,[275] a significant number of important cases which could assist in assessing the efficiency of the NAALC have been dealt with.[276] The ministerial consultations and public communications are applicable in respect to all matters dealing with the eleven labour principles set out in NAALC.[277] Any dispute with a question relating to the adequacy of the administrative or governmental measures to implement labour law can be dealt with through public communications or ministerial consultations.[278] Equally, issues relating to the existence of appropriate administrative, quasi-judicial or judicial recourses regarding them,[279] procedural guarantees linked to the exercise of such recourses,[280] and accessibility and public dissemination of this same legislation,[281] can also be handled with through public communications or ministerial consultations.

Compa has argued that the public communications filed created an awakening period, related to the initial complaints of a Party's failure to value any of the obligations set in the NAALC.[282] Verge has made a detailed and highly valuable analysis of some of the cases handled by the NAOs concerning the NAALC.[283] Starting with the cases of *Honeywell*[284] *and General Electric,*[285] the US NAO sought to address the matter of workers who were dismissed whilst trying to establish a union that was not affiliated to the leading Mexican union in the *maquiladoras*[286] owned by multi-national companies. In dealing with this matter, the US NAO

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[274] See NAALC Article 24 para 4.
[275] See NAALC Article 22.
[276] See NAALC Articles 6, 7 and 22.
[277] See NAALC Article 2. The public communications and ministerial consultations provide an opportunity to verify the level of protection offered by national labour law.
[278] See NAALC Article 3.
[279] See NAALC Article 4.
[280] See NAALC Article 5.
[281] See NAALC Articles 6 and 7.
[282] Compa 8. The first case centered on the exercise of freedom of association and the protection of the right to organize (principle 1). The country complained against, in this case was Mexico.
[283] See Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" http://white.oit.org.pe/cimt/nn/documentos/146eng.pdf (accessed 03-03-2012).
[284] US NAO 9401.
[285] US NAO 9402.
[286] See Wilson *Exports and Local Development: Mexico's New Maquiladoras* (1992) 139. A maquiladora or maquila is the Mexican name for manufacturing operations which take place in a free trade zone where factories import material and equipment on a duty-free and tariff-free basis for assembly, processing or manufacturing and then re-export, process or manufactured products sometimes back to the country of origin of the raw materials

confined itself to the view that the dismissals corresponded with a phase of union movements in Mexico.[287] They then concluded that since the dismissed workers had received compensation in return for renouncing their right to seek a judicial reinstatement, the workers no longer had a justifiable action at law as their consent to compensation was consistent with Mexican labour law.[288] The US NAO then planned for co-operative information activities on freedom of association with the participation of the Mexican and Canadian NAOs, without so much considering the option of proposing for ministerial consultations.[289]

However, in the *Sony*[290] case, the US NAO took a more distinct approach as opposed to the approach it took in the *Honeywell* and the *General Electric* cases. The *Sony* case background was in the main related to that of the *Honeywell* and *General Electric* cases. It was built on the consideration of a number of specified problems like:

> "...the allegations of dismissals and discriminatory acts against workers which the US NAO found reasonable; the uncertain economic situation of workers who want to initiate reinstatement procedures; contradictory evidence of police violence, with the cooperation of the employer, against workers involved in an allegedly illegal strike; and the unjustified rejection of the union's registration, which deprived it of the legal status needed to bargain collectively; doubts about the impartiality of the tribunal that adopted the decision; presence of the employer during a vote by show of hands to elect union delegates; denying union members access to the union's by-laws and the collective agreement."[291]

The set of facts in the *Sony* case prompted the US NAO to instigate a program of tri-national cooperative activities on the protection of workers dismissed for union activities, to which was added the issue of procedural guarantees applicable to the internal administration of unions.[292] Furthermore, a study of the labour tribunals involved in the issue of dismissals related to union activity was done by the US NAO and which also recommended ministerial consultations on the usefulness of the law that protects freedom of association and the right to organize in Mexico.[293] The ministerial consultations then led to public seminars on national procedures for recognizing

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they used. See also Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)"

[287] US NAO 9401 and 9402. See also Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)".

[288] US NAO 9401 and 9402.

[289] US NAO 9401 and 9402.

[290] US NAO 9403.

[291] US NAO 9403 18. See also Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)".

[292] Compa 9.

[293] US NAO 18.

unions and a study which was done by independent experts on Mexican law on union registration as well a string of meetings between Mexican officials and the parties involved in the application for union registration.[294] The *Sony* case attained reputation as the first real prospect for a truly tri-national investigation of significant aspects of Mexican law dealing with the first NAALC principle and its enforcement.[295]

In the years that followed, the public communications dealt with issues pertaining to freedom of association and the right to organize, and to administrative and legal intervention in the same areas. This occasionally presented the chance to investigate particular characteristics of Mexican law, but in most instances restated, without doubt and with exactness, the problems faced in the *Honeywell* and *General Electric* cases which the US NAO had previously handled.[296] Therefore, in 1996, the US NAO in the *Presca Union*[297] case once again looked at the question of the scope of the international conventions ratified by Mexico within its domestic law. In particular, the *Presca Union* case wanted to address the scope of coverage given to ILO convention on the Freedom of Association and Protection of the Right to Organize Convention,[298] in view of the existence of a Mexican law imposing a single union in the civil service,[299] on which the labour tribunal relied to make it difficult for another trade union to register. Realising the magnitude of the challenge at hand, the US NAO recommended ministerial consultations as regards the difficulty of admitting international law in domestic law, an issue which then became the subject of a tripartite seminar of experts.[300]

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[294] US NAO 18.
[295] US NAO 18.
[296] Compa 10.
[297] US NAO 9601. This case related to the issue of union registration in the civil service. It sought to address the scope of ILO Convention 87 in the Mexican labour legislation.
[298] ILO Convention 87.
[299] See Human Rights Watch "Labor Rights and NAFTA: A Case Study" http://www.unhcr.org/refworld/docid/3ae6a7fe8.html (accessed 16-03-2012). Mexico's Law of Federal Workers, under which federal government ministries operate, limits to one the number of unions that workers can create in any single government entity, such as a ministry, and prescribes the one and only federation to which such unions can belong. The NAALC requires signatories to uphold their labor law, but the petition argued that this part of the labor rights side agreement cannot be used by Mexico to justify maintaining portions of its law that mandate limits on freedom of association that are barred under other Mexican law, including the national Constitution. Under international law, Mexico cannot interpret a treaty in a way that contradicts the treaty's ends and purposes. See also Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)".
[300] See Weiss *Proceedings of the Seminar on International Constitutional Systems of the United States, Mexico and Canada: Laboring in the Shadow of Regional Integration* (1998) 22.

The US NAO was to later handle a series of cases relating to the violation of workers' right to the freedom of association or collective job actions. The first of such cases was held in 1998. It was the case of *Aerovias de Mexico*,[301] in which the US NAO declined to mediate with respect to an alleged infringement of the right to strike ensuing from a governmental call to end a strike on an airline.[302] In the *Han Young* case, the US NAO dealt with the rejection of a labour tribunal to register a union established to substitute a union affiliated to a confederation linked to the government at the time, a rejection which was based upon the employer submission of a collective agreement signed with the latter union, without the workers' knowledge.[303] The *Echlin*[304] case dealt with an apparent case of violence which occurred in the course of a non-secret vote, under the auspices of the labour tribunal, during a similar inter-union conflict as was the state of affairs in the *Han Young* case. The US NAO's review of these two these cases led to an inter-ministerial agreement in May 2000 which required that: the Mexican government was to maintain the implementation a system to register collective agreements in accordance with domestic law and to endorse the awareness of their existence in a range of workplaces as well as setting up a system for secret union affiliation balloting, including a list of the members entitled to vote.[305]

In addition, a public seminar on the different general and specific facets of the freedom of association was to be organized in the region where the developments in the two cases existed with a trilateral seminar on the composition and operation of Mexican labour tribunals acting primarily in the area of union representation also being conducted.[306] However, the US NAO was not the only committee to handle the *Echlin* case. The Canadian NAO also had the chance to deal with the case in 1998.[307] The Canadian NAO recommended ministerial consultations concerning the areas of the enforcement of Mexican law governing the expulsion of a union member, the

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[301] US NAO 9801.
[302] See Article 49 of the NAALC. The right to strike is recognised as the third principle of the NAALC.
[303] US NAO 9702.
[304] US NAO 9703.
[305] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)".
[306] Ibid.
[307] Can-NAO 9-18.

fairness of Mexican labour tribunals, the distribution of union bylaws and the collective contract as well as the way to declare the integrity and accuracy of the union allegiance vote.[308]

In July 2000, the US NAO, in the *TAESA-Flight Attendants*[309] case, yet again recommended ministerial consultations after noting, once more, the utilization of a non-secret vote and acts of coercion in opposition to the attempts of a craft union to replace a general union. A similar set of facts was to be found in the *Duro Bag*[310] case in which the US NAO had to deal with another refusal to hold a secret and neutral union loyalty vote. The US NAO was not the only committee to handle matters of the infringements in workers' collective bargaining and freedoms of association rights. The Mexican NAO was also presented with an issue of protecting the freedom of association and the right to organize, in the *Sprint*[311] case. In this case, the Mexican NAO recommended ministerial consultations with the objective of spelling out the need to protect workers' rights to organize in the event of unexpected closures of industrial units. The ministerial consultations became the subject of a public seminar and a study published by the Commission on this issue.[312]

In the *Labour Policy Association*[313] case, the Canadian NAO temporarily refused to preside over a communication submitted with a somewhat particular intention by Parties with specific business interests. At time of this case, Canadian labour law matters had only related to the first two principles of the NAALC[314] which had only been the subject of only two communications in 1998, before the US NAO. The first communication was that of the *Mac-*

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[308] Can-NAO 9-18.
[309] US NAO 9901.
[310] US NAO 0101.
[311] Mex NAO 9501.
[312] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)". There were to be more communications which also addressed the right to freedom of association and the right to bargain collectively; two involved difficulties experienced by Mexican migrant workers and another two raised the problem of the red tape of the government body, the National Labour Relations Board (NLRB), charged with intervening in such matters. The outcome was a joint ministerial declaration in which the American and Mexican labour secretaries committed themselves to cooperating with a view to resolving those difficulties and to undertaking specific cooperative activities on this subject, including the preparation of a trilingual guide describing the manner in which migrant workers' rights are protected in the three countries. See the following cases: *Solec* Mex NAO 9801; *Washington State Apples* Mex NAO 9802 and *De Coster Egg Farm* 9803.
[313] Can NAO 99-1.
[314] See annexure 1 of the NAALC. The first two principles are the freedom of association and the right to organize and the right to bargain collectively.

Donald[315] case which had to do with the closure of a company in the context of union organizing in Quebec. This communication also raised the issue of the length of the union recognition procedure under Quebec law. However, after being initially accepted, the communication was then withdrawn by its instigators, who appeared to have been content with the fact that Quebec was going to review the law governing collective labour relations. The second communication was that of the *Rural Route Mail Couriers*[316] case which dealt with the fact that rural mail couriers had not been protected by the federal law governing collective labour relations. The US NAO simply refused to review the issue in depth.

After all of the initial cases had appeared to deal with the first two principles of the NAALC, the 1997 *Pregnancy Testing*[317] case brought before the US NAO was to expand the field of investigation to other labour principles. As a result, the case is predominantly significant, unlike the *Sony* case which focused on the area of freedom of association which falls within the first two principles of the NAALC. The case dealt with the principle of the elimination of employment discrimination,[318] to condemn the practice of carrying out pregnancy tests in a number of Northern Mexican *maquiladoras*. The tests led to businesses rejecting to hire pregnant women. Instead they began to offer pregnant women incentives to leave their jobs so that the companies will not have to pay maternity leave. The affected women also contended that they had no faith in the ability of the labour authorities' capacity to correct such ill-treatment.[319]

After a hearing, the US NAO acknowledged the existence of problems in attaining contact with the authorities in such conditions; denounced the pressures wield upon the pregnant workers, but indicated that it was not in a position to rule on the illegality of the pregnancy tests with respect to Mexican law or to rule on the refusal to hire pregnant women.[320] The US NAO then recommended ministerial consultations to ascertain the degree of the protection given by Mexican law with respect to sexual discrimination against pregnant women and its enforcement

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[315] US NAO 9803.
[316] US NAO 9804.
[317] US NAO 9701.
[318] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)". See also principle 7 of the NAALC.
[319] US NAO 9701 8.
[320] US NAO 9701 8. See also Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)".

by the authorities in question.[321] The ministerial consultations provided an opportunity for tri-national cooperative activities on the issue, including information activities for the workers and a tri-national public conference.[322]

In the same year, the previously mentioned *Han Young* and *Echlin* cases raised, beside the difficulties associated with freedom of association, various failures to enforce Mexican law on occupational safety and health.[323] As such, in the latter case, the US NAO noted, among other things, the insufficiency of both the fines and the labour inspection.[324] The subsequent ministerial consultations prescribed information exchanges between Mexican and US officials on those aspects of the enforcement of the laws relating to occupational safety and health, and relating to the handling of hazardous substances, protective gear and the role of union management occupational safety and health committees.[325] They were also to establish a program to disseminate information in the workplace.[326]

In the *Auto Trim* case of 2000, the US NAO, in connection with a communication related to safety and occupational health and to compensation in cases of occupational injuries and illnesses,[327] again noted deficiencies in the labour inspection and the administration's lack of response to the complainants, and recommended ministerial consultations on the matter.[328] The *Echlin* case submitted in 1998 to the Canadian NAO had addressed both principles 9 and 10 of the NAALC.[329] After a hearing, the US NAO noted, in particular, that contrary to Article 3 of the NAALC, the workers in question did not have, in accordance with Mexican law, easy access to material safety data sheets, and that there was inadequate labeling of the latter and a lack of appropriate protective equipment for exposed workers.[330] It recommended ministerial consultations on these issues, and on labour inspection, and the beginning of a cooperative

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[321] US NAO 9701 8.
[322] US NAO 9701 8.
[323] US NAO 9701 8. See also principle 9 of the NAALC.
[324] US NAO 9701 8.
[325] US NAO 9701 8. See also the case of *Aerovias de Mexico* US NAO 9702.
[326] US NAO 9701 8.
[327] See NAALC principle 10.
[328] US NAO 0001.
[329] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)".
[330] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)".

dialogue between the Canadian labour minister and his Mexican counterpart about protection against occupational injuries caused by handling asbestos.[331]

As for US law, four communications filed with the Mexican NAO in 1998 similarly extended the field of intervention to other labour principles. Thus, after the treatment of the herein referred to cases of *Solec*, *Apple Industry* and *De Coster Egg Farm*, the different cooperative activities stipulated in the joint ministerial declaration were to address not only freedom of association and the right to bargain collectively, but also minimum employment standards,[332] elimination of employment discrimination,[333] prevention of occupational injuries and illnesses and compensation in these cases,[334] and protection of migrant workers[335]. The Mexican NAO's prior review of these cases revealed various failures to enforce US law in these areas, particularly in companies using Mexican agricultural workers.

These difficulties associated with migrant agricultural workers, which were revealed for the first time in the *Industria de la Manzana*[336] case, were the object of an additional case in 1998. In the *Yale Law School*[337] case, the enforcement of minimum US employment standards was compromised by an administrative practice of labour inspectors disclosing information to the Immigration Service of any violation of immigration law by persons seeking to secure the minimum wage or respect for other minimum labour standards.[338] An agreement between the respective labour ministers put an end to that practice, which would necessarily have a dissuasive effect on those seeking to have the labour laws enforced.[339]

All this activity originated by the communications presented to the NAOs resulted, initially, in the identification of the most critical points in the enforcement of the labour law of the countries in question, as well as not only making these difficulties known to the

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[331] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)".
[332] See NAALC principle 6.
[333] See NAALC principle 7.
[334] See NAALC principles 9 and 10.
[335] See NAALC principle 11.
[336] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)".
[337] Mex NAO 9804.
[338] Mex NAO 9804.
[339] Mex NAO 9804.

governmental authorities of the three countries, but also revealing them to public gaze.[340] This was true, to take Mexico as an example, with respect to the impartiality of some labour tribunals because of their composition; the difficulties obtaining union registration in the presence of a rival union signatory of a secret collective agreement; union procedures for applying a unionized shop provision in a collective agreement; the practice of non-secret balloting on union affiliation; the precarious situation of pregnant workers in the *maquiladoras*; and inadequate occupational safety and health inspections.[341]

In the US, the difficulty of enforcing legislation related to the various labour principles in the case of migrant workers became evident.[342] Such knowledge of the reality of the enforcement of national labour laws, which was not methodically established before the NAALC, is a prerequisite to the quest for the cooperative relations contemplated in this instrument.[343] As a matter of fact, it is even possible to credit the public communications with some immediate positive results: for example, in Mexico, the commitment of the federal labour department to set up a public registry of collective agreements, as a result of the ministerial consultations carried out in the *Echlin* case; the assessment of a large fine for a violation of the law on safety and occupation health, the day after the presentation of the communication in the *Han Young* case; a certain influence of the NAALC perhaps in the development of a new labour policy by this country's previous federal government.[344]

In the case of the US, it might be proper to mention a simplified guide to labour law for migrant workers and the suppression of the administrative practice of informing on foreign workers with immigration irregularities, following the *Yale Law School* communication.[345] On the other hand, it must be admitted that the NAOs have been ineffective in other cases.[346] Thus, the existence of a mechanism in the US national law to appeal the first level decisions of labour tribunals is not a satisfactory response to the operating deficiencies at this first level with regard

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[340] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)".
[341] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)".
[342] Ibid.
[343] Ibid
[344] Ibid.
[345] Ibid.
[346] Ibid.

to article 5 of NAALC,[347] as the *Pesca Union* case revealed.[348] The recommendation for ministerial consultations is sometimes formulated in exceedingly general terms.[349] Thus, the Mexican NAO typically requested that the review of the questions raised be continued at the ministerial level. The US NAO for its part was even more general in the formulation of its recommendation in the *TAESA Flight Attendants* case.[350] In particular, the recurrent nature of some of the difficulties might introduce some doubt about the efficacy, in the long run, of the intervention, in particular, of ministerial consultations and related activities.[351]

Thus, it can be observed throughout the years that a certain similarity in the kind of obstacles to the exercise of freedom of association mentioned in the first communications related to Mexico, including the *Sony* case, and those found in 1997 communications, such as the *Han Young* and *Echlin* cases, and in *TAESA-Flight Attendants* in 1999, have been faced when trying to implement the NAALC.[352] Depending on the cases, it was a question of violence associated with a union affiliation vote or, at least, the lack of a secret ballot in an appropriate place.[353] A failure to reinstate illegally fired workers was also present in the first cases, and three years later in the *Echlin* case.[354] On the one hand, it may be argued that the size and complexity of the Mexican economy and the multiplicity of workplaces involved can explain the lack of an immediate corrective effect and the same is true of Canada and, to a much greater extent, the US.[355]

However, this practical view of things is not enough to dismiss doubts about the effectiveness of the measures adopted following ministerial consultations, which are themselves a response to communications reiterating difficulties of the same kind.[356] As a matter of fact, in

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[347] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 10.
[348] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 11. See also the case of *Presca Union* US NAO 9601 31.
[349] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 12.
[350] US NAO 9901.
[351] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)"12.
[352] Ibid.
[353] Ibid.
[354] Ibid.
[355] Ibid.
[356] Ibid.

the case of *Duro Bag*, questions were raised concerning the effectiveness of the unity, if any, between the Mexican and US ministers of labour pursuant to the *Han Young* and *Echlin* cases, with respect to the establishment of balloting procedures for union affiliation votes.[357] The Mexican and US ministers of labour did not refer the *Duro Bag* case to the ECE. The establishment of an ECE could have helped throw a light, one that was external to and independent of the Parties, on the precise scope of national law, particularly with respect to the corresponding international labour law, following the ministerial consultations.[358] The case of discrimination against pregnant workers would have lent itself to this, but so far no recourse has been made to the ECE, nor was it in the other cases.

International labour law has been evoked in connection with the study of some of the communications. In some cases, it was examined vis-à-vis its possible scope if integrated into national law. The legal solutions differ in this respect from one Party to the other, and even within a single country, based on some schools of thought, as was shown in particular by the symposium of experts organized pursuant to the recommendations in connection with the *Pesca Union* case.[359] Thus, with respect to Mexico, the US NAO had already mentioned the fact that this country had ratified the ILO Convention 87 on the Freedom of Association and Protection of the Right to Organize Convention in its report on the *Sony* case and assumed that the contents of this convention had become part of Mexican labour law.[360] The Canadian NAO did the same in its 1998 report on the union component of the *Echlin* case.[361] It assumed a similar integration into Mexican law of the content of the other international instruments to which this country had adhered.[362]

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[357] Ibid.
[358] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 13.
[359] Ibid.
[360] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 13. See also the *Sony case* 18.
[361] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 13.
[362] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 14. See also the *Echlin* case 18. The international instruments referred to are the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Convention on Human Rights and the International Covenant on Economic, Social and Cultural Rights.

For its part, the Mexican NAO, in its report,[363] simply mentioned the fact that the US had not ratified ILO Convention 87.[364] In certain other reports, all involving Mexico, references to international law become more detailed. The US NAO's report in the *Pesca Union* case, in which the issue was the legislated imposition of a union monopoly in the public service, led the US NAO to take into account previous recommendations of the ILO's Freedom of Association Committee with respect to this same problem, in the specific case of Mexico, as well as the more general position of that same body's Committee of Experts on the Application of Conventions and Recommendations on the subject.[365] Similarly, in the *Echlin* report, the US NAO took into account the general positions of these bodies on the issue of union monopolies and the enforcement of the clauses on union security in collective agreements, with respect to ILO Conventions 87 and 98 on freedom of association.[366]

Mexico has ratified only the first of these conventions, but, as pointed out by the US NAO, it is bound, as a member of the ILO, by the ILO's Declaration of Fundamental Principles and Rights at Work and its follow up of 1998.[367] Likewise, in the communication related to discrimination against pregnant workers, it noted that the ILO Committee of Experts considered that discrimination on the basis of pregnancy fits in well with the understanding of sexual discrimination, but that there were no specific statutes about the legality of pregnancy tests in relation to ILO Convention 111 Concerning Discrimination in Respect to Employment and Occupation.[368] The same was true, it also noted, for the interpretation of the UN Convention on the Elimination of All Forms of Discrimination against Women.[369] Finally, in the *Echlin* case,

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[363] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 14. See also the *Industria de la Manzana case* para 3.1.3.

[364] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 14.

[365] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 14. See also the *Pesca Union* case 22.

[366] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 15.

[367] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 15. See also the *Echlin* case 20.

[368] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 14.

[369] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 14. See also *Pregnancy Testing* case 25.

both the American and Canadian NAOs reviewed the contents of the ILO Conventions in the area of occupational safety and health ratified by Mexico and the attendant recommendations.[370]

From these various actions of the NAOs, one can infer that international labour law, even in the absence of any express reference in the NAALC, has been, in those cases where it is appropriate, one of the elements taken into account in formulating the recommendation for ministerial consultations, either with the objective of clarifying the scope of national law or of more directly monitoring its enforcement.[371] However, it should be noted that, so far, all the cases that are significant in this sense have involved Mexico, a country, unlike Canada, with a monistic constitutional system that makes any treaty ratified by this nation an integral part of its domestic legal system.[372] Finally, as was illustrated by the *Pesca Union* case, it can happen that a NAO is called upon to offer an opinion, in the case of such a country, on the enforcement of the national law in which a component of international origin in this case, ILO Convention 87 has already been the object of intervention by international bodies with respect to the behaviour of this same country.[373]

In 2005 in the case of *Federación de Trabajadores Vanguardia Obrera de la Confederación Revolucionaria de Obreros y Campesinos* (FTVO-CROC), with support from the US Labour Education in the Americas Project and the Washington Office on Latin America,[374] the US Office of Trade and Labour Affairs had to deal with allegations that the Government of Mexico failed to fulfil its obligation to effectively enforce its labour laws in connection with freedom of association and protection of the right to organize, the right to bargain collectively, and the right to strike.[375] The submission further alleged that the Mexican government did not effectively enforce its laws by failing to conduct required on-site inspections to detect and remedy labour law violations concerning forced labour, child labour, minimum employment

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[370] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 15. See also the *Echlin* case 56.
[371] Verge "Section IV Analytical Presentation of the North-American Agreement on Labour Cooperation (NAALC)" 16.
[372] Ibid.
[373] Ibid.
[374] See Submission 2005-03 of the Office of Trade and Labour Affairs (OTLA) (formerly the U.S. National Administrative Office or NAO and the Office of Trade Agreement Implementation or OTAI).
[375] See Article 3 of the NAALC.

standards, employment discrimination, and occupational safety and health.[376] The submission further alleged that the Mexican government had failed to effectively ensure that administrative and labour tribunal proceedings related to collective bargaining and the right to strike were fair, equitable, and transparent which violated the requirements of the NAALC.[377] The US OTLA found that:

> "While the FTVO-CROC did not always follow proper legal procedures in seeking to represent interested workers..., the Mexican labour authorities' handling of the process revealed several problematic aspects with the administrative procedures that allow for the registration of collective bargaining agreements and the exercise of collective bargaining rights. Areas of concern include reliance on technical grounds to reject union petitions seeking collective bargaining rights, unwarranted delays resulting from ineffective communication between federal and state labour authorities, and a general lack of transparency as to how Mexican labour law recognizes unions and collective bargaining agreements. The Government of Mexico failed to conduct periodic inspections at ... between 1998 and 2005, as required by Mexico's Federal Labour Law. As a result, labour law violations may have gone unchecked for several years, as evidenced by violations that were found when four Extraordinary Inspections were conducted by Mexican authorities in May 2005."[378]

In October 2011, the Canadian NAO received a submission by 80 unions from across North America, including several Canadian unions which alleged that the Government of Mexico had failed to meet its obligations under the NAALC.[379] Specifically, the complainants alleged that through its actions surrounding the events in 2009 at Luz y Fuerza del Centro, a state-owned electricity company, the Mexican government had violated the basic labour rights of the Sindicato Mexicano de Electricistas (the Mexican Union of Electrical Workers) and its members.[380] In 2009, the complainants had argued that:

> "...the Mexican government has consistently disregarded its obligation to enforce, at a bare minimum, its own labour laws under the NAALC. Permitting the Mexican government to act in this manner will undermine the NAALC's aim of ensuring that increased economic integration does not lead to a corresponding decrease in labour standards. As such, the Petitioners request that the US Office of Trade and Labour Affairs Implementation ("OTLA"), following its investigation, recommend ministerial consultations regarding the Mexican government's failure to respect its own labour and health and safety laws as

[376] See US OTLA 2005-03.
[377] See Article 5 of the NAALC.
[378] See US OTLA 2005-03.
[379] Can-NAO 2011-1.
[380] Ibid.

> provided for under Article 22 of the NAALC. If these steps cannot be obtained as a result of ministerial consultations, the Petitioners request that the United States request the establishment of an arbitral panel in accordance with Article 29 of the NAALC."[381]

The case was yet to be finalized at the time of writing this work. This raises the question of whether the NAALC has been effective in protecting workers' rights in trade. Results of studies evaluating the NAALC have been mixed. Those who claim relative success of the NAALC acknowledge some weaknesses but stress its potential within the context of trade agreements and conclude that it represents an important shift from agreements such as the GATT, which characterize any regulations addressing labour, health and the environment as trade barriers.[382] Those who claim mixed results measure the NAALC's effectiveness against the constraints inherent in a compromised agreement. They argue that the value of increased attention to labour rights violations and heightened cross-border solidarity whilst acknowledging the need for improvements.[383] Some warn against unrealistic expectations of international bodies given that respect for sovereignty is a fundamental NAALC principle.[384] They advocate against abandoning the NAALC process and for creative uses of the NAALC as a tool in a broader strategy that combines cross-border solidarity, legal, media, lobbying and organizing efforts.[385]

On the other end hand, there are those who believe that the NAALC is inherently flawed and therefore "designed to fail."[386] While some attribute minor gains to use of the NAALC, they claim that the NAALC incorrectly presumes that current labour standards are sufficient rather than harmonizing them upwards or aligning them with the NAALC's eleven principles.[387] Others cite the NAALC's inability to address violations of fundamental worker rights to organize, bargain and strike as a basic flaw, the length of the process, and its inaccessibility to workers.

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[381] Ibid.
[382] See Trebilcock and Howse The Regulation of International Trade (2005) 559.
[383] Trebilcock and Howse 576.
[384] Ibid.
[385] Ibid.
[386] See Compa Justice for All: The Struggle for Worker Rights in Mexico (2003) 41. Compa argued that: "The NAALC has failed to achieve its high purpose. Apparently more eager to maintain diplomatic niceties rather than tackle and solve worker rights violations, the three governments have demonstrated a lack of will to hold one another to their NAALC commitments. Some investigations and reports have led to significant findings and recommendations, but they have not produced change. Ministerial consultations resulted only in research projects and trinational conferences. Although theses are often informative, they have not directly addressed or resolved worker rights violations documented and proven in NAALC proceedings."
[387] Trebilcock and Howse 577.

The analysis in this study leaves one question as to whether the inclusion of the social clause in the unilateral, bilateral and regional trade instruments is the right approach to protecting labour violations in trade practices in the world. Like the still-born attempts at linkage in the WTO, and like the unilateral trade and labour provisions described above, bilateral and regional linkage regimes have not been as effective as they could be at improving working conditions, protecting workers' rights, or compelling states to improve their labour law enforcement. Many critics of the trade and labour approaches adopted in the NAALC, the BTPAA and the FTAs have focused on what they claim are structural deficiencies in the design of these agreements, particularly the weakness of the enforce-your-own-labour-law standard[388] and what they believe are, in practice, non-equivalent dispute settlement procedures and remedies that violate what they claim is required in the US BTPAA.[389] These critiques might be compelling for those who advocate a strict State Action-State Sanctions Model in which the primary objective is to create sufficient economic incentives for States to strengthen their labour laws and enforcement regimes.[390]

Kolben suggests that in fact, these labour rights provisions have been ineffective, at least in part, because they are so overly linked to a State Action-State Sanctions Model, particularly in the context of trading partners with low regulatory capacity. The relative ineffectiveness of NAALC is illustrative.[391] Weiss also noted that the NAALC system, although initially holding out promise to some, has largely failed to live up to the expectations of its initial proponents, as there have been few constructive resolutions of labour rights problems through the NAALC procedures.[392] While at least in the NAALC some of the preliminary procedures, known as public communications, were initiated, albeit to little effect, the complaint procedures negotiated in agreements post-NAALC have not been utilized at all.[393] Indeed, the US and its trading partners have not, thus far, initiated any complaints under the labour rights provisions of any trade agreement; given the limitation that only governments may initiate complaints, and not

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[388] See Elliott "Labor Standards, Development, and CAFTA" http://www.iie.com/publications/pb/pb04-2.pdf. (accessed 03-03-2012).
[389] Weiss 726.
[390] Kolben 222.
[391] Ibid.
[392] Weiss 735.
[393] Kolben 222.

third parties, political realities suggest that it is highly unlikely that parties to a trade agreement will choose to initiate them because few countries would be interested in encouraging similar claims against themselves.[394]

To demonstrate, an expose by the National Labour Committee, a US based advocacy group, claimed that there were widespread and systematic violations of Jordanian and international labour law in Jordan's garment factories.[395] The report described 90 to 120 hour work weeks, confiscation of foreign workers' passports, and other serious abuses. Yet despite the labour provisions in the US Jordan FTA, which were partly responsible for creating an apparel industry in Jordan in the first place, no complaint has been brought by the United States under the US Jordan FTA.[396] This is not to say, of course, that labour rights provisions are completely irrelevant in effecting changes in workers' rights and labour law enforcement.

Another criticism of the bilateral or regional approach to a social clause is its reliance on domestic labour regulation. Contemporary studies appear to indicate that the protection of core labour standards through domestic laws may no longer be sufficient in the global era. Harpur contends that effective regulation has three essential components.[397] First, the law must develop standards; second, there must be sufficient monitoring of compliance to detect non-compliance; and third, there must be some form of motivation to avoid non-compliance.[398] The growth in international trade has created significant challenges for all three of these stages.[399] The traditional regulatory model involves a law, state inspectors and legal sanctions for non-compliance.[400] One of the largest challenges for the state is how to adequately monitor compliance.[401] Countries like the US and China have literally tens of millions of workplaces.[402]

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[394] Ibid.
[395] See Kernaghan "National Labor Commission, U.S.-Jordan Free Trade Agreement Descends into Human Trafficking and Involuntary Servitude" http://www.nlcnet.org/live/Article.php?id=10 (accessed 05-03-2012). See also Kolben 222.
[396] See Greenhouse and Barbaro "An Ugly Side of Free Trade: Sweatshops in Jordan" 3 May 2006 New York Times C1.
[397] See Harpur "New Governance and the Role of Public and Private Monitoring of Labor Conditions: Sweatshops and China Social Compliance for Textile and Apparel Industry" 2010 *Rutgers Law* Record 49.
[398] Ibid.
[399] See Kolben "Note from the Field: Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories" 2004 *Yale Human Rights and Development Law Journal* 80.
[400] Harpur 49.
[401] Ibid.
[402] Ibid.

It now is impossible for the state to monitor the activities in every workplace without the support of non-state actors.[403]

New governance scholars have observed the limitations with the reliance upon the regulatory state and have proposed transforming government into a series of public and private networked relations.[404] New governance models include non-state stakeholders in a participatory and collaborative process to develop more effective regulatory responses.[405] Accordingly the focus of new governance regulation is not state control, but expanding the regulatory pie to improved regulatory responses.[406] New governance interventions still retain the threat of punishment. Rather than focusing upon large state interventions, new governance focuses upon de-centred regulation and regulatory nodes.[407] This form of regulation has been proposed and adopted in a range of areas including labour laws[408] and environmental laws.[409]

One of the benefits of private regulations is that they can encourage the state to develop enforceable public regulations.[410] The creation of these public regulations can have a positive or negative result.[411] If the public vehicle increases monitoring and enforcement, clearly this is positive.[412] There is, however, a risk that the state intervention prevents the private regulatory model from operating without replacing it with an effective public regulation.[413] The act of turning private institutions and practices into state sanctioned institutions and practices may alter the nature of the private vehicles.[414] Some private enforcement vehicles are effective precisely because they are not state controlled.[415] To maximize the potential from both public and private

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[403] Ibid.
[404] See Lobel *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought* 2004 *Minnesota Law Review* 342. See also Trubek "New Governance and Soft Law in Health Care Reform" 2006 *Indiana Health Law Review* 139.
[405] See Cohen "Meet New Governance: Interests, Skills, and Selves" 2008 *Law and Social Inquiry* 503.
[406] See Ford "New Governance, Compliance, and Principles-based Securities Regulation" 2008 *American Business Law Journal* 28.
[407] See Burris, Kempa and Shearing "Changes in Governance: A Cross-Disciplinary Review of Current Scholarship" 2008 *AKRON Law Review* 1.
[408] See Waterstone "A New Vision of Public Enforcement" 2007 *Minnesota Law Review* 434.
[409] See Orts "Reflexive Environmental Law" 1995 *Northwestern University Law Review* 1227.
[410] See Trebilcock and Kirton *Introduction: Hard Choices and Soft Law in Sustainable Global Governance, in Hard Choices, Soft Law Voluntary Standards in Global Trade, Environment and Social Governance* (2004) 12.
[411] Harpur 50.
[412] Ibid.
[413] Ibid.
[414] Ibid.
[415] Ibid.

enforcement the integrative linkage model has been developed.[416] Integrative linkage focuses on maximizing the regulatory outcome and tailors the combination of public and private institutions and practices in each case.[417] Arguably integrative linkage can assist countries with poor labour rights records, where there is public and private resistance to change, to better develop public regulatory models. Kolben observes that the

> "...interplay of private regulatory regimes and regulatory capacity in developing states has not been tested sufficiently in the literature to date and that the assumption surrounding the connection between integrative linkage and improved regulation is conjectural."[418]

However, regardless of the challenges faced in bilateral and regional approaches to incorporating a social clause in trade practices, important changes do occur in domestic labour law in the course of trade negotiations. Oman promised to alter its labour laws in response to US Congress threats not to ratify a trade agreement with them.[419] Also, as the Central America Free Trade Agreement (CAFTA) countries were aware, it would have been even more difficult for US Congress to ratify the CAFTA agreement had they not reformed their labour laws in the process.[420] However, the real question to ask is, is it necessary to use such forms of coercion? More appropriate solutions must be sought to protect labour standards in trade related practices otherwise the US approach may justify the allegations of protectionism leveled by developing countries against developed countries.

5 5 CONCLUSION

This chapter has explored the use of a social clause in unilateral trade systems and in bilateral and regional FTAs. There are clear lessons to be learnt from this analysis. The first one is that the fundamental reasons of why states sometimes do not succeed to enforce their labour laws or come up with efficient regulatory systems are frequently complicated, and structurally embedded. In some instances, it is not just a simple want of will-power that can be solved by the appropriate tariff incentive or sanction in a trade agreement otherwise the State Action-State

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[416] Kolben 233.
[417] Kolben 234.
[418] Kolben 234.
[419] See Abrams "*House Approves U.S.-Oman Free Trade Pact*" http://www.guardian.co.uk/worldlatest/story/0,,-5964717,00.html. (accessed 10-03-2012).
[420] Kolben 223.

Sanctions Model may be easily applied. For developing countries, the State Action-State Sanctions Model presents challenges especially where penalty fees are imposed for the violation of labour standards in trade practices. A penalty fee of fifteen to twenty million dollars, even if it is meant to improve that country's labour standards, may just be too high as such an amount may just be a sizeable amount in the budget of poor developing countries. It undoubtedly will force developing countries to resist trade-labour linkage proposals.

Furthermore, the regulatory failure in developing countries, as already alluded to in chapter four, frequently takes place due to a perceived lack of will by government elites, business owners and managers to enforce labour law. These mentioned parties may be benefiting from poor labour standards, hence they will offer resistance in implementing labour regulations. Again this context renders the State Action-State Sanctions Model problematic, as creating tariff based incentives or sanctions to compel state enforcement of labour law in trade practices may simply not be enough. The NAALC and other modern approaches to a trade-labour linkage appear to favour the use of the State Action-State Sanctions Model. This method is likely to remain largely ineffective in improving respect of workers' rights and enforcing domestic or international labour law. It does not focus on the key issue of inequality amongst member states of the WTO. It assumes a uniform application of sanctions and the protection of core labour standards by unequal trade partners. This approach will not be fully effective in implementation.

The ideal solution for the acceptance of the inclusion of a social clause in trade will likely lie in a legal arrangement that recognises the inequality of countries in the world and possibly allows such countries to assume a balanced yet progressive recognition of core labour standards in trade practices. Unfortunately, there has never been a model for a social clause that has been drafted with an eye on the developing countries. The models that are in existence are lop sided and usually reflect the views of developed countries. This study seeks to propose a balanced model of incorporating a social clause in trade agreements as focusing on state action in developing countries with poor regulatory capacity appears might just be ill-advised.

Another lesson to note is that even super-powers such as the US have been reluctant to prefer sanctions against developing countries such as Bangladesh with the likely reason being that the US itself does not wish to start a race to protect labour rights for the fear that other countries will engage in retaliatory labour rights complaint actions against it. This view may be

true when applied in respect of other developed countries in the world. Again this suggests that whatever legal mechanism is used in incorporating a social clause in trade practices must not infringe on the sovereignty of another country.

As such, it may be concluded that, whilst bilateral and regional trade and labour arrangements have also relied heavily on the State Action-State Sanctions Model which has not been entirely successful, they still have the potential to offer substantial hope for developing a successful and novel trade and labour linkage regime in the globalised world. It is evident that the NAALC's dispute resolution system has not brought the intended success story of the State Action-State Sanctions Model. Where sanctions have not been applied, not much has been achieved through moral persuasion. It is also clear that developing countries are not entirely objected to the inclusion of a social clause in trade as they appear to be entering into FTAs or regional agreements which include social clauses. This may be an indication that a new but integrative approach to an effective social clause model is now required. Such a model ought to be sensitive to the inequalities existing between developed and developing countries.

The next chapter will thus take a closer analysis of how the trade-labour linkage debate has affected one of the poorest regions in the world, Southern Africa, with a view to showing what an efficient social clause in trade must be sensitive to. Southern Africa has its own version of a social clause in its regional agreement with no sanctions involved in the protection of labour standards in general. An analysis of how this legal system operates and the challenges or successes faced may be useful in formulating an inclusive legal solution for an appropriate trade-labour linkage model in multilateral trade.

CHAPTER SIX

Trade Agreements and the Social Clause: A Southern African Perspective (Part 1)

6 1 INTRODUCTION

World trade is regulated by international trade agreements on multilateral, regional and bilateral levels.[1] These legally binding and enforceable agreements go beyond mere trade regulations and have repercussions for various "non-trade" issues such as environment, employment or human rights.[2] It is such repercussions for employment and human rights that have prompted debates over the inclusion of a social clause in the multilateral trade regulatory system of the World Trade Organisation (WTO). Such debates are crucial for a region like Southern Africa, which is easily one of the poorest regions in the world[3] with a prevalence of high levels of poverty which continuously diminish the quality of lives of its poor inhabitants.[4] Amongst the impoverished people in the region are workers who, like half of Africa's population, live on less than one United States dollar (USD) a day.[5] This is a cause for concern in a world which is supposed to be driven by a desire to afford human rights protection to all the world's citizens.[6]

This chapter will advance the argument that should core labour standards continue to be excluded from the WTO trade system, which in itself is a key driver of world economies, poverty cycles such as the one in Southern Africa could possibly remain unbroken effectively rendering it almost impossible for people in the region and other developing regions of the world to escape the poverty trap.[7] Improving the protection of core labour standards in trade might be a central

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1 Grammling "Reconciling Trade and Development in Southern Africa: Challenges for Trade Unions" FES/NALEDI Training Course on Trade and Development for Trade Unionists of SADC Countries Johannesburg 9-11 July 2007 2.

2 Grammling 2.

3 Handley, Higgins, Shama, Bird and Cammack "Poverty and Poverty Reduction in Sub-Saharan Africa: An Overview of Key Issues" 2009 Overseas Development Institute Working Paper 299 2.

4 Ibid.

5 Grammling 3. Grammling notes that, "Sub-Saharan Africa is expected to be the only region to fall short in fulfilling the first Millennium Development Goal which aims at halving the proportion of people who live on less than 1 US dollar a day by 2015. The main reason is the persisting 'jobless growth' dilemma, ie the inadequacy to provide a significant higher number of people with productive employment opportunities, which is a key element of 'pro-poor growth'''.

6 See the World Savvy Monitor "Global Poverty and International Development" http://worldsavvy.org/monitor/index.php?option=com_content&view=Article&id=350&Itemid=539 (accessed 10-06-2012).

and useful part of this dynamic especially if it is considered that one of the key issues that have been closely linked to the high levels of poverty in the region is the employment conditions of workers. In particular, employment sectors related to trade or foreign direct investment have raised questions as to why the conditions of workers in these sectors continue to decline into poverty whereas the companies that employ them continue to make huge profits.[8]

As the first part of two chapters focused on to Southern Africa and the social clause, this chapter starts with an insight into the general perspective of what informs debates of a social clause in the region. Of significance, the chapter will undertake a detailed analysis of the debates on the social clause in South Africa, a country which has been regarded as having the most progressive labour laws in the region yet it appears to be facing challenges of its own concerning the trade-labour linkage. The purpose of this approach is to provide a basis for analyzing the issues surrounding the social clause in the region as a whole in the next chapter, which is the second part of the Southern African perspective. South Africa's case shows how globalization has exposed workers, their employment and wages to the dynamics of the international economy and global competition.[9] This could assist in understanding the dynamics shaping the social clause debate in the region. However, before delving into the South African situation, a short background to the social clause in the region will be given to assist one develop a clear understanding of the issues informing the trade-labour linkage debate amongst Southern African Development Community (SADC) countries.

6 2 SOUTHERN AFRICA AND THE SOCIAL CLAUSE

Since the inception of the WTO, the trade-labour linkage debate has been one of the most polarized issues in the world.[10] In 1999, Wilkinson noted that low and middle income developing countries were opposed to the inclusion of core labour standards into multilateral

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7 Same "Sub-Saharan Africa Strategy for Sustainable Growth to Breakthrough in the 21st Century" http://siteresources.worldbank.org/WBI/Resources/AchilleFinalDraft.pdf (accessed 10-06-2012).

8 Organisation for Economic Co-operation and Development (OECD) "Globalisation, Jobs and Wages" 2007 http://www.oecd.org/dataoecd/27/1/38796126.pdf (accessed 10-06-2012).

9 Deacon, De Lombaerde, Macovei and Schröder "Globalization and the Emerging Regional Governance of Labour Rights" 2011 *International Journal of Manpower* 334.

10 Wilkinson "Labour and Trade-related Regulation: Beyond the Trade-labour Standards Debate?" 1999 *British Journal of Politics and International Relations* 165.

trade agreements.[11] Their general contention was that a social clause has the North-South (developed to developing country) view of competitiveness as its basis.[12] This perception remains at the centre of the case against the inclusion of a social clause in multilateral trade agreements. Southern Africa has been confronted with proposals to link trade practices to core labour standards but most of the countries in the region have not received the proposals very well as divided views concerning the debate exist. In general, the views have been divided on the basis of how countries in the region recognise core labour standards in their national labour legislations and in practice. Only South Africa initially appeared to have had a positive approach to proposals for linking core labour standards to trade immediately after the end of the apartheid era, a position which is now debatable.

Most of the countries in Southern Africa have not been cooperative concerning the need to embrace the calls to include a social clause in trade as this and the next chapter will show. Regardless of the opposition, opinions on the contentious trade-labour linkage proposal appear to be changing with the emergence of new developments impacting on trade due to globalisation.[13] Differences in opinions between developed and developing countries[14] could perhaps be the reason why it might have been easy for developing countries to oppose the inclusion of a social clause in the trade negotiations of the WTO out of fears of protectionism by developed countries. It also could be the reason why developing countries' evidently unanimous North-South perception has not been subjected to close scrutiny regarding its validity. In the present day world, the debate whether or not to incorporate a social clause within the framework of the WTO is no longer just a North-South competition view but also a South-South (developing to developing country) competition view. The rise of the South-South competition view of a social clause in the WTO has largely been attributed to the emergence of China as a key competitor in world trade.[15]

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[11] Wilkinson 165.

[12] Ibid. See also Tsogas "Labour Standards in International Trade Agreements: An Assessment of the Arguments" 1999 *International Journal of Human Resource Management* 351.

[13] Chauffour "Preferential Trade Agreements: Adjusting to New Trade Realities?" 2012 *Great Insights* 2.

[14] Tsogas 351.

[15] World Trade Organisation (WTO) "*Understanding the WTO: The Organization, Members and Observers*" http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 12-06-2012). See also Walkenhorst "Quantitative Assessments of Textiles Trade Liberalization: A Survey" 2005 *Journal of Economic Integration*

China's increased exports to developing countries appear to have offered a platform to review the issues surrounding the trade-labour linkage debate.[16] Lin contends that this is due in part to the fact that differences between the relative factor endowments of different categories of developing countries could now become significant,[17] a development which might force some developing countries like South Africa to realize that supporting a trade-labour linkage could be a way to protect both their own industries and their export markets from threats such as the one posed by China.[18] Ironically the potential use of labour standards for protectionist purposes is at the centre of the North-South debate on the social clause. Labour standards, it has been argued, must not be used for protectionist purposes.[19] However, as far back as 2003, Chan and Ross observed that China had a remarkably inferior labour rights record which poses a threat to core labour standards' protection in developing countries.[20] This situation still prevails and is arguably one of the threats to developing countries' growth. It is also important to realise that China is not the only party guilty of violating core labour standards in trade through its companies. This and the next chapter will show that other private actors in pursuit of economic gains contribute to the violation of core labour standards in trade.

If one also considers the position of developing countries whose development strategy is oriented to the building of export platforms, where components are assembled and exported, the China factor becomes even more significant[21] as the former's development strategy can be affected with respect to third markets.[22] This export displacement is best illustrated by the case of Mexico, a country which, like South Africa, enjoys a comparative advantage in labour

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139 and Polgreen and French "China is in Africa Both Benefactor and Competitor" In *The New York Times* of 20 August 2007.

16 Marima "Outrage over Brutal Chinese Labour Practices" Independent 12 April 2012. The Article notes that, "By 2009 roughly six years after adopting a more aggressive expansionist policy, Sino-Africa trade stood at about US$90 billion, surpassing US and European markets which at the time were battling a global recession".

17 See Lin "New Structural Economics: A Framework for Rethinking Development" http://www.econ.yale.edu/seminars/Kuznets/lin-110301.pdf (accessed 12-06-2012).

18 Van den Cate "The Impact of International Trade on Less Developed Countries" 2009 *Business Intelligence Journal* 119.

19 See WTO "Understanding the WTO: Cross-cutting and New Issues" http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (accessed 12-06-2012).

20 Chan and Ross "Racing to the Bottom: International Trade without a Social Clause" 2003 *Third World Quarterly* 1013.

21 See WTO "*Understanding the WTO: The Organization. Members and Observers*" http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 12-06-2012).

22 See WTO "Understanding the WTO: The Organization, Members and Observers" http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 12-06-2012).

intensive goods in comparison to developed countries.[23] Mexico has seen a sharp drop in exports to the United States (US) in a number of labour-intensive industries coupled with a significant decrease in the number of *maquiladoras*[24] from 3590 in 2000 to 2810 in 2006.[25] From occupying the first place in knit clothes exports above the US during the nineties, Mexico has become the fourth source after China, Vietnam and Honduras as of 2007.[26] Apart from the negative impact that Chinese trade practices have had on the development strategies of some developing countries, lowered transaction costs can also affect the middle-income developing countries through import competition.[27] This is the case for South Africa, where Chinese imports are perceived as a threat to the national textile industry[28] and where, according to WTO statistics, imports of apparel grew by 500% from 2002 to 2006.[29] Such export and the import pressures could set off renewed pressure for protection from the affected production sectors.[30] This argument is also at the centre of the Wal-Mart-Mass-Mart merger in South Africa, an issue discussed later in this chapter. This study will attempt to determine whether or not labour standards can provide that protection.

An analysis of the current developments surrounding the trade-labour linkage debate in Southern Africa will be done against the background of the above highlighted issues concerning the social clause. It must be understood that Southern Africa like other regional blocs has an interesting integration process which groups together the Southern African States in what is

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[23] Ibid.

[24] Wilson *Exports and Local Development: Mexico's New Maquiladoras* (1992) 139.

[25] The National Institute of Statistic and Geography (INEGI) "*Industria Maquiladora de Exportación*" http://www.inegi.org.mx/prod_serv/contenidos/espanol/bvinegi/productos/continuas/economicas/maquiladora/ime/ime.pdf (accessed 12-06-2012). INEGI states that, "Even though several other explanations have been suggested for this result, amongst which the downturn in the US market in the wake of September 11 2001, the strong Mexican peso, the competition from low wage countries is still considered by the political establishment as one of the most viable explanations".

[26] See the Congressional Research Service Report on the US Clothing and Textile Trade with China and the World: Trends Since the end of the Quotas of 10 July 2007 12.

[27] Ibid 16.

[28] Montserrat, Johan and Bart "Middle-Income Developing Countries and the Trade-labour at the WTO" Paper prepared for the Workshop–"International Political Economy and Cross-Border Effects" in London 28 April 2011. See also The Democratic Alliance "Textile Sector Crisis-The DA's 8 Step Solution" http://www.da.org.za/docs/591/textilesectorcrisis_document.pdf (accessed 12-06-2012).

[29] This statistical data was retrieved from the WTO Statistics Database. See WTO "International Trade Statistics 2011-World Trade Organisation" www.wto.org/english/res_e/statis_e/its2011_e/its2011_e.pdf (accessed 13-06-2012).

[30] See the report compiled by the International Monetary Fund (IMF) "Middle East and North Africa: Economic Outlook and Challenges" Deauville Partnership Ministerial Meeting 2012 4.

known as the SADC.[31] The SADC was founded in 1992 and is an association agreement with broad political and development aims, rather than a trade agreement, although it includes a trade component through its SADC Protocol on Trade.[32] SADC also has a tripartite commission for labour and social affairs.[33] Regardless of this arrangement, the developments in the individual countries clearly show that a regional approach to the trade-labour linkage in Southern Africa, whilst it is applauded, might be exerting little or no impact on the protection of core labour standards in trade. This could be a sign that regionalism, especially of the developing countries, might be fraught with a lot of challenges which render some of the "well meaning" legal structures redundant. The Director of the Trade Law Centre for Southern Africa, Trudi Hartzenberg, whilst commenting on the possibility of achieving the Tripartite African Free Trade Area (TAFTA)[34] by 2017 was extremely cautious due to a number of factors, including the continued existence of failed states across Africa. Hartzenberg said:

> "Even if you take SADC, which is one of the more developed organisations, it is experiencing a crisis related to the development of its legal and institutional infrastructure- the effective suspension of the SADC tribunal leaves member states and private parties without a forum to seek redress on matters pertaining to the SADC treaty and protocols."[35]

Perhaps the developments in the individual countries could be a reflection of the position adopted at the regional level concerning a trade-labour linkage, which in turn would suggest that something beyond regionalism may be required to address such a challenge. Furthermore, the exclusion of a clear social clause in the proposed TAFTA might be a sign that developing countries are not willing to change their stance on incorporating core labour standards into multilateral trade agreements.[36] Sadly, the omission of a social clause in the TAFTA

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[31] See Part 2B(1) of the Treaty of the Southern African Development Community 2000. SADC includes Angola, Botswana, The Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

[32] See the August 1996 SADC Protocol on Trade.

[33] In 2001, the SADC tripartite commission for labour and social affairs adopted a Social Charter on Fundamental Labour Rights in Southern Africa.

[34] See the Agreement Establishing the African Tripartite Free Trade Area of 2009.

[35] Corcoran "Major Challenges remain for African Free Trade Area" Irish Times 13 February 2012.

[36] See Article 3(1) of the TAFTA which gives one of its objectives as the need to, "...promote the rapid social economic development of the people of the region through job and wealth creation and the elimination of poverty, hunger, and disease; through building skills, innovativeness and hard and soft infrastructure; and through improving the location factors for sustainable generation of local, regional and foreign investment and of trade opportunities." This is the only clause that makes mention of anything related to employment, in this case, "job creation". Nowhere else is there any mention of a social clause. This might be a sign that the TAFTA will

accommodates the model of labour violations being used by Chinese firms and other private actors. Such approaches are being endorsed by many African governments a development which sets a dangerous precedent for a continent expected to become the new centre of global growth led by BRICS.[37] The regrettable part is that global growth could be driven by Africa with little or no benefit to the African people and the continent itself. Cocoran has noted that:

> "The development of trade between African states has increasingly become a priority for the African Union because of its member states' inability to tackle widespread poverty, despite annual economic growth rates above 5 per cent in many member states over the past decade. Although African economic growth slowed in 2009 due to the global recession, regional gross domestic product (GDP) was well above rates posted in countries in Europe and the US. By 2010, the continent had bounced back with the GDP doubling to 5.4 per cent that year…"[38]

Cocoran's observations are reflected by the data in Table 1.

Table 1. Total exports from SADC, 2000-2010

	2000	**2005**	**2010**
	USD billion	USD billion	USD billion
World	52.2	102.1	170.3
	%	%	%
World	100.0	100.0	100.0
SADC	12.6	9.7	10.9
Rest of Africa	2.4	3.1	3.2
Eropean Union	37.9	34.0	23.0
Other high income OECD	27.9	29.2	26.4
BRICS	7.8	13.0	28.8
Rest of the World	11.3	11.0	7.7

Source: UNCTADStat.

In spite of this success, South African President, Jacob Zuma, was quick to point out that less than 10 per cent of Africa's trade is between its states and that boosting trade amongst African

repeat same mistake of excluding a social clause in trade agreements which arguably will hamper development in Africa.

[37] BRICS is the title of an association of leading emerging economies, arising out of the inclusion of South Africa into the BRIC group in 2010. As of 2012, the group's five members are Brazil, Russia, India, China and South Africa.

[38] Corcoran "Major Challenges remain for African Free Trade Area" quoted in the Irish Times edition of 13 February 2012. See also an Article in the Zambia Daily Mail "Clear Obstacles to Intra-Africa Trade" Zambia Daily Mail 22 March 2012.

states should be a priority as a way to further develop the continent.[39] This statement clearly signifies the importance of the TAFTA, hence, one would question why core labour standards were excluded from its framework even though the Agreement has as one of its objectives, the adoption and implementation of policies in all sectors of economic and social life that promote and consolidate an equitable society and social justice.[40] Labour standards could easily have fallen into this category as cooperation in other areas in terms of the agreement excludes core labour standards but surprisingly includes the environment which is one of the issues that has been argued of late to be linked with trade.[41]

Trade has a direct impact on the quantity and quality of employment.[42] The interactions between labour, trade and social policies have been analyzed and acknowledged in the jointly conducted ILO/WTO study on trade and employment.[43] This is a factor which the majority of African countries have downplayed with most of the countries strongly against proposals for linking trade with labour at the multilateral level. However, this has not precluded the SADC member states from developing a Social Charter which has as one of its key objectives facilitating the establishment and harmonisation of social security systems and generation of incomes.[44] The Social Charter also seeks to promote the development and harmonisation of legal, economic and social policies and programmes, which contribute to the creation of productive employment opportunities and generation of incomes, in member states.[45] It also seeks to harmonise regulations relating to health and safety standards at work places across the region[46] and promote the development of institutional capacities as well as vocational and technical skills in the region.[47]

The Social Charter gives the responsibility to create an enabling environment in order to realize the objectives mentioned to the Governments in the region. This is a key aspect of this study as the developments in the Southern African countries will show the attitude of the

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[39] Corcoran "Major Challenges remain for African Free Trade Area" quoted in the Irish Times edition of 13 February 2012.
[40] See Article 4(7) of the TAFTA.
[41] See Article 42(1) of the TAFTA.
[42] Grammling 4.
[43] See ILO and WTO *Trade and Employment: Challenges for Policy Research* (2007) 19.
[44] Article 2(b) of the SADC Social Charter.
[45] Article 2(b) of the SADC Social Charter.
[46] Article 2(f) of the SADC Social Charter.
[47] Article 2(g) of the SADC Social Charter.

Governments towards protecting core labour standards relative to attaining economic gains. It will question whether or not the same governments would then be willing to recognise and protect core labour standards in other regional integration arrangements. An analysis of these issues will assist in assessing the impact of the Social Charter in the region and in establishing whether or not it can address the violation of core labour standards in trade agreements. Equally it could assist in establishing whether or not African governments are able to abide by their own agreements, a factor which will assist in addressing the genuineness of the resistance to a social clause in the WTO on the basis of the North-South perception. This is made all the more important when one considers that the Social Charter:

> "…embodies the recognition by governments, employers and workers in the region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the Constitution of the International Labour Organisation, the Philadelphia Declaration and other relevant international instruments".[48]

Article 4 of the Social Charter provides that member states shall create an enabling environment consistent with International Labour Organisation (ILO) Conventions on freedom of association,[49] the right to organise and collective bargaining.[50] It thus can be argued that the Social Charter also aims at protecting core labour standards in the region. Accordingly, trade related violations of core labour standards can be analysed in terms of the Social Charter. This leads to the issue whether or not the Social Charter has been useful in advancing efforts to improve core labour standards' recognition in the region. The answer is derived from developments currently unfolding in individual Southern African countries.

6 2 1 South Africa

The debate on the social clause in South Africa was addressed by the Congress of South African Trade Unions (COSATU) during the nineties with the debate appearing to have had a more public dimension.[51] Organized labour, the employers' associations and the government participated in consultations during the nineties and came to a framework agreement on the

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[48] Article 3(1) of the SADC Social Charter.
[49] See ILO Convention 87.
[50] See ILO Convention 98.
[51] Garibay, Adriaensen and Kerremans "Middle-income Developing Countries and the Trade-labour Linkage: Adaptation or Inertia?" 2010 International Institute of the East Bay Working Paper 40 12.

issue.[52] In its submissions to the South African Parliament, COSATU vigorously defended the incorporation of a social clause involving sanctions into free trade agreements in several resolutions and proposed the incorporation of a social clause into the European Union-South Africa Trade, Development and Cooperation Agreement[53] as well as the Trade Protocol of the SADC.[54] COSATU also advocated for the elimination of Export Processing Zones (EPZs) in the neighbouring countries and addressed the "race to the bottom" phenomenon.[55] Simultaneously, COSATU expressed fear of possible protectionist uses of labour standards by the G-7 countries.[56] In 2005, COSATU confirmed its support for the inclusion of a social clause in the WTO,[57] a position which now starkly contrasts with the views of some current members of the South African government on the issue. Its textile affiliate, the South African Clothing and Textile Workers' Union (SACTWU), has underscored the labour standards argument in its position concerning Chinese imports.[58]

The main avenue through which COSATU attempted to translate its social clause proposal into policy was the National Economic Development and Labour Council (NEDLAC), a social dialogue organ formed after apartheid on the advice of the ILO and whose composition and functions were prescribed in the NEDLAC Act of 1994.[59] At NEDLAC it was agreed that political, substantive and technical difficulties involved in promoting universal respect for labour standards called for a creative and multi-faceted strategy.[60] NEDLAC

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[52] Ibid.

[53] COSATU "COSATU Submission on EU-RSA Trade Development and Cooperation Agreement (COSATU, 1999)" http://www.cosatu.org.za/docs/1999/eutrade.htm (accessed 14-06-2012).

[54] See COSATU "Submission on the SADC Protocol on Trade, (COSATU, 1999)" http://www.cosatu.org.za/docs/1999/sadctrad.htm (accessed 14-06-2012).

[55] COSATU "Accelerating Transformation. COSATU's Engagement with Policy and Legislative Processes during South Africa's First Term of Democratic Governance. First Term Report of the COSATU Parliamentary Office" http://www.cosatu.org.za/congress/cong2000/ parlrep.htm (accessed 14-06-2012).

[56] Ibid. The G-7 began in 1975 as the Group of Six and included France, West Germany, Italy, Japan, United Kingdom and United States. It was later joined by Canada in 1976. In 1997, Russia was added to the group hence it is now known as the G-8.

[57] Ibid.

[58] Taking into account the fact that the textile sector has been perceived as the main sector damaged by the Chinese imports, the absence of a position might be related to the quasi absence of textile affiliates within the other federations. See Kriel "SACTWU to Fight Pending Job Losses in Textile Industry" http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=285867&sn=Detail&pid=71619 (accessed 14-06-2012).

[59] Buhlungu "Union-Party Alliances in the Era of Market Regulation: The Case of South Africa" 2005 *Journal of Southern African Studies* 702.

incorporates representatives from labour, business associations, the South African government and the community.[61] They are appointed by the corresponding minister upon a nomination by the relevant organizations.[62] It has four chambers, among which is a Trade and Industry one, which shares with the other chambers the tasks of concluding agreements, considering changes to social and economic policy (which includes trade) before they are discussed in Parliament, and promoting coordinated policies, among others.[63]

Trade policy is implemented in South Africa by the Department of Trade and Industry (DTI), which receives input from both NEDLAC and other ministries and agencies. NEDLAC labour and business representatives have been part of the South African delegations to the WTO Ministerial Conferences on at least two occasions: Seattle and Hong Kong.[64] Even though the DTI has not externalized any opinion on the trade-labour issue aside from the WTO statements, the Trade and Industry Chamber of NEDLAC, of which the Trade Minister is a member, served as a forum for discussions on the social clause between 1995 and 1996.[65] Labour representatives, backed by business, proposed the inclusion of a social clause in all South Africa's bilateral and multilateral trade agreements.[66] NEDLAC's Executive Council reached agreement on a landmark framework which, for the first time, linked South Africa's trade relationships with the promotion of human rights and, in particular, workers' rights.[67] Central to the social-clause framework was the fact that it was viewed as not being a barrier to trade but rather a mechanism

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[60] NEDLAC "Report on Activities 2000- Trade and Industry Chamber Activities 12.08.2008: http://www.nedlac.org.za/top.asp?inc=docs/reports/annual/2000/trade_and_industry_chamber_act_2000.htm (accessed 14-06-2012).

[61] See section 3 of the NEDLAC Act 35 of 1994.

[62] See section 3(2) of the NEDLAC Act.

[63] See sections 8, 9 and 10 of the NEDLAC Act.

[64] NEDLAC "Stimulating Significant Growth. National Economic Development and Labour Council" 2006/2007 Annual Report Johannesburg.

[65] NEDLAC "NEDLAC's New Premises-NEDLAC House" Annual Report 2001-2002 Johannesburg.

[66] See Article 1 of the Framework Agreement on the Social Clause adopted on 28 June 1996.

[67] Barber "The New South Africa's Foreign Policy: Principles and Practice" 2005 *International Affairs* 1079. Barber argued that the NEDLAC framework, "…embedded the social clause in the history of the struggle for human rights in South Africa, and stated that the commitment with workers' rights was a cornerstone of South Africa's new democracy". Besides the framework agreement, another measure linking trade and labour standards was the launching, in 1999, of the "Proudly South African" label, a certificate of compliance with certain labour and environmental standards. The Proudly South African campaign was negotiated and launched within NEDLAC, with the active participation of several ministries, among which the Department of Trade and Industry. According to a South African diplomat, the campaign was a way of countering the economic competence by products from countries with low labour and environmental standards (such as the neighbouring countries). See also NEDLAC "*Framework Agreement on the Social Clause"* http://www.nedlac.org.za/top.asp?inc=docs/agreements/agree9.html (accessed 14-06-2012).

to engage South Africa's trading partners in a dialogue linking human rights with trade.[68] The then NEDLAC Executive Director Jayendra Naidoo once said:

> "The social-clause framework negotiated by business, labour and government delegates at NEDLAC reaffirms the principle that economic growth and development must be underpinned by a commitment to social justice, including respect for universally recognised labour standards. The danger is that with the liberalisation of world trade and the globalistaion of the world economy, workers' rights will be downgraded to requirements below the basic acceptable levels. The principles underlying the social-clause framework mean that South Africa will champion a move to improving the rights and conditions of workers worldwide."[69]

In implementing the social-clause framework, South Africa ratified the core ILO Conventions which relate to labour standards. Naidoo at that time stated that:

> "Two of the Conventions (freedom of association and the protection of the right to organise) have already been ratified by government, and NEDLAC has recommended that three others (relating to forced labour, the abolition of forced labour, and discrimination) be ratified during the 1996 parliamentary session."[70]

The second phase of the social clause framework adoption for South Africa required that it enter into memorandums of understanding with its trading partners which would commit both parties to ratifying, upholding and promoting the ILO's Conventions on trade union rights, collective bargaining, and fair employment practices.[71] Regional initiatives to promote the framework agreement also began with the issue being put on the agenda of the Labour and Employment Commission of the SADC, and by utilizing the Social Charter in Southern Africa to promote workers' rights.[72]

However, consensus on the importance of a social clause in trade in South Africa is fast decreasing. NEDLAC's 2005 Annual Report stated that the Trade and Industry Chamber did not manage to achieve a common position on the social clause.[73] In August 2011, the South African cabinet had to rush to dismiss speculation that South Africa's rigid labour legislation

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[68] Bezuidenhout "Towards Global Social Movement Unionism? Trade Union Responses to Globalization in South Africa" Discussion Paper 115 2000 ILO: Geneva.

[69] Jayendra Naidoo quoted in Bezuidenhout "Towards Global Social Movement Unionism? Trade Union Responses to Globalization in South Africa" Discussion Paper 115 2000 ILO: Geneva.

[70] Ibid.

[71] Barber 1079.

[72] Barber 1080.

[73] See the NEDLAC Annual Report for 2004/2005 http://www.nedlac.org.za/media/9780/part1.pdf (accessed 14-06-2012).

might be eased in the interest of job creation following pronouncements on the matter from Finance Minister Pravin Gordhan and Minister in the Presidency Trevor Manuel. The two ministers were of the opinion that labour standards in the country must be relaxed to create more jobs a view which goes against the spirit of a social clause. On August 15 2011, Minister Pravin Gordhan suggested that South Africa might have to relax its labour laws in certain cases to grow jobs.[74] At a conference in Johannesburg, he told internal auditors that, "We may have to change the way we see the labour dispensation in South Africa."[75] His statements were prompted by threats made by Chinese owners of clothing factories in Newcastle, KwaZulu-Natal to close and relocate to Lesotho, Swaziland or Botswana if they were forced to pay a minimum wage.[76]

It appears from the minister's response that the view amongst some in the South African government is that jobs must be created even if such a development does not result in significant benefits to the workers. It is imperative to analyse the minister's views as they set a bad example to other countries in the region and give the impression that when faced with threats by foreign investors to leave due to a higher compliance with labour standards, a country must embark on a race to the bottom as a solution to such impending action. Indeed, the minister's statements add to the already growing concerns that:

> "…the process of competitive bidding between countries for FDI may be inducing countries to offer concessions on regulation, taxes, environmental protection and labour standards that are unnecessary. Apart from the direct social and environmental impact, these concessions may impair the competitiveness of the domestic economy, reduce the potential for such investment to contribute to development, and ultimately impede the entry of FDI. 'Beggar-thy neighbour' investment incentive competition may even distort the international allocation of FDI away from sites with a potentially higher return in terms of development and to investors."[77]

Zampini has observed that, "It is worth nothing that the international labour movement has a fairly idiosyncratic relationship with the way information is presented in the Doing Business reports of the World Bank and International Finance Corporation (IFC) since their first issue in October 2003."[78] In a way, Zampini's view implies that the policy positions adopted by

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[74] See BussinessDay "Change needed in Labour Dispensation" BusinessDay 15 August 2011.
[75] BussinessDay "Change needed in Labour Dispensation" 15 August 2011.
[76] Ibid.
[77] Zampini "Developing a Balanced Framework for Foreign Direct Investment in SADC: A Decent Work Perspective" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* Chapter 5 1.
[78] Zampini 8.

countries, in particular developing countries, concerning how they conduct business are prescribed for them. It is from this perspective that in 2006 the International Trade Union Confederation (ITUC) claimed that data collected through the Doing Business process has been used to promote labour market deregulation and to recommend that governments implement specific measures to infringe workers' rights (such as social protection) with flagrant disregard to the poverty impact of such measures and their implications for employment, wages, working conditions and respect for workers' fundamental rights.[79]

South Africa was given as an example of countries affected by proposals made through the Doing Business process. In the 2006 Doing Business report, South Africa was considered a business unfriendly environment with reference to the 'Grounds for firing' category.[80] The grounds for firing in South Africa were viewed as inconsistent with rules such as 'the employer may not terminate employment contract without cause'[81] and 'the law establishes a public policy list of "fair" grounds for dismissal'.[82] The report failed to remind the reader that the higher hiring-and-firing indicators for South Africa in comparison to the Organisation for Economic and Cooperation Development (OECD) countries were explained in part by the country's affirmative action programmes, adopted by post-apartheid governments to overcome the legacy of decades of racial discrimination in the labour market.[83]

In 2008, Business Unity South Africa (BUSA), the voice of South African organised business, expressed concerns over the methodology and approach adopted in the Doing Business reports.[84] Reservations were expressed to the effect that Doing Business indicators, since 2003, have been used with a regional leverage.[85] Countries were advised to gauge their labour market

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79 See ICFTU "How the World Bank and IMF Use the Doing Business Report to Promote Labour Market Deregulation in Developing Countries" 2006. See also Zampini 8.

80 See the World Bank Doing Business Report of 2006. See also the 2011 World Economic Forum Global Competitiveness Survey which indicated that South Africa currently ranks fourth to last in the world in terms of "flexibility in wage determination" and third last in "hiring and firing practices".

81 See the World Bank Doing Business Report of 2006.

82 Ibid.

83 Zampini 8.

84 Ibid.

85 See World Bank *A Better Investment Climate for Everyone* (2005) 19. In this report, the World Bank argued that a 'good investment climate fosters productive private investment; the engine for growth and poverty reduction. It creates opportunities and jobs for people'. As a result, regional development plans such as the SADC's Regional Indicative Strategic Plan (RISDP) 2004 and the New Economic Partnership for Africa's Development (NEPAD) rely heavily on achieving macroeconomic stability as a basis for attracting investors.

rigidity indices as recorded under the 'Hiring and Firing Workers' section and take actions to get them lower than the regional average.[86] Unions argue that the 'Doing Business' Report has been used in SADC countries to place downward pressure on workers' protection. For example, in the 2006 International Monetary Fund (IMF)'s Article IV Consultation report on Lesotho recommended a downward flexibility of real wages in Lesotho so as to 'improve competitiveness'.[87] The IMF report did not mention that wage levels in Lesotho are already lower than those in other countries in Southern Africa. For example wages in Lesotho's garment manufacturing sector were already less than a third of those in neighbouring South Africa.[88] In turn, Lesotho's low wage levels were mentioned in the IMF's 2007 Article IV report for Swaziland, in connection with a recommendation to the local government to 'reduce the cost of doing business', which emphasises that wages in Lesotho were only half of those in Swaziland.[89] It is worth noting that Lesotho and Swaziland are the countries to which Chinese companies operating in Kwa-Zulu Natal threatened to relocate to. One can thus conclude that the fear of losing the Chinese as investors drove minister Gordhan to call for labour market flexibility in line with the World Bank and IFC proposals. After all, the ITUC has also noted how the World Bank in its Country Partnership Strategy (CPS) for the Republic of Mauritius:

> "...announces the availability of a Development Policy Loan for 'reforming the labour market', one facet of which will be 'overhauling the current tripartite wage-setting machinery'. The overall aim of the reform, according to the CPS, 'is to secure a position for Mauritius in the top ten most investment and business-friendly locations in the world ...'"[90]

The picture that is portrayed by the World Bank from the above analysis is that lowering labour standards attracts investors and makes countries eligible for investment loans. If that is the case then it is logical to ask how international trade and investment are influencing the quality of employment in countries if at all there is any such influence. This may help SADC policy makers to adopt the appropriate investment plans which are implemented in the best interests of their countries.

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[86] See the World Bank Doing Business Report of 2006.
[87] IMF "Kingdom of Lesotho: Article IV Consultation Staff Report" 2006 Washington: IMF 16-17.
[88] Zapini 8.
[89] IMF "Kingdom of Swaziland: Article IV Consultation Staff Report" 2007 Washington: ILO 14-15.
[90] ITUC "The IFIs' Use of Doing Business to Eliminate Workers' Protection: Analysis of Doing Business 2008 and New Country Evidence" 2007 Washington: ITUC 23.

Flanagan and Khor tried to establish how cross-border economic activity influences working conditions and core labour rights.[91] They observed that, "Trade policies enhance or retard the evolution of international flows of economic activity with trade policy negotiations often provoking strong sentiments regarding the links between trade liberalisation and labour conditions."[92] They also argued that:

> "Recognising the powerful influence of per Capita Gross Domestic Product (GDP) opens broad short-term and long-term policy menus for advancing labour conditions. In the short-run, severe recessions tend to degrade the labour conditions of the employed in addition to reducing employment and output. Deploying a nation's fiscal and monetary policy weapons to remove gaps between actual and potential GDP restores both the quantity and quality of jobs. In the long run, even under autarky, a country's labour conditions can improve with higher rates of technical progress, investments in physical and human capital, and the establishment of institutions that clarify property rights enforce contracts and reduce corruption…."[93]

Mashayekhi *et al* have stated that trade is an important element of creating productive employment and reducing poverty.[94] However it still must be questioned why no distinct improvement in labour standards is being observed in SADC, a region which compared with other regional economic communities in Africa, has a relatively high share of intra-SADC trade at 11% of the region's total trade.[95] Could this suggest that SADC leaders are only paying lip service to the objectives set in the SADC Social Charter whilst trying to conform to the demands of institutions such as the IMF with the hope of accessing loans?

The answer to the above question could be partially found in Minister Gordhan's other proposal made in response to the Chinese threats. Gordhan argued that labour laws might have to be relaxed to allow young people to enter the workplace and gain skills and experience at lower wages, but not at the expense of people who already had jobs.[96] Gordhan's proposal appears to be supported by Scarpetta *et al* who in 2010 stated that:

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91 Flanagan and Khor "Trade and the Quality of Employment: Asian and Non-Asian Economies" 2012 *Policy Priorities for International Trade and Jobs* 260.

92 Ibid.

93 Flanagan and Khor 268.

94 Mashayekhi, Peters and Vanzetti "Regional Integration and Employment Effects in SADC" 2012 *Policy Priorities for International Trade and Jobs* 387.

95 Mashayekhi et al 388.

96 BussinessDay "Change needed in Labour Dispensation" 15 August 2011.

> "One way to encourage the employment of young workers, very common in Organisation for Economic Co-operation and Development high-income economies, is to apply a lower minimum wage, called an "apprentice wage," for young people below a certain age. This encourages employers to hire first-time employees, and it can ease the transition to permanent employment, especially where employers commit to training the young employees".[97]

Whether such a policy initiative would be successful in developing countries is subject to debate. South Africa through its National Youth Development Plan[98] has tried to implement the South African Youth Wage Subsidy Plan.[99] In his 2010 State of the Nation Address, South African President Jacob Zuma announced for the first time the proposed youth wage subsidy which was intended to help first-time job seekers gain entry to the labour market. COSATU objected to the subsidy which it claimed would open the door to cheap labour and jeopardize existing jobs.[100] COSATU's argument compelled the South African government to backtrack on its proposals to implement a R 5 billion youth wage subsidy. Was COSATU wrong in its analysis? Probably it was not. After all, could such an initiative in developing countries not simply expose the young workers to employers such as the Chinese who would gladly employ the young and cheap labour whilst doing away with skilled and fairly expensive labour? This must be viewed in light of the fact that the Chinese have been complaining about the imposition of a minimum wage and have even threatened to close their factories and relocate to Lesotho where there are extremely flexible labour standards.[101] It appears that Gordhan's policy initiative is consistent with the IMF position

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[97] Scarpetta, Sonnet and Manfredi "Rising Youth Unemployment during the Crisis: How to Prevent Negative Long-Term Consequences on a Generation" 2010 Social, Employment and Migration Paper 106.

[98] See the 2011 Integrated Youth Development Strategy for South Africa available at http://www.nyda.gov.za/images/stories/documents/CLEAN%20EDITED%20Improved%20Draft%20IYDS_July%202011-5%20(1)%5B1%5D.pdf (accessed 25-08-2012). See also the 2011 South African National Treasury Discussion Paper entitled "Confronting Youth Unemployment: Policy Options for South Africa" http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/PDF/Confronting%20youth%20unemployment%20-%20Policy%20options.pdf (accessed 27-08-2012).

[99] See Donnelly "UN, Africa Development Bank back Youth Wage Subsidy" Mail & Guardian 29 May 2012. See also COSATU "The Youth Wage Subsidy in South Africa" http://www.cosatu.org.za/docs/discussion/2012/YouthWageSubsidy-SA.pdf (accessed 25-08-2012). See also Malikane "Wage Subsidy has no Empirical Basis for SA" The Sunday Independent 10 September 2012. See also the United Nations and African Development Bank Report on youth wage subsidy 2012 available at http://www.africaneconomicoutlook.org/fileadmin/uploads/PAGES-%20Pocket%20Edition%20AEO2012 EN.pdf (accessed 27-08-2012).

[100] See the 2010 State of the Nation Address by South African president Mr Jacob Zuma available http://blogs.timeslive.co.za/hartley/2010/02/11/jacob-zumas-state-of-the-nation-speech-full-text/ (accessed 26-08-2012).

which calls for labour market policies that include measures to reduce labour costs and increase labour market flexibility.[102]

The main political opposition party in South Africa, the Democratic Alliance (DA)[103] supported the views of Ministers Gordhan and Manuel. Its spokesperson Ian Ollis argued that, "Labour market rigidity is a major driver of our country's jobs crisis".[104] Ollis' view has been endorsed as the DA's official policy position concerning a trade-labour linkage in that whilst commenting on the proposed 2012 Labour Bills of South Africa, the party stated that:

> "The proposed amendments to the Basic Conditions of Employment Act (BCEA) and Labour Relations Act (LRA) will exacerbate existing regulatory rigidity and further stifle the labour markets. Additional regulation will only serve to raise the cost of employment for businesses and therefore intensify our current unemployment crisis."[105]

From the above statement, it is clear that the DA judges any proposed amendments to labour legislation on the merits of their impact on job creation.[106] As such, the DA is of the view that before any labour legislation can be amended, it must be ascertained whether or not the proposed

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[101] The proposals made by Minister Gordhan are worrisome if one considers that China's record in violating core labour standards is not improving but worsening. See Hall "The Many Faces of China in Africa" BusinessDay 8 November 2011. See also International Trade Union Confederation (ITUC) "China-Annual Survey of Violations of Trade Union Rights" survey.ituc-csi.org/China.html?lang=en (accessed 16-06-2012). The ITUC in its 2012 survey observed that, "Labour activists and rights groups are regularly harassed while internal migrant workers continue to be discriminated against. Child labour is believed to be on the increase as a result of the relative slowing down of the economy amidst the global recession and law evasion from companies, including multinationals".

[102] See Doing Business "Employing Workers" 2012 1. See also Haltiwanger, Scarpetta and Schweiger "Assessing Job Flows across Countries: The Role of Industry, Firm Size and Regulations" 2008 National Bureau of Economic Research Working Paper No. 13920.

[103] The Democratic Alliance is a South African political party, the governing party in the Western Cape province and the official opposition to the ruling African National Congress (ANC). Its present leader is Helen Zille who succeeded Mr. Tony Leon in May 2007. Its policies are centrist and it is a member of Liberal International and Africa Liberal Network.

[104] See Ollis "DA Welcomes Gordhan's View on Labour" http://www.ianollis.com/in-the-media/da-welcomes-gordhan%E2%80%99s-view-on-labour (accessed 16 June 2012). See also Ollis "DA will push for Amendments if NEDLAC Fails to Clean up Labour Laws" http://www.da.org.za/newsroom.htm?action=view-news-item&id=10097 (accessed 10-08-2012).

[105] See the executive summary of the DA's Position Paper on the Basic Conditions of Employment Amendment Bill and the Labour Relations Amendment Bill entitled "Labour Laws must Accelerate Job Creation" July 2012 3.

[106] See the DA's Position Paper on the Basic Conditions of Employment Amendment Bill and the Labour Relations Amendment Bill entitled "Labour Laws must Accelerate Job Creation" July 2012 4. See also Sapa "DA Warns on Labour Law Changes" http://m.news24.com/fin24/Economy/DA-warns-on-labour-law-changes-20120723-2 (accessed 10-08-2012); Motau "Rigid Labour Laws Kill Jobs" http://www.da.org.za/newsroom.htm?action=view-news-item&id=11005 (accessed 12-08-2012) and Motau "Growing Consensus that Labour Bills will Destroy Jobs" http://www.da.org.za/newsroom.htm?action=view-news-item&id=11014 (accessed 12-08-2012).

labour bills will create a more job-friendly environment.[107] Therefore the DA argued that a further tightening of the labour market in South Africa would only increase the cost of labour and therefore suppress employment even further.[108]

As a basis for their policy position, the DA made reference to a 2009 study on labour market regulation across 73 countries by the University of Bath, which found that tight labour market regulation increased unemployment all over the world.[109] The DA deemed the study as particularly relevant to South Africa as it is one of the first to cover not only industrial countries but also developing and transition countries. The research concluded that adverse labour market effects are probably due to lower investment by domestic firms as well as lower FDI inflows caused by stricter market regulation.[110] Furthermore, the research found that stringent hiring and firing rules have particularly adverse effects on unemployment, with the most severely impacted being women and young people.[111] The DA also made reference to a 2010 Regulatory Impact Assessment (RIA) carried out by the Development Policy Research Unit at the University of Cape Town which established that South Africa's wage-employment elasticity was estimated at 0.7 % which means that an increase in the cost of hiring workers of 1% is likely to translate to a decrease in employment of 0.7%.[112]

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[107] See the DA's Position Paper on the Basic Conditions of Employment Amendment Bill and the Labour Relations Amendment Bill entitled "Labour Laws must Accelerate Job Creation" July 2012 4.

[108] Ibid.

[109] Feldmann "The Unemployment Effects of Labor Regulation around the World" 2009 *Journal of Comparative Economics* 76. See also Almeida and Carneiro "Enforcement of Labor Regulation and Firm Size" 2009 *Journal of Comparative Economic Studies* 28; Lee, McCann and Torm "The World Bank's "Employing Workers" Index: Findings and Critiques –A Review of Recent Evidence" http://www.ilo.int/public/english/revue/download/pdf/s6_notes_lee_mccann_torm.pdf (accessed 19-08-2012); and the World Bank Doing Business Report of 2008.

[110] Feldmann 90.

[111] Feldman 79-80.

[112] See the Report prepared for the Department of Labour by Professor Paul Benjamin entitled "Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010" https://www.labour.gov.za/downloads/documents/useful-documents/labour-relations/RIA13Sept2010.pdf (accessed 13-08-2012). See also Bhorat and Jacobs "An Anatomy of a Crisis: The South African Labour Market Pre-and Post Recession" 2010 Unpublished Research Report, Development Policy Research Unit.

The DA's position on labour market flexibility is also supported by the World Bank's controversial "Employing Workers Index" (EW Index),[113] which the World Bank introduced as part of its Doing Business (DB) indicators.[114] Lee, McCann and Torm note that:

> "Since the DB project was launched in 2004, the World Bank's assessment of existing regulations in developing countries has been predominantly negative. Rigid labour market policies are blamed for poor labour market performance, such as low productivity, high unemployment and informal employment, while a more flexible regulatory framework is perceived to be associated with increased growth and employment creation."[115]

The DB indicators mirror the Washington Consensus[116] principles[117] which were believed to be necessary for the recovery of Latin America from the economic and financial crises of the

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[113] See Lee, McCann and Torm "The World Bank's 'Employing Workers' Index: Findings and critiques – A Review of Recent Evidence" 2008 *International Labour Review* 416. Lee *et al* note that, "The "Employing Workers" Index (EW index) was developed by the World Bank as part of its "Doing Business" indicators (DB indicators). This controversial project represents an important attempt to measure "business regulations" and their enforcement across 178 countries, and provide a guide for evaluating regulations that directly impact on economic growth, allowing for cross-country comparisons and identification of good practice." See also World Bank "Doing Business: An Independent Evaluation-Taking the Measure of the World Bank-IFC Doing Business Indicators" http://siteresources.worldbank.org/EXTDOIBUS/Resources/db_evaluation.pdf (accessed 25 -08-2012).

[114] Lee *et al* 416. The key product of the Doing Business project, as pointed out by Lee *et al*, is an "ease-of-doing business" index. It is made up of ten sub-indices including the EW index, which measures the cost of labour market regulations. This index is a composite indicator based on measures of three elements: difficulty of hiring; rigidity of working hours; and difficulty of firings indicators. For more details see the Doing Business web site: http://www.doingbusiness.org/. (accessed 25-08-2012).

[115] Lee *et al* 416. See also Rodrik "Why We Learn Nothing from Regressing Economic Growth on Policies" http://cui-zy.cn/Recommended/mathodology/RodrikRegression.pdf (accessed 23-08-2012) and Rodrik "Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform" 2006 *Journal of Economic Literature* 973.

[116] See Williamson "A Short History of the Washington Consensus" http://www.iie.com/publications/papers/williamson0904-2.pdf (accessed 27-08-2012). The term Washington Consensus was coined in 1989 by the economist John Williamson to describe a set of ten relatively specific economic policy prescriptions that he considered constituted the "standard" reform package promoted for crisis-wracked developing countries by institutions such as the International Monetary Fund, World Bank, and the US Treasury Department. The prescriptions encompassed policies in such areas as macroeconomic stabilization, economic opening with respect to both trade and investment, and the expansion of market forces within the domestic economy.

[117] Ibid 3. The Washington Consensus principles included the following: Fiscal policy discipline, with avoidance of large fiscal deficits relative to GDP; redirection of public spending from subsidies (especially indiscriminate subsidies) toward broad-based provision of key pro-growth, pro-poor services like primary education, primary health care and infrastructure investment; tax reform, broadening the tax base and adopting moderate marginal tax rates; interest rates that are market determined and positive (but moderate) in real terms; competitive exchange rates; trade liberalization: liberalization of imports, with particular emphasis on elimination of quantitative restrictions; any trade protection to be provided by low and relatively uniform tariffs; liberalization of inward foreign direct investment; privatization of state enterprises; deregulation: abolition of regulations that

1980s.[118] Latin American countries embraced the Washington Consensus and almost immediately started to gain short term benefits from it.[119] Frers the Director of the Fiscal Policy Program Centro de Implementación de Políticas Publicas para la Equidad y el Crecimiento (CIPPEC)[120] of Argentina noted that:

> "Latin America strongly embraced the Washington Consensus. For example, as a result of monetary prudence, inflation went down to single digits almost everywhere. Also, as a consequence of fiscal discipline, average budget deficits went down from 5 percent of the GDP to an average of 2 percent, and public debt went from 50 percent of the GDP to less than 20 percent. After trade liberalization, tariffs went from an average of more than 40 percent to nearly 10 percent. Also, after financial liberalization, direct credit controls were abandoned, interest rates were deregulated, FDI regimes were open, and foreign exchange and capital account controls were dismantled. Finally, more than 800 public firms were privatized between 1988 and 1997."[121]

Regardless of the almost immediate success of the Washington Consensus, Frers was quick to point out that:

> "Not all results were as good as expected. On the positive side, there was a surge of private capital influx into the region that went from $14 billion in 1980 to $86 billion in 1997. There was also an expansion of investment and export volumes. On the negative side, it must be admitted that real GDP growth only amounted to 3 percent a year for a decade, or just 1.5 % per capita. That was barely better than the 2 percent displayed during the lost decade of the 1980s and well below the rate of 5 % displayed during the 1960s or the 1970s. After the reforms unemployment rose, poverty remained widespread and there was generalized disappointment and sense of injustice. There was a sharp rise in crime and violence."[122]

The lessons to be learnt from the failures of the Washington Consensus according to Frers were that:

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impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudential oversight of financial institutions and legal security for property rights.

[118] Broad "The Washington Consensus Meets the Global Backlash: Shifting Debates and Policies" 2004 *Globalizations* 129.

[119] See Frers "Why did the Washington Consensus Policies Fail?" http://developmentinstitute.org/member/diazfrers_consensus/DiazFrers_script.pdf (accessed 24-08-2012).

[120] The Center for the Implementation of Public Policies Promoting Equity and Growth (CIPPEC) links research and policy to improve the livelihoods of people in Latin America and the Caribbean. CIPPEC advocates for greater use of research by civil society organisations and think tanks that are trying to influence decision-making processes in Argentina and Latin America. In 2005 CIPPEC consulted with the Overseas Development Institute in the United Kingdom to coordinate the Civil Society Partnerships Programme (CSPP) in the Latin American and Caribbean region. For more information see the following website http://cippec.org/nuevo/content.php?idcontenido=1&idcategoria=1 (accessed 23-08-2012).

[121] Frers 2.

[122] Ibid.

> "Today there is generalized consensus that countries should focus on equity and income distribution as objectives in themselves, and not only as preconditions for sustainable growth... There is consensus that there is a need to tax the rich and spend better on the poor. There is still consensus that economic cycles must be smoothed, and this can be done through fiscal rules and safety nets. Also, another item that is considered today very important is that liberalizations should be done gradually and cautiously until regulatory and supervision capacities are strong. There is an additional powerful rationale that crises are particularly harmful to the poor and others in the bottom half of the income distribution."[123]

The failure of the Washington Consensus upon which the DB indicators are modeled raises serious questions as to whether or not the Bretton Woods Institutions are playing a role in forcing developing countries to lower their labour standards in order to promote short term trade and investment gains. The starting point in addressing this question is to observe that there is an argument to the effect that rigid labour legislation could cause an undesired effect to the economy which has been used by developing countries to lower labour standards in order to attract investors.[124] The DA suggested that there was need to introduce labour reforms that would make the labour market less rigid, more flexible in wage determination and introduce more accommodating hiring and firing regulations, whilst respecting the four key labour principles of the ILO.[125]

However, questions are also raised about the DA's proposals which are in line with the DB indicators. One such question is that whilst it might be argued that rigid labour legislation could negatively impact the economy, would labour market flexibility not equally affect workers in developing countries, who are not as privileged as workers in developed countries, a development which could harm the economy in the long run and render the DA's model a failure? Could the failure of the Washington Consensus in Latin America not be an indication that labour market flexibility is not necessarily the best approach to promoting trade and luring

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[123] Frers 4.

[124] See the 2010 Creative Economy Report of the United Nations entitled "Creative Economy: A feasible Development Option" 99. See also Botero, Djankov, La Porta, Lopez-de-Silanes and Shleifer "The Regulation of Labor" 2004 *Quarterly Journal of Economics* 1339; Djankov "Measuring the Ease of Enterprise" 2007 World Bank; Djankov, McLiesh, Ramalho and Rita "Regulation and Growth" 2006 World Bank and Djankov "A response to *Is Doing Business Damaging Business*" http://egateg.usaidallnet.gov/sites/default/files/A%20Response%20to%20Is%20Doing%20Business%20Damaging%20Business.pdf (accessed 22-08-2012).

[125] See the DA's Position Paper on the Basic Conditions of Employment Amendment Bill and the Labour Relations Amendment Bill entitled "Labour Laws must Accelerate Job Creation" July 2012 13.

investment in developing countries? Perhaps the DA holds well meaning policy proposals which nevertheless could be ill-suited to the context of developing countries in which they have to be applied. In addition, it must be asked how less rigid labour legislation intended to protect the rights of the previously and still disadvantaged workers in South Africa should be when there are persistent challenges currently being faced by the workers due to the effects of globalisation. Could Ian Ollis and the DA be missing something which the two ministers also missed?

COSATU spokesperson Patrick Craven pointed out what those who call for the weakening of labour standards could be missing when he argued that:

> "While executives continue to laugh all the way to the bank, with massive remuneration packages, millions of workers continue to earn starvation wages, from which they are forced to support more family members due to high levels of unemployment, and have suffered massive casualisation, including through intensive usage of labour brokers as a clear strategy by companies to circumvent progressive labour laws".[126]

The recent developments in South Africa's Platinum mining belt illustrate the dangers posed by companies profiteering at the expense of workers who are subjected to cheap labour in flexible labour markets which Craven referred to.[127] The South African mining industry has been experiencing increased levels of industrial action, developments which have emerged as a significant risk to the industry and economic development in the country. Aquarius[128] the world's fourth largest producer of platinum retrenched two thousand workers and closed operations at its Everest Mine in early 2012, citing labour unrest as the raeson for winding up its operations.[129] Another Platinum mining company Implats[130] experienced a six-week industrial action in February 2012 which sliced 21 percent off its full-year output and, combined with declining metals prices, led to a sharp cut in its dividend, to R1.95 a share from R5.70 last year.[131] Three

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[126] See Craven "COSATU will Fight Right Wing Attempts to Weaken Labour Laws" http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=252737&sn=Detail&pid=71654 (accessed 16-06-2012).

[127] Howick "Marikana Massacre Exposes Weaknesses" Sunday Times 20 August 2012.

[128] See the Aquarius Platinum website available at http://aquariusplatinum.com/ (accessed 20-08-2012).

[129] Reuters "Workers to Warriors: Union War Batters SA Mines" http://m.engineeringnews.co.za/Article/workers-to-warriors-union-war-batters-sa-mines-2012-08-20 (accessed 22 August 2012).

[130] See the company profile which is available at http://www.implats.co.za/implats/Company-profile.asp (accessed 23-08-2012).

[131] See the 24 May 2012 Implats News Release entitled "Implats Employees Back at Work" http://www.implats.co.za/implats/downloads/2012/press_releases/24%20May%202012%20%20Implats%20employees%20back%20at%20work.pdf (accessed 23-08-2012).

lives were lost during the strike at Implats.[132] The industrial action cost the company, which produces 30 percent of global platinum, 120 000 ounces in lost production and translated into R2.8 billion in lost revenue.[133]

In August 2012, the London listed Lonmin's Marikana mine experienced an illegal industrial action that resulted in the deaths of a total number of forty-four people. Webb has argued that, "What no one has dared to say, aside from the miners themselves, is that the mining industry remains dependent on cheap and flexible labour."[134] A Bench Marks Foundation study of platinum mines in the North West Province of South Africa revealed that a number of factors led to the rising discontent of workers.[135] Lonmin was singled out as a mine with high levels of fatalities, very poor conditions for workers and unfulfilled community demands for employment.[136] The company also effected a mass dismissal of nine thousand workers in May of 2011, a development which raises questions as to whether or not there are any gains for developing countries from foreign investors on a long term basis.[137] How such developments prevail in a company which in 2011 made nearly R2 billion in profit is difficult to comprehend.[138] The company was able to pay its nine executive directors a total of R 45 million in the year 2011, a figure which is above the total salaries budgeted for all its mining employees for the year 2012 which was pegged at an estimated R 44 million.[139] It is also hard to understand

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[132] Reuters "Implats says South Africa Labour Unrest Huge Risk" http://www.abndigital.com/page/news/top-business-stories/1369491-Implats-says-South-Africa-labour-unrest-huge-risk (accessed 23-08-2012).

[133] Gambarini "Continued SA Labour Troubles Keep Platinum in Focus" Bullionstreet 23 August 2012.

[134] Webb "Echoes of the Past: Marikana, Cheap Labour and the 1946 Miners Strike" The Bullet 21 August 2012. See also Feinstein *An Economic History of South Africa* (2005) 211 and Naicker *The African Miners Strike of 1946* (1976).

[135] Bench Marks Foundation "Communities in the Minefields" 2012. Bench Marks Foundation notes that 80 % of the world's platinum is in South Africa (SA) yet the social conditions for mining communities in the platinum belt have not improved. Citigroup noted that the platinum industry is worth 2 trillion rands. All these facts raise questions as to why the social conditions of workers are not improving.

[136] Ibid. The Centre for the Study of Violence and Reconciliation (CSVR) together with the SA Human Rights Commission also revealed that Lonmin signed an agreement with the World Bank's International Finance Corporation in 2007 to develop the local community. However, CSVR's director Delphine Serumaga said, "It appears that Lonmin has not met its obligations it agreed to with the International Finance Corporation."

[137] The continual retrenchment of workers by the platinum mining companies raises questions as to how labour market flexibility is expected to create more jobs in South Africa. It appears that regulated labour market flexibility seeks to achieve the opposite of job creation by allowing companies to hire and fire as they please. This appears to defeat the objectives of the 2012 SA National Development Plan 2030 which aims to create more jobs for its citizens.

[138] See the Lonmin 2011 Annual Report. See also Marketline Advantage Reports on South Africa's Platinum Group Metals, 2011.

[139] Hlongwane "Lonmin, the 'Unacceptable face of Capitalism'" Daily Maverick 21 August 2012.

how the miners who work hard to drill platinum which per ounce sells at about USD 1444 on the international market end up taking home around USD 500 per month.[140]

The South African Chamber of Mines (SACM) has argued that the miners' demands for a salary of R12 500 per month are economically unsustainable.[141] Whether or not this argument is plausible is subject to debate. A question which must be raised though is how the SACM addresses the observations made by Maleki to the effect that:

> "Lonmin Plc's 2011 revenues equates to an average of $71,665 per worker, if the money was divided equally between individuals (Calculated from the total 2011 revenue of $1,992 billion divided between 27,796 employees. Those rock drill operators who were massacred by police on August 16 were paid a very small fraction of this total, only $3,600 to $6,000 each per year (Calculated from the monthly wage range of rock drill operators: $300 - $ 500). The more the workers are paid, the less can go to pay for the enormous profits of top investors and executives, such as the executive director's nearly $884,000 in compensation (This is the total cash compensation and does not include possible stock options). This is the simple recipe for the concentration of wealth: in the extreme, the chief executive earns the same as about 245 rock drill operators combined."[142]

It must be pointed that no one is against businesses profiteering as trade gains constitute the basis of doing business. However if business is done with a gross disregard of human rights then there might be a problem. After all, as has been evidenced by the developments in the aftermath of the Marikana massacre, the use of cheap labour is not a competitive advantage but a threat to business. Multiple strike actions have recently engulfed the South African mining industry. At the time of this study, Anglo-American Platinum the world's largest platinum producer had closed its mine in Rustenburg in fear of the victimisation of its workers by other striking workers.[143] Goldfields' workers had also joined the strike demanding the same amount as the R 12 500 which led to the impasse at Lonmin.[144] A total of 55 people had been killed since the beginning of the strikes in the South African platinum belt in 2012.[145]

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[140] Jenneman "US Gold Open- Comex Gold Trends Higher in Wake of Lonmin Violence" 29 August 2012.
[141] Sapa "Chamber of Mines says Industry not in Crisis" Sunday Times 16 September 2012.
[142] Maleki "Creation of Cheap Labour a means to Profits: Marikana Mineworkers Massacre in South Africa" http://rabble.ca/blogs/bloggers/nima-maleki/2012/08/creation-cheap-labour-means-profits-marikana mineworkers-massacre (accessed 30-08-2012).
[143] Reuters "South Africa miners blockade Anglo American Platinum Mine" The Guardian 12 September 2012.
[144] Post "Lonmin Strikers remain Defiant" Post 10 September 2012.
[145] York "South African Mine Strikes spread" The Globe and Mail 12 September 2012.

With the strikes threatening operations, the cost effect of Lonmin closing down its operations due to the difficulties of doing business would lead to 35 000 workers losing their jobs.[146] This would worsen the situation in South Africa which has almost half of its 52 million citizens living in poverty with Labour Force Survey figures indicating that 60 % of all workers in South Africa earn less than R 2500 a month.[147] Many of these workers are the sole income earners in their households. This development mirrors the failure of the Washington Consensus in Latin America as already alluded to in this chapter. Could this be the competitive advantage that cheap labour brings? The crippling strikes in the mining industry were continuing at the time of this study with Lonmin having missed the production target of a saleable 750 000 ounces of platinum which translates to lost revenue estimated at R 800 million within 37 days.

However, the Lonmin strike came to an end after an agreement by the company and the workers which resulted in a 22% wage increase across the board for the mine workers in addition to a R2000 once-off bonus.[148] Strike actions are continuing at other mines. There are concerns though that the wage increase may lead to job losses as Lonmin seeks to cut operating costs. Lonmin has tried to dismiss such concerns by indicating that it will not reduce the number of miners. Only time will tell. Important questions are raised though. Does it take workers to undertake an illegal strike action for them to be given a record pay rise in South Africa in the history of wage negotiations? If so what example does such behaviour set concerning wage negotiations and the investor friendly nature of the country? Should the government not develop a policy to address the workers' grievances as well as the role of companies in ensuring sustainable development? All these questions need proper answers in order to ensure an investor friendly environment in the country.

There are lessons to be drawn from the Marikana Lonmin mine incident in relation to Craven's sentiments. Trade unions are also liable for the escalating poor labour conditions experienced by workers. The differences between the National Union for Mineworkers (NUM)[149] and Association of Mineworkers and Construction Union (AMCU)[150] fuelled the

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[146] Sapa "Miners Threaten to kill Lonmin Management" Sowetan 05 September 2012.
[147] Statistics South Africa "Quarterly Labour Force Survey: Quarter 2, 2012" http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2012.pdf (accessed 03-09-2012).
[148] Masombuka "Striking Miners Claim Victory after New Offer" TimesLIVE 19 September 2012.

tensions already existing concerning legitimate calls for an increase in wages made by the Marikana mine workers. NUM, an affiliate of COSATU has been accused of ignoring the workers' interests in favour of promoting their business ventures and liaisons with companies.[151] AMCU has been accused of taking advantage of workers' plight and turning it into an opportunity to fan violence in the mining industry so as to appear as if they are concerned about the latter's problems.[152] However, disrupting business is hardly the right course of action to take when the workers themselves are already impoverished due to the little wages they receive and the inescapable conclusion that companies may be forced to shut down as a result of the strike actions, a situation which further worsens the plight of the already disadvantaged workers and their families. The "no work no pay" principle has seen striking workers rely on borrowing money from loan sharks and receiving handouts from Gift of the Givers (an NGO requested to assist the workers in the face of a worsening humanitarian crisis) in order to feed themselves and their families.[153]

On 14 September 2012, Gordhan who had initially proposed the relaxing of South African labour laws to allow for labour market flexibility noted that the increasing illegal strike actions in the country's mining industry would adversely affect its growth path, employment retention as well as creation agenda and investor confidence.[154] Gordhan warned that if investor confidence is undermined, investment from inside and outside the country would be threatened as well.[155] Investment can either be threatened in the short-term through mine shutdowns with a possible view to withdrawal of business operations by investors due to a business unfriendly

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[149] The National Union for Mineworkers (NUM) was formed on the 5 December 1982 and is the largest recognised collective bargaining agent in the South African mining industry.

[150] The Association of Mineworkers and Construction Union (AMCU) was formed in Mpumalanga South Africa in 1998 as a breakaway faction of the COSATU affiliated NUM. it was formally registered as a Union in 2001. The union sees itself as distinct from NUM in that it contends that it is apolitical and noncommunist. Its competition with NUM over bargaining rights at Lonmin mines in the Rustenburg culminated in the violent Marikana miners' strike which resulted in what is now know as the Lonmin or Marikana massacre.

[151] Sibeko and Dolan "Amplats hit by Labour Unrest" BusinessReport 17 September 2012.

[152] South African Labour News "SACP calls for Inquiry to probe AMCU, funding by BHP Billiton alleged" South African Labour News 20 September 2012.

[153] Gift of the Givers "Humanitarian Assistance for Marikana Miners" http://www.giftofthegivers.org/marikana-miners/page-1-01.html (accessed 15-09-2012). See also Davis "Marikana: Gift of the Givers brings food to Striking Miners" Daily Maverick 10 September 2012.

[154] Fin24 "Gordhan: Strikes could hit Economy Hard" http://www.fin24.com/Economy/Gordhan-Strikes-could-hit-economy-hard-20120914 (accessed 15-09-2012).

[155] Ibid.

environment[156] or in the long-term due to the reluctance by future possible investors to invest in the country due to an unstable business operating environment charasterised by labour unrest.[157] All such scenarios have crippling and dire consequences to the development prospects of the country.

From Gordhan's assessment of the crippling strikes, it may be inferred that if flexible labour market conditions lead to labour market unrest which in turn threatens investor confidence and the growth path of the country's economy then labour market rigidity could be the safeguard to boosting investor confidence from within and without South Africa. After all one of the central issues at the heart of the labour unrest in South Africa's mining industry has been the omission from its labour laws to recognise minority trade unions.[158] Labour market rigidity is against the recommendations of Bretton Woods's institutions that prefer labour market flexibility as a route to economic development as already alluded to in this chapter. Lessons from the failed Washington Consensus in Latin America indicate that labour market flexibility might not offer the long-term development goals which developing countries should be aiming for. From this argument, could Gordhan have indirectly admitted that flexible labour market conditions may not be conducive to creating investor confidence for trade purposes? It may be argued that his views appear to suggest so.

Striking mine workers disowned both AMCU and NUM for failing to represent their interests. Nevertheless the position of NUM and AMCU in relation to the Marikana Lonmin mine incident does not undermine the importance of Craven's sentiments which are substantiated by the fact that in March 2006, the International Finance Corporation (IFC) adopted new environmental and social standards which contain new requirements for community health, safety and security; labour conditions; pollution prevention and abatement; integrated social and environmental assessments; and management systems.[159] The standards adopt an 'outcomes-

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[156] Ernst and Young "Business Risks Facing Mining and Metals 2012-2013" 2012 The Business Risk Report Mining and Metals 2012-2013 20.

[157] Cekerevac "South African Gold Mining Stocks Sell Off Amid More Worker Violence" Investment Constraints 5 September 2012.

[158] Reuters "Workers to Warriors: Union War Batters SA Mines" Reuters 19 August 2012.

[159] International Finance Co-operation "IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information: Report on the First Three Years of Application" 29 July 2009. See also OECD "Recommendation of the Council on Common Approaches for Officially Supported

based approach' which requires client companies to have in place effective management systems that allow them to handle social and environmental risks as an integral part of their basic operations and business model.[160] DB in its 2012 report also acknowledged the need to change the approach to conducting business with a view to ensuring consistency with ILO Conventions and striking a better balance between labour market flexibility and social protection (including unemployment protection).[161]

DB's stance comes in the aftermath of an ongoing research which commenced in 2010 and is being conducted by the World Bank Group working with a consultative group which includes labour lawyers, employer and employee representatives, and experts from the ILO, civil society, the private sector and the Organisation for Economic Co-operation and Development (OECD).[162] The research is working towards exploring the measurement of worker protection to complement the measurement of the cost to employers of labour regulations.[163] The research has led to the collection of new data on issues related to the minimum wage in 2012. The guidance of the consultative group has provided the basis for several changes in the methodology of calculating the minimum wage ratio in employing workers. The change in the methodology of calculating the minimum wage ratio in employing workers has been effected to ensure that:

> "No economy can receive the highest score if it has no minimum wage at all, if the law provides a regulatory mechanism for the minimum wage that is not enforced in practice, if there is only a customary minimum wage or if the minimum wage applies only to the public sector. A threshold was set for paid annual leave and a ceiling for working days allowed per week to ensure that no economy benefits in the scoring from excessive flexibility in these areas. Finally, the calculation of the redundancy cost and of the annual leave period for the rigidity of hours index was changed to refer to the average value for a

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Export Credits and Environmental and Social Due Diligence (The 'Common Approaches') 28 June 2012 - C (2012)101.

[160] See International Organisation for Employers (IOE) "The Evolving Debate on Trade and Labour Standards" 2006 IOE Information Paper 14.

[161] Doing Business 2012 1. Doing Business, in its indicators on employing workers, measured flexibility in the regulation of hiring, working hours and redundancy in a manner consistent with relevant ILO conventions. This was done to strike a better balance between labour market flexibility and social protection (including unemployment protection). In Doing Business 2010, for example, the indicators were complemented with data on the existence of unemployment protection schemes in cases of redundancy dismissal where workers receive less than 8 weeks of severance pay.

[162] For the terms of reference and composition of the consultative group, see World Bank "Doing Business Employing Workers Indicator Consultative Group" http://www.doingbusiness.org (accessed 13-08-2012).

[163] A full report with the conclusions of the consultative group is available at http://www.doingbusiness.org/methodology/employing-workers (accessed 17-08-2012).

worker with 1 year of tenure, a worker with 5 years and a worker with 10 years rather than the value for a worker with 20 years of tenure."[164]

However, there is a lot of criticism that has been leveled against the DB indicators. Critics have been particularly concerned with the use of the EW index, and in particular the country rankings to guide legal reform, as a benchmark against which to measure progress and a basis for providing financial assistance to developing countries.[165] Kitching,[166] Arrunada,[167] Berg and Cazes[168] and Lee and McCann,[169] and Djankov[170] have all challenged the conceptual and methodological foundations of the EW index and broader DB project and deemed them as problematic or unreliable.

The conceptual limitations of the DB project can be argued to stem from its underlying understanding of labour laws, which are grouped together with the other legal measures covered by the index as a form of "business regulation".[171] This conceptualization of labour standards differs from conventional accounts of their purpose in policy, legal and other discourses, which tend to centre on the social objectives of such standards such as ensuring justice, protecting workers' well-being and security, or improving the quality of life of workers and their families.[172] Lee *et al* have argued that, "In line with the classification of labour laws as an element of "the business environment", the DB indicators are intended neither to recognize the social objectives of labour regulations, nor to assess the level of protection offered by the domestic standards they cover."[173]

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[164] Doing Business 2012 5.
[165] Lee *et al* 420.
[166] Kitching "A Burden on Business? Reviewing the Evidence Base on Regulation and Small-business Performance" 2006 *Environment and Planning C: Government and Policy* 799.
[167] Arrunada "How Doing Business Jeopardizes Institutional Reform" 2008 Economics and Business Department Working Paper No. 1088. See also Arrunada "Pitfalls to avoid when Measuring Institutions: Is 'Doing Business' Damaging Business?" 2007 *Journal of Comparative Economics* 729.
[168] Berg and Cazes "The Doing Business Indicators: Measurement Issues and Political Implications" 2007 Economic and Labour Market Paper No. 2007/6.
[169] Lee and McCann "Measuring Labour Market Institutions: Conceptual and Methodological Questions on 'Working Hours Rigidity' " in Berg and Kucera (eds) *In Defence of Labour Market Institutions: Cultivating Justice in the Developing World* (2008) 32.
[170] Djankov "A response to Is Doing Business Damaging Business" 2008 *The World Bank* 4.
[171] Lee *et al* 421.
[172] Ibid. See also Langille "What is International Labour Law for?*"* 2005 Geneva, International Institute for Labour Studies and Murray "Transnational Labour Regulation: The ILO and EC Compared" (2001) 20.
[173] Lee *et al* 421.

Key concerns have thus been raised to the effect that aside from the ILO's core labour standards, the EW index disregards many of the entitlements contained in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.[174] The 2008 DB report claimed that methodological improvements have aligned the EW index with the ILO's Conventions.[175] Lee and McCann carried out an analysis with respect to the international standards on working time, finding the sub-index on "rigidity of hours" to be substantially in conflict with them.[176] Also, the 2008 DB report singled out Georgia as a model of labour market regulation,[177] although its labour code has been heavily criticized by the ILO for granting employers an unlimited right to dismiss workers without cause and imposing severe restrictions on trade union action and workers' collective bargaining rights.[178] Lee *et al* argued that:

> "In terms of the overall country rankings, moreover, the EW index generates some striking results that are, in some cases, out of line with the economic outcomes it purports to measure. Because of their deregulated labour markets, countries like Afghanistan, Haiti and Papua New Guinea, for example, earn higher marks on the index than do prosperous economies with low levels of unemployment and high productivity, such as Finland, the Netherlands and Sweden, contradicting the World Bank's claim that more flexible policies are a recipe for high-quality job creation."[179]

The ITUC has argued that by discouraging countries from maintaining anything above the bare minimum level of labour market regulation, the DB project undermines the development goals promoted by international organizations, including the World Bank itself.[180] Lee, McCann and Messenger have revealed that an examination of the "rigidity of hours" sub-index showed it to be broadly out of step with trends in domestic regulation and also to reward substantially deregulated working time regimes.[181] McLeod has argued that the "rigidity of employment" component of the EW index provides no additional information: its only effect, he suggested,

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[174] The ILO Declaration on Fundamental Principles and Rights at Work was adopted in 1998 and is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values - values that are vital to our social and economic lives.
[175] World Bank *Doing Business* Report 2008 68.
[176] Lee *et al* 421.
[177] World Bank *Doing Business* Report 2008 68.
[178] Lee *et al* 422.
[179] Ibid.
[180] ITUC "The IFIs' use of Doing Business to Eliminate Workers' Protection: Analysis of Doing Business 2008 and New Country Evidence" 2007 2.
[181] Lee, McCann and Messenger *Working Time Around the World: Trends in Working Hours, Laws and Policies in a Global Comparative Perspective* (2007) 22.

was to introduce a bias towards the interests of employers by adding weight to the "hiring", "firing" and "rigidity of hours" sub-indices.[182] Berg and Cazes have pointed to the absence from the EW index of tripartite negotiation and collective bargaining measures, despite their role in encouraging dynamic and responsive labour markets.[183] They have also questioned the models of "the business" and "the worker" that are applied to evaluate labour legislation for the purposes of the DB index.[184] Assumptions about "the business" include, for example, that it is a limited liability company; operates in the manufacturing sector; and has 201 employees.[185]

In their studies, Palmer, Wedgwood and Hayman[186] and the United Nations Industrial Development Organization (UNIDO)[187] noted that this model of the firm does not represent the bulk of the private sector in many developing countries, most notably because it misses the micro-enterprises that are characteristic of the informal sector. Kitching, in reference to sub-Saharan Africa, has argued that since the DB project assumes a model of the enterprise atypical of the vast majority of micro and small enterprises, it is unable to offer meaningful information on any growth constraints that may affect these businesses.[188] According to Lee *et al*, the image of "the worker" embedded in the index is also open to criticism as reflecting the "standard" model of labour market participation in that he or she is assumed to be 42 years old, engaged on a full-time basis and to have been employed by the same company for 20 years (The twenty years has since been revised to ten years).[189] Fudge and Owen noted that this model of engagement in paid labour hypothesised by DB was alien to many workers and women in

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[182] McLeod "Doing Business in Indonesia: Legal and Bureaucratic Constraints" 2007 Research Program "Economic Attractiveness of the Law", Nanterre, University of Paris Working Paper AED-EAL-2007-3.

[183] Berg and Cazes "The Doing Business Indicators: Measurement Issues and Political Implications" http://www.oit.org/public/english/employment/download/elm/elm07-6.pdf (accessed 10-09-2012). See also Marais "Methodological Limits of 'Doing Business' Reports" 2006 Program "Economic Attractiveness of the Law", Nanterre, University of Paris Working Paper AED-2006-1 (Version 4).

[184] On the methodology of the EW index, see http://www.doingbusiness.org/Methodology Surveys/EmployingWorkers.aspx (accessed 20-08-2012).

[185] Ibid.

[186] Palmer, Wedgwood and Hayman "Educating out of Poverty? A Synthesis Report on Ghana, India, Kenya, Rwanda, Tanzania and South Africa" Department for International Development Educational Paper No. 70.

[187] United Nations Industrial Development Organization (UNIDO) "Creating an enabling environment for private sector development in sub-Saharan Africa" 2008 UNIDO 33.

[188] Kitching 800.

[189] Lee *et al* 423.

particular across the industrialized countries, and it captures only a minority of workers in many developing countries.[190]

Siems has argued that by comparing countries in which the context of particular rules is completely different, the DB approach did not allow for an assessment of individual countries' legal systems, thereby undermining the overall ranking system.[191] Bath studied the application of the index to China and Australia established that the restricted scope of the EW index meant that the overall DB index does not provide an accurate picture of "ease of doing business", thereby restricting its usefulness both for analyses of individual countries and for cross-country comparisons.[192] Hoyland, Moene and Willumsen also questioned whether the EW index accurately captures the employment climate best suited to business and argued that countries may actually find it easier to shift their rankings in the index than to change their underlying business environment.[193] This supports the suggestion of Menard and du Marais that the DB ranking system is superficial and measures the ability of countries to "fix the rules of the game".[194] Deakin, Lele and Siems have concluded that the current state of knowledge on the workings of labour legislation does not validate the belief that labour law reform towards deregulation will enable countries to improve their economic performance.[195] Villaba has argued that:

> "These conceptual and methodological deficiencies of the EW index stand in contrast with the increasing references being made to it within global policy circles, raising suspicion in some quarters that the main motivation behind the EW index is international trade goals – for example, global competition for labour deregulation – rather than questions of national development."[196]

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[190] Fudge and Owens *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (2006) 30.
[191] Siems "The End of Comparative Law" 2007 Cambridge Centre for Business Research Working Paper No. 340.
[192] Bath "The World Bank Doing Business Reports - Regulation and Change in China and Australia" Sydney Law School Research Paper No. 07/79.
[193] Høyland, Moene and Willumsen "Be Careful when Doing Business" 2008 Centre of Equality, Social Organization and Performance, University of Oslo Report commissioned by the Norwegian Ministry of Foreign Affairs.
[194] Ménard and Marais "Can we Rank Legal Systems according to their Economic Efficiency?" in Nobel and Gets (eds) *New Frontiers of Law and Economics* (2006) 7.
[195] Deakin Lele and Siems "The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes" 2007 *International Labour Review* 133.
[196] Villalba "The World Bank Insists on the Liberalization of Economies" 2006 *IFIs Latin American Monitor* 3.

From the above detailed current position assumed by actors in world business, Craven's views in 2011 strengthen arguments that developing countries' leaders might be lacking foresight by focusing on quick political gains which do not offer a better long term future for their countries. It must also be accepted though that the lack of foresight amongst developing countries' leaders could possibly be compounded by the Bretton Woods institutions[197] which incentivize labour market flexibility without paying much attention to the conditions under which workers in developing countries are living in.

In June 2012, Rob Vos, the United Nations Director of Economics indicated that African countries must focus on long term economic gains rather than short term political gains. Vos was adding emphasis on recommendations made in the 2012 Economic Report on Africa which stressed the need for African countries to focus on investing in human capital[198] and regional integration.[199] As such when one contrasts the current position of South African labour and the statements of some members of the South African government with the initial softer approach of South Africa towards the trade-labour linkage taken at the end of the apartheid era, it can only be argued that the later differences in opinions between the government and the trade unions on the one hand and amongst government officials on the other hand,[200] raises serious questions as to the sincerity of some in the South African government towards realizing sustainable development in the country. On the other hand, one could argue that it signals high levels of ignorance amongst South African trade unions concerning the place of core labour standards in

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[197] Woods *The Globalizers: The IMF, the World Bank, and their Borrowers* (2006) chapter 5. See also Weiss and Daws *Oxford Handbook on The United Nations* (2006) chapter 13 1. The World Bank and its sister organization, the International Monetary Fund, were created at Bretton Woods New Hampshire in 1944. Together they are referred to as the Bretton Woods Institutions or BWIs. The World Bank is currently the largest multi-national lending and technical agency dealing with Third World development. As the world's leading development agency, the World Bank has a wide-ranging mandate, from consolidating loans for large-scale development projects to providing structural adjustment loans and sectoral adjustment loans to developing countries experiencing balance of payments problems. The IMF's original mandate sets forth three main objectives, 1) To promote international monetary cooperation; 2) To facilitate the expansion of international trade; and 3) To promote exchange rate stability. The IMF achieves these objectives by advising member countries on their economic policies and by providing conditional assistance to member countries experiencing balance of payments problems.

[198] See Economic Commission for Africa "*Unleashing Africa's Potential as a Pole of Global Growth*" 2012 113.

[199] See Economic Commission for Africa 129.

[200] Mail and Guardian "Cabinet: No Pravin we won't Relax SA's Labour Laws" Mail and Guardian 25 August 2011. Government spokesperson Jimmy Manyi had to rush to indicate that the South African Cabinet would not entertain any proposals to relax labour laws. The Cabinet also issued a "tacit rebuke" to Pravin Gordhan for his suggestions that South Africa had to relax labour laws to create more jobs.

trade and development. An analysis of some of the violations of core labour standards in trade currently taking place in South Africa could help in clarifying which of the two arguments advanced is plausible.

6 2 1 1 Low compliance with core labour standards in South Africa's wine industries

South Africa is regarded as having sound labour legislation in the region and the world at large. Sadly, in August 2011 a Human Rights Watch report established that each year, millions of consumers around the world enjoy South African fruits and the well-known wines that come from its vineyards yet the farm workers who produce these goods for domestic consumption and international export are among the most vulnerable people in the South African Society.[201] The workers work long hours in harsh weather conditions, often without access to toilets or drinking water and are exposed to toxic pesticides that are sprayed on crops.[202] For this physically grueling work, they earn among the lowest wages in South Africa, and are often denied benefits to which they are legally entitled.[203] They also face obstacles to union formation, which remains at negligible levels in the Western Cape agricultural sector.[204]

All the labour standards violations continue to occur regardless of the safeguards offered at law for the workers. It is important to observe that the violations of core labour standards at hand are similar to those practiced by Chinese companies. This indicates that the problem goes beyond just being a China issue but an international issue. In that regard, it could be an indication that something beyond national legislation is required to address the violation of core

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[201] Human Rights Watch "Ripe with Abuse: Human Rights Conditions in South Africa's Fruit and Wine Industries" 2011 4. After the report, the government of South Africa and other stakeholders (business and organized labour) did not taken any action to remedy the poor labour conditions under which employees worked. This has resulted led to illegal strike actions in South Africa's Western Cape Province's farming sector strikes (at the time of completing this study). Such unnecessary setbacks, during the harvesting for export purposes could have avoided if timely attention had been given to the workers' grievances. It must be appreciated that emphasis is not to be placed on giving in to workers entire demands as this may cripple business. The objective is to adopt measures which cushion workers during harsh economic conditions such as those characterizing the world economy at the present moment whilst at the same time ensuring that no huge salaries have to be imposed upon the employers which would limit investment returns. A balance of interests would be the ideal approach to avoid crippling strike actions such as has become common in South Africa at the time of completing this study. Such an approach could also work elsewhere in today's world.

[202] Ibid.

[203] Human Rights Watch 4. It must also be observed that apart from the wine industries, in 2011, the clothing factories in the Western Cape agreed to a minimal entry salary of a miserly R700 with a view to ensuring that South Africa competes against China in the clothing sector.

[204] Human Rights Watch 4.

labour standards in trade. An analysis of legal instruments available to protect South African workers in farms from exploitation is thus necessary on the basis that the Social Charter requires national governments to implement measures which will ensure the realisation of its objectives.[205]

6 2 1 2 South Africa's legal obligations

The 1996 Constitution of the Republic of South Africa is the supreme law of the country.[206] It notes that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."[207] Furthermore it provides that, "the state must respect, protect, promote and fulfil the rights in the Bill of Rights."[208] The Bill of Rights guarantees a range of rights for every person in South Africa, as well as certain rights that are restricted to citizens.[209] In respect of some of those rights the government must take reasonable measures to achieve their progressive realization.[210] One such right of which the State must ensure a progressive realisation is the broad right to fair labour practices.[211]

The South African government has enacted legislation and regulations that are relevant to the rights of farmworkers and farm dwellers. This includes Sectoral Determination 13, which was promulgated by the Minister of Labour to establish basic conditions of employment for farmworkers.[212] The Government of South Africa is obligated to respect, protect, and fulfill the rights enshrined in international and regional instruments it has ratified.[213] The South African

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[205] See the SADC Social Charter Article 2(1).

[206] See the Constitution of the Republic of South Africa 1996 (hereinafter referred to as the Constitution) chapter 1 Section 2.

[207] See chapter 2 of the Constitution section 7(1).

[208] See chapter 2 of the Constitution section 7(2). These rights may be limited only in certain circumstances. See chapter 2 of the Constitution, sections 7(3) and 36.

[209] Rights limited to citizens include political rights, rights to reside in the country, and rights to choose freely their trade, occupation, or profession. See chapter 2 of the Constitution sections 19, 20, 21(3)-(4) and 22.

[210] See chapter 2 of the Constitution sections 26(2) and 27(2).

[211] See section 23(1) of the Constitution.

[212] See the Basic Conditions of Employment Act (BCEA), No. 75 of 1997. Sections 51-55 of the BCEA enable the Minister of Labour to promulgate Sectoral Determinations to establish basic conditions of employment for workers in a sector and area, excepting sectors in which a collective agreement concluded by a bargaining council or statutory council already exists. Section 57 of the BCEA provides that if a matter is regulated in both the BCEA and the Sectoral Determination, the provision in the Sectoral Determination prevails. Inspectors from the Department of Labour are tasked with monitoring the implementation of Sectoral Determinations and ensuring that employers follow all requirements.

Constitution also requires that international law be considered in interpreting the Bill of Rights and legislation.[214] An analysis of some key labour-related rights being violated in the fruit and wine industries of South Africa follows below.

6 2 1 3 Occupational health and safety

As already indicated in the 2011 Human Rights Watch Report, workers in the fruit and wine industries in the Western Cape Province of South Africa, work long hours in harsh weather conditions, often without access to toilets or drinking water and are exposed to toxic pesticides that are sprayed on crops.[215] All this is taking place regardless of the South African Constitution guaranteeing everyone the right "to an environment that is not harmful to their health or well-being"[216] and "the right to have access to health care services," which the government must take reasonable measures to achieve.[217] Issues concerning the environment are some of the key issues that have come up for debate before the WTO. The Occupational Health and Safety Act (OHSA),[218] regulates workplace health and safety for workers in all sectors. The OHSA requires employers to provide and maintain a safe workplace.[219] Labour inspectors are tasked with ensuring that employers comply with health and safety regulations.[220] Employers who fail to comply with occupational health and safety regulations may be subject to penalties.[221]

Under the OHSA, the Department of Labour has promulgated the Regulations for Hazardous Chemical Substances[222] and the Hazardous Biological Agents Regulations[223] which apply respectively to employers at workplaces where persons may be exposed to hazardous

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[213] The South African government also undertakes not to undermine the object and purpose of treaties to which it is a signatory. See Article 18 of the Vienna Convention on the Law of Treaties 1969 which entered into force on 27 January 1980.

[214] See chapter 2 of the Constitution section 39(1)(b) and chapter 14, section 233.

[215] Human Rights Watch 4.

[216] See Section 24 of the Constitution.

[217] See Section 27(1)-(2) of the Constitution.

[218] The Occupational Health and Safety Act No 85 1993.

[219] See section 8 of the OHSA.

[220] Section 8 of the OHSA.

[221] Section 43(4) of the OHSA.

[222] See the Department of Labour, Regulations for Hazardous Chemical Substances of South Africa 1995.

[223] See the Department of Labour, Hazardous Biological Agents Regulations of South Africa 2001. Note that the general use of pesticides on farms is also governed by the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947.

chemical substances or hazardous biological agents. Both sets of regulations require that employers provide employees with information and training, medical surveillance and attention in certain cases, and respiratory protective equipment and protective clothing. The Facilities Regulations[224] also promulgated under the OHSA, require that employers provide sanitary facilities and an adequate supply of drinking water. The Compensation for Occupational Injuries and Diseases Act[225] covers workers' compensation and disability benefits for injuries occurring on the job. Under the Act, employers must either pay into the workers' compensation fund or obtain insurance to fully cover any and all costs due to an injured worker.[226] The Committee on Economic, Social and Cultural Rights has interpreted the International Covenant on Economic, Social and Cultural Rights (ICESCR)[227] to include:

> "preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health [and] … the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment."[228]

6 2 1 4 Freedom of association

The South African Constitution guarantees the right to freedom of association,[229] and all workers have the right "to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike."[230] In addition, under the International Covenant on Civil and Political Rights (ICCPR)[231] and the African Charter on Human and Peoples' Rights (ACHPR),[232] the

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[224] See the Facilities Regulations of South Africa 1990.
[225] See the Compensation for Occupational Injuries and Diseases Act (COIDA) No 130 1993.
[226] See sections 83-84 of the COIDA.
[227] The Economic, Social and Cultural Rights Treaty was adopted by the United Nations General Assembly on the 16th of December 1966 and came into force on the 3rd of January 1976. It commits parties to work toward the granting of economic, social and cultural rights to individuals. Such rights include labour rights.
[228] See the CESCR General Comment No. 14 of the UN Document E/C.12/2000/4.
[229] See section 18 of the Constitution.
[230] See Sections 23(2) and 23(3)-(5) of the Constitution.
[231] The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly on the 16th of December 1966 and came into force on the 23rd of March 1976. It commits its parties to respect the civil and political rights of individuals such as freedom of assembly.
[232] The African Charter on Human and People's Rights also known as the Banjul Charter, was adopted by Organisation of African Unity (which has since been replaced by the African Union) on the 21st of October 1986. It is intended to promote and protect human rights and basic freedoms in Africa.

South African government is obligated to respect the right to freedom of association.[233] Having ratified ILO Conventions 87 and 98, South Africa has committed to ensure that workers have the right to establish and join organizations of their own choosing and that workers are protected against discrimination based on union activity.[234] The ILO has determined that freedom of association and the right to collective bargaining are fundamental labour principles and rights.[235] The Labour Relations Act (LRA), a South African statute that formally adopts ILO provisions, prohibits discrimination against employees for exercising their rights of freedom of association.[236]

6 2 1 5 Conditions of employment

Under the South African Constitution, "everyone has the right to fair labour practices."[237] Under the BCEA,[238] which governs basic conditions of employment in South Africa, the Minister of Labour has established Sectoral Determination 13.[239] Among other things, Sectoral Determination 13 requires that employers pay at least the minimum wage and limits the amount of deductions that employers can make from wages, including no more than 10 percent for food and no more than 10 percent for accommodation.[240] It requires employers to provide written particulars of employment[241] and paid annual leave, sick leave, and maternity leave;[242] regulates the hours of work, including payments for overtime work or work on Sundays and public

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[233] See Article 22 of the ICCPR and Article 10 of the ACHPR.

[234] See Article 2 of ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise adopted on 9 July 1949 and entered into force on 4 July 1950. See also Article 1 of the ILO Convention No 98 concerning the Right to Organise and Collective Bargaining adopted on 1 July 1949 and entered into force on 18 July 1951 which notes that protection against anti-union discrimination applies particularly "in respect of acts calculated to ... cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities."

[235] See the International Labor Organization, Declaration on Fundamental Principles and Rights at Work 1998.

[236] See Section 2(1)-(2) of the LRA. No person may do or threaten to do the following: require an employee or person seeking employment to not be or become a member of a trade union; prevent such person from exercising rights conferred by the Act; or prejudice such person because of past, present, or anticipated trade union membership or participation.

[237] See section 23(1) of the Constitution.

[238] See the Basic Conditions of Employment Act No. 75 of 1997.

[239] Basic Conditions of Employment Act: Sectoral Determination 13: Farm Worker Sector, South Africa Regulation 149 2006.

[240] See sections 8(1)(a)-(b) and 8(2)-(b) of Sectoral Determination 13 No 75 1997.

[241] See section 9 of Sectoral Determination 13.

[242] See sections 21, 22 and 24 of Sectoral Determination 13.

holidays;[243] prohibits child labour and forced labour;[244] and regulates the termination of employment.[245] The Unemployment Insurance Act[246] establishes the Unemployment Insurance Fund (UIF) and provides for the government's payment from the fund of unemployment benefits, maternity benefits, and other benefits.[247]

As State Party to the ACHPR, South Africa must recognize and promote work under equitable and satisfactory conditions.[248] This encompasses fair remuneration, a minimum living wage for labour, and equal remuneration for work of equal value; equitable and satisfactory conditions of work; and the right to rest and leisure.[249] The ICESCR recognizes the right to just and favourable conditions of work, in a similar manner as section 23(1) of the South African Constitution which guarantees fair labour practices to everyone.[250] It requires fair remuneration, safe and healthy working conditions, equal opportunity for promotions, and rest and leisure.[251] The ILO has also adopted conventions specific to farm workers, such as ILO Convention 129, Labour Inspection (Agriculture), 1969, which covers labour inspections in the agricultural sector. Although South Africa has not ratified these conventions, they provide guidance on international norms regarding hired farm labour.[252]

6 2 1 6 Human rights responsibilities of private actors

Although governments have the primary responsibility to respect, protect, and fulfil human rights, private entities such as business enterprises also have responsibilities regarding human rights. The basic principle that businesses of all sizes have a responsibility to respect human rights, including workers' rights, has achieved wide international recognition.[253] This approach is

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[243] See section 10 -20 of Sectoral Determination 13.
[244] See section 13(25) of Sectoral Determination 13.
[245] See sections 26-31 and 33 of Sectoral Determination 13.
[246] Unemployment Insurance Act (UIA) No. 63 2001.
[247] See sections 24-26.
[248] See section 15 of the UIA.
[249] See Article 6 of the Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa which was incorporated into the Resolution on Economic, Social and Cultural Rights in Africa adopted in December 2004 by the ACHPR.
[250] See Article 7 of the ICESCR.
[251] See Articles 9, 10 and 11 of the ICESCR.
[252] ILO Convention No 129 concerning Labour Inspection in Agriculture 25 adopted June 1969 and entered into force on 19 January 1972. See also ILO Convention 11 concerning the Right of Association and Combination of Agricultural Workers, adopted 12 November 1921 and entered into force on 11 May 1923.

reflected in various norms and guidelines, including in the work of the United Nations Special Representative on business and human rights, Professor John Ruggie, who held the post until June 2011. During his mandate the longstanding concept that businesses have a responsibility to respect all human rights secured additional support, including from the United Nations Human Rights Council (UNHRC) and from business organizations.[254] In particular, the "Protect, Respect and Remedy" framework and the "Guiding Principles on Business and Human Rights" for their implementation, which were developed by Ruggie and endorsed by the UNHRC in 2008 and 2011,[255] respectively, reflect the expectation that businesses should respect human rights, avoid complicity in abuses, and adequately remedy them if they occur. Among other elements they outline basic steps that businesses should adopt consistent with their responsibilities. This includes undertaking adequate due diligence that encompasses risk assessments and monitoring in order to identify and effectively mitigate against human rights problems.[256] Moreover, although not specified in the Guiding Principles, it is a best practice among companies, as well as

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[253] The preambles to key human rights treaties recognize that ensuring respect for human rights is a shared responsibility that extends to "every organ of society," not only to states. In addition, the preambles of both the ICCPR and ICESCR recognize that "individuals" have human rights responsibilities, a term that can incorporate juridical persons (including businesses) as well as natural persons. The broad consensus that businesses have human rights responsibilities is also reflected in the decisions of the UN Human Rights Council on business and human rights, discussed further below, as well as in the International Labor Organization's Tripartite Declaration of Principles, the UN Global Compact, and elsewhere.

[254] For example, the International Chamber of Commerce issued a policy statement that reads in part: "Respect for human rights constitutes a baseline expectation for companies operating in any country. All companies, regardless of their size or home country, are expected to obey applicable laws and regulations, including those aimed at protecting human rights. Where national law is absent, or not enforced, companies are expected to respect the principles of relevant international instruments." International Chamber of Commerce, "Policy statement: ICC views on business and human rights," December 10, 2008. This statement expanded on a joint statement the ICC issued with two other business groupings in May 2008. See "Joint initial views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eight Session of the Human Rights Council on the Third Report of the Special Representative of the UN Secretary-General on Business and Human Rights" http://www.biac.org/statements/investment/08-05_IOE-ICC-BIAC_letter_on_Human_Rights.pdf (accessed 12-06-2012).

[255] See the UN Human Rights Council "Mandate of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises," Resolution 8/7 A/HRC/RES/8/7 and UN Human Rights Council "Human Rights and Transnational Corporations and other Business Enterprises" Resolution 17/4 A/HRC/17/L.17/Rev.1.

[256] See the UN Human Rights Council report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises "Protect, Respect and Remedy: a Framework for Business and Human Rights" UN Document A/HRC/8/5 7 April 2008. See also the report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" UN Document A/HRC/17/31 21 March 2011.

in multi-stakeholder initiatives designed to address business and human rights problems, to require independent third-party audits; some also communicate the results publicly.[257]

6 2 2 Chinese trade practices

As South African President Jacob Zuma visited the Democratic Republic of China to court investors for South Africa in 2011, Chinese companies were closing 85 apparel factories they own in Newcastle in the Province KwaZulu-Natal because of a wage dispute. The factories employ about 8,000 workers who produce an estimated three million garments a month. South Africa's National Bargaining Council had instituted a drive for clothing manufacturers to raise minimum weekly wage levels to 324 rand, or about $45 at current exchange rates. The factory owners, represented by the Newcastle Chinese Chamber of Commerce, contended that they could not afford the increase.

Alex Liu, Chairperson of the Newcastle Chinese Chamber of Commerce, said the lowest paid workers earn 250 rand, or $34 a week, and the highest paid get 500 rand, or $69.[258] He said it was impossible to pay the minimum wage being sought "because we are competing with imports from China and the price from our customers will not sustain us."[259] The South African Clothing and Textile Workers' Union sued the factory owners, arguing the closures were illegal. The union and factory owners then called on the government to intervene and Union General Secretary Andre Kriel wrote to Michael Mabuyakhulu, Provincial Minister for Economic Development.[260] He argued that the union "... [is] very concerned about this state of affairs and its impact on the creation and protection of jobs in the KZN province and nationally".[261] Kriel further stated that, "The clothing, textile, leather and footwear industry is a vulnerable sector needing special support measures and, given its labour-intensive nature, steps must be taken to secure its future sustainability and growth".[262] Securing a solution which the union desires may

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[257] Two examples related to supply-chain issues are the Fair Labor Association and the Workers Rights Consortium's Designated Supplier Program. See Fair Labour Association "What We Do" http://www.fairlabor.org/fla/go.asp?u=/pub/mp&Page=WWD (accessed 12 June 2012) and Worker Rights Consortium "Designated Suppliers Program (DSP)" http://www.workersrights.org/dsp/ (accessed 12-06-2012).

[258] Payne "High Wages Unravel Newcastle's Industry" Mail & Guardian 22 July 2011.

[259] Ibid.

[260] Wise "Chinese Mills in South Africa Shut in Wage Dispute" http://www.vics.org/docs/latest_news/WWD_9-8-10_Chinese_Mills_in_South_Africa_Shut_in_Wage_Dispute.pdf (accessed 13-06-2012).

[261] Ibid.

[262] Ibid.

just require something much more than a national or regional approach. As long as there are countries which are eager to condone China's poor compliance with core labour standards, the protection of workers rights in trade will remain an endemic problem.

The Chinese appear reluctant to strike a balance between profiteering and compliance with or conformance to internationally accepted labour standards. The Chinese's compliance to fair global trade practices must be questioned. Their assertion that the minimum wage is not sustainable in a competitive trade environment seems to advance claims that international competitive pressures degrade working conditions and labour rights in countries with open trade policies.[263] Flanagan and Khor question how trade would diminish working conditions is a matter of some mystery and proceed to state that:

> "Open trade policies raise foreign demand for a country's exports and for the services of workers who produce those exports. What then happens to wages and nonmonetary working conditions depends on labour supply conditions, which themselves are determined by the domestic labour market alternatives available to workers. Where there is substantial unemployment or underemployment, increased export demand will raise employment without necessarily improving pay and non-monetary working conditions. This situation may be the norm in countries with significant reserves of underemployed rural agricultural labour or high urban unemployment rates. The additional employment derived from increased export demand will raise total wage income, while producing little change in the employment conditions of individual workers."[264]

Studies conducted by Aw and Batra,[265] Bernard and Jensen,[266] Hahn,[267] Van Biesebroeck,[268] found that after allowing for industry and firm size, export firms pay higher wages than non-export firms, and the export wage premium is largest in less developed countries. Flanagan and Khor also made an important observation concerning the direct and indirect effects of trade when they stated that:

> "...free trade will improve a country's working conditions indirectly by increasing its per capita income. Whether comparative advantage or economies-of-scale motivates trade, a

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[263] Flanagan and Khor 269.
[264] Ibid.
[265] Aw and Batra "Technology, Exports and Firm Efficiency in Taiwanese Manufacturing" 1998 Department of Economics Working Paper Pennsylvania State University.
[266] Bernard and Jensen "Exporters, Jobs and Wages in U.S. Manufacturing, 1976-1987" 1995 *Brookings Papers on Economic Activity: Microeconomics* 67.
[267] Hahn "Exporting and Performance of Plants: Evidence from Korean Manufacturing" 2004 National Bureau of Research (NBER) Working Paper No. 10208.
[268] Van Biesebroeck "Exporting Raises Productivity in Sub-Saharan African Manufacturing Plants" 2003 National Bureau of Economic Research Working Paper No. 10020.

> country's resources are used more productively in a free-trade environment than under autarky. The greater efficiency permits higher monetary and/or nonmonetary compensation. Transfers of technology that may accompany increased trade flows likewise raise productivity and compensation. In each case, free trade should improve working conditions to the extent that it raises per capita income. To the extent that trade liberalisation raises per capita income, trade itself becomes one mechanism for improving a country's working conditions and labour rights."[269]

Flanagan and Khor also observed that, "Particularly for the poorest countries, international competition does not lead exporters to reduce wages below national norms...one can doubt that unobserved worker quality differences account for wage premia as large as 10-12% in Korea, 15-17% in Taipei, China and 40% in sub-Saharan Africa."[270] Lipsey and Sjoholm have observed that, "It seems to be a universal rule that, in every country, foreign owned firms and plants pay higher wages, on average, than domestically owned ones. That is true not only in developing countries, but also in high income countries, such as Canada, the United States and the United Kingdom."[271]

Why then are the Chinese forcing South Africa into a race to the bottom with working conditions not improving? The answer could possibly be that the impact of a multinational company (MNC) on working conditions in a host country depends on the extent to which it must compete with other multinational companies (MNCs) or host country firms for its workers and on the local elasticity of labour supply.[272] If MNCs establish inferior conditions in newly-constructed plants, they will face recruiting and retention difficulties when competing with other firms for labour.[273] If they instead acquire local companies and try to worsen working conditions, they will encounter increased quit rates as workers leave to join host country firms offering superior conditions.[274] Whether the arrival of MNCs can improve working conditions, according

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[269] Flanagan and Khor 268. See also Berg and Krueger "Trade, Growth and Poverty: A Selective Survey" in *New Reform Strategies* Pleskovic and Stern (eds) 2003 Annual Bank Development Conference, Washington: World Bank; Wacziarg and Welch "Trade Liberalization and Growth: New Evidence" 2003 National Bureau of Economic Research Working Paper No. 10152 and Flanagan *Globalization and Labor Conditions* (2006) Chapter 4.

[270] Flanagan and Khor 269.

[271] Lipsey and Sjoholm "Foreign Direct Investment and Wages in Indonesian Manufacturing" 2001 National Bureau of Economic Research Working Paper No. 8299.

[272] Flanagan and Khor 279.

[273] Ibid.

[274] Ibid.

to Flanagan and Khor, depends on labour supply conditions in the host country and the human resource management policies of the firm.[275]

Becker has argued that, "…the leading theory of labour market discrimination predicts that increased competition to hire labour should erode discrimination by providing labour force minorities with additional employment opportunities with employers who have less discriminatory tastes."[276] If Becker's view is correct, then it is proper to argue that to the extent that open trade policies increase the number of export firms and/or MNCs competing for labour in local labour markets, employer discrimination may decrease. The status and security that comes with higher income may become possible in the present day world. Flanagan and Khor contend that:

> "In markets with a limitless supply of labour available at the current wage, increased labour demand from MNCs or host country firms will raise employment, but not wages. When workers require inducements to overcome the costs of changing employers, however, labour supply is less elastic, and increases in labour demand from MNCs will raise both wages and employment. When firms compete for labour, the effect of increased demand on wages depends on what workers are willing to accept – not on what firms may wish to pay. If MNCs do not compete with other firms for labour services, they may force labour conditions below competitive levels."[277]

From the above analysis, it may be argued that proper policies to promote free trade and lure investors rather than a race to the bottom could result in a social clause not being rejected in the multilateral trade system of the WTO as free trade appears to improve labours standards indirectly by increasing a country's per capita income as already indicated in this chapter. It is submitted that fewer investors in a country might posse a threat of monopoly which might result in the violation of labour standards by companies which lack competition. Perhaps this could be the problem which South Africa is facing. This argument is also important in matters related to Foreign Direct Investment (FDI) in South Africa. A discussion follows below.

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[275] Ibid.
[276] Becker *The Theory of Discrimination* (1957) 30.
[277] Flanagan and Khor 279.

6 2 3 Wal-Mart/Mass-Mart merger

With the relaxation of many capital controls, a significant increase in investment flows between countries accompanied the late 20th century globalisation.[278] As with international trade, much of the growth led to the regaining of the ground lost during the retreat from the late 19th century globalisation.[279] A parallel growth of MNCs accompanied the resurgence of foreign direct investment.[280] These developments raise two sets of questions about the relationship between foreign investment and labour conditions. First, do labour conditions influence FDI inflows? Does cheap labour, poor labour conditions and weak support of labour rights attract FDI? The Wal-Mart/Mass-Mart merger has become one of the most recent cases which depict the adverse effects of excluding a social clause from trade especially where Foreign Direct Investments (FDI) are concerned. Following the initial offer by Wal-Mart to purchase Mass-Mart in September 2010, the Labour Research Service (LRS) was commissioned to undertake a study on the structure and operations of Mass-Mart and the conditions of the company's workers in order to understand the position of workers in the context of the proposed deal.[281] The study by the LRS found evidence that workers at Mass-Mart currently experienced a high level of victimisation and a hardening of management attitudes which they attribute to the desire by Mass-Mart management to make the company "globally competitive" in order to attract a global retailer as a buyer, and specifically Wal-Mart.[282] There was confirmation of this in the form of Mass-Mart's disclosed strategy to attract a buyer, particularly Wal-Mart, with whom they have had a long relationship.[283]

In a presentation in November 2010 to investors, analysts and media, Mark Lamberti, founder, one-time Chief Executive Officer (CEO), now chairperson of Mass-Mart stated on behalf of the board that:

> "The relationship (with Wal-Mart) which commenced in 1990 has resulted in: exposure of many Mass-Mart executives to aspects of Wal-Mart's operations and training, many shared retail principles and business values, mutual respect...."[284]

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[278] Flanagan and Khor 275.
[279] Ibid.
[280] Ibid.
[281] Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 2010 1.
[282] Ibid.
[283] Ibid.

As the LRS established, the above statement, whilst not clearly outlining the nature of the relationship between Wal-Mart and Mass-Mart, showed a formal rather than a casual relationship at an operational and strategic level, with shared values over an extended twenty year period, ever since the formation of Mass-Mart.[285] Moorad has argued that the twenty year period was far longer than the date of introduction that current Mass-Mart CEO Grant Pattison gave in a presentation at the Gordon Institute of Business Science (GIBS) in February 2011 in which he stated that the relationship began in 2004.[286] After a casual meeting in 2004, Pattison stated that Mass-Mart executives began meeting with retired Wal-Mart executives from 2007.[287]

Pattison, according to Moorad, further confirmed that rumours of Wal-Mart's interest in Africa began to surface in 2008 and that, given Mass-Mart's long-term strategy of being bought by a global retailer, Mass-Mart took action.[288] An Economist article noted that:

> "Ten years ago Mass-Mart, which is South Africa's leading wholesale warehouse business, decided that it needed a global partner. Wal-Mart began sniffing around South Africa three years ago, seeking a toehold on a continent where consumer spending power has risen sharply in the past decade. The obvious partner was Shoprite, Africa's biggest grocer. But Mass-Mart increased its allure by rushing into the food-retailing business, and the gamble paid off."[289]

Moorad then argued that the long-stated intention of Mass-Mart to be acquired by a global retailer was further confirmed by Pattison at the GIBS presentation where he stated that Mass-Mart positioned itself to be bought by a global retailer in order to participate in the globalisation of retail. Pattison said, "…the first time they (Wal-Mart) were here, I made it absolutely clear that we were available for sale".[290]

Crotty then argued that whilst an answer as to why Pattison and the chairman of Mass-Mart had different ideas of when the relationship between Mass-Mart and Wal-Mart commenced

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[284] See the 29 November 2010 Mass-Mart/Wal-Mart presentation to investors "Wal-Mart Confirms Intention to make a Firm Offer to Acquire a Controlling Interest in Mass-Mart" http://www.Wal-Martinfo.co.za/docs/transaction/Presentation-Mass-Mart_Wal-Mart.pdf (accessed 15-06-2010).

[285] Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 1.

[286] Moorad "Wal-Mart/Mass-Mart - The Makings of Marriage" BusinessLIVE 17 February 2011.

[287] Ibid.

[288] Ibid.

[289] The Economist "Wal-Mart in South Africa, the Beast in the Bush: A Hungry Predator Stalks Africa" 17 February 2011.

[290] Moorad "Wal-Mart/Mass-Mart - The Makings of Marriage" BusinessLIVE 17 February 2011.

was yet to be obtained, even the shorter timeline sets the context of the actions of Mass-Mart in the years from at least 2008 including the retrenchments and the acquisitions and sell-offs, high dividend payouts and general strategy that was described by the Competition Tribunal in 2009 as sinister.[291] Mass-Mart Chairperson, Mark Lamberti, vowed to ".....take out competitors and force them into a position where they make no money. We cannot allow our competitors to flourish. Our margins may have to drop to fend off competitors".[292] As the LRS argued, the statement does not sound like one of healthy competition, but much like Wal-Mart's strategy of selling products below cost price and taking a loss on them in order to undermine the business of competitors.[293]

The LRS then proceeded to question how Mass-Mart management understood and strategized over what it meant to be a "globally competitive" and attractive target for a global retailer and how that influenced its actions not over a matter of months but rather of years, at least since 2008.[294] It must be questioned whether this is a healthy attitude to being competitive that should be supported in South Africa. A number of issues related to this question from an employment perspective were thus raised by the LRS. A discussion of those issues follows below.

6 2 3 1 Value to shareholders not workers and retrenchments

Over the years Mass-Mart has paid a higher percentage of profits to shareholders as dividends while its workers are at pains to improve their pay and working conditions.[295] It is noteworthy too that in the year Mass-Mart workers went on strike for a R460 increase in wages, Mass-Mart paid a record R867 million in dividends to its shareholders.[296] In addition, when the value added statement[297] of Mass-Mart for 2010 was analysed, it showed that the proportion of the wealth

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[291] Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 2. See also Crotty "Mass-Mart Plan for a Fund to take out Rivals 'Sinister'-Tribunal" Business Report 2 December 2009.
[292] Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 2.
[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] Ibid.
[297] Business Dictionary "Value Added Statement" http://www.businessdictionary.com/definition/value-added-statement.html (accessed 16-06-2012). A Value Added Statement according to the Business Dictionary, refers to a financial statement which shows how much value (wealth) has been created by an enterprise through utilization of its capacity, capital, manpower, and other resources, and how it is allocated among different stakeholders (employees, lenders, shareholders, government, etc.) in an accounting period.

created applied to employee wages and salaries dropped dramatically in 2003 and has not recovered.[298] When compared to its competitors, Mass-Mart distributes far less of its wealth to employees.[299] In the same year, 2010, Shoprite distributed 58% and Pick n Pay 65% of wealth to employees as salaries, wages and other benefits.[300] Concerning retrenchments, Mass-Mart contends that the retrenchments at Massdiscounters[301] in 2009 had nothing to do with a possible take-over.[302]

The Competition Commission concurred in their report that because there was no note of the retrenchments being influenced by the possible take-over in the board minutes of 2010 when they entered into discussions with South African Commercial, Catering and Allied Workers Union (SACCAWU), there was no connection between the two.[303] However, the LRS contends that:

> "…given that (1) Mass-Mart and Wal-Mart have been in a relationship for at least six, or up to sixteen, years where Mass-Mart executives had been exposed to Wal-Mart operations and training, (2) Mass-Mart had a stated aim of being purchased by a global retailer (3) Wal-Mart had already been sniffing around in 2008 and in 2009 (not 2010 as is stated by the Commission)".[304]

Mass-Mart noted that:

> "We clearly moved from a speculative environment…It was our strategy to be bought by a global retailer; we did not have to wonder about how we were going to deal with it, or whether our shareholders would like it, or whether management would come along. We

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298 See the Mass-Mart Annual Report 2010 47.

299 Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 3.

300 Ibid.

301 Massdiscounters operates two retail formats: Game and DionWired. Game is a discount retailer of general merchandise Fast Moving Consumer Goods, and non-perishable groceries for home, leisure and business use, operating throughout South Africa and in 12 major cities in sub-Saharan Africa. DionWired is a South African electronics and appliances speciality store catering for the middle- to upper-end income consumer. Game currently has 106 stores and the total number of DionWired stores is 16.

302 Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 4.

303 See the Competition Commission Report-2010 Nov5445 41-43. The report notes that, "… retrenchments took place at various Game Stores and they commenced retrenchments during October 2009. ... Although from the merger record in particular the Wal-Mart board minutes it is clear that Mass-Mart representatives (CEO and CFO) visited Wal-Mart in the USA and UK during May 2010 in anticipation of a potential buy-out no correlation between the retrenchments and the potential sale to Wal-Mart could be found in the Mass-Mart board minutes of 2010." See also Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 4.

304 Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 4.

sent them (Wal-Mart) a very clear message-if you want to chat to us we are ready and we had some good ideas".[305]

According to LRS, the retrenchments, which began in October 2009, were therefore right within the timeframe for increasing Mass-Mart's appeal to Wal-Mart at a time that would have been critical and cannot therefore be separated from the offer which followed without firm evidence of which there is none.[306] Why evidence of a connection was only sought in board minutes, let alone board minutes of 2010 when the retrenchments began in 2009 and not in the stated company strategy could be questioned.[307]

6 2 3 2 The deteriorating relationship between management and the union

According to the LRS, Pattison, at the GIBs presentation made several unsubstantiated statements concerning workers at Mass-Mart, their feelings concerning the deal with Wal-Mart and their relationship with the union to which 38% of them, according to Mass-Mart's own figures, belonged.[308] In the presentation Pattison stated that:

> "It really is an exciting time for employees. And just so you are absolutely clear, our employees aren't driving any protest: you'll see there has been no strikes, no protests; in fact I would suggest that they have gone as far as to tell the union not to get in the way. It is all good for our employees".[309]

The LRS then argued that Pattison's making of an uncorroborated comment concerning the relationship, not just between management and the workers but between unions and their own members, had to be challenged.[310] The likely outcome of that challenge would be that the commitment that Mass-Mart/Wal-Mart have made to maintain existing relationships with organised labour could be seen to have a negative outcome for workers as that relationship in its

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[305] Ibid.
[306] Ibid.
[307] Ibid.
[308] See the Mass-Mart Annual Report 2010. The Labour Research Service observed that, "The percentage given in this report is different from the Commission's report which states that the majority of Mass-Mart's employees are unionized. 38% is not a majority and it would be important to know where the Commission got its figures." See also Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 4.
[309] See also Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 4.
[310] Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 4.

current state is antagonistic.[311] Pattison's statement is seen in the context of deteriorating relationship between Mass-Mart and the unions, in particular since 2008.[312]

The LRS also observed that when one looked at Mass-Mart's annual reports over the past decade, there was very little mention of the relationship between itself and the trade unions.[313] However, in Mass-Mart's 2009 and 2010 annual reports, there had been discussion of it and it had not been positive. The 2009 Annual Report noted an increase in:

> "…the stridency of populist rhetoric and the vigour of socio-economic demands, both indicative of a more open democracy. Service delivery rioters, striking workers, obstructive taxi owners, and officious youth leaders all contributed to an environment conducive to the first ever protracted dispute between certain Mass-Mart divisions and organised labour".[314]

The 2010 Annual Report stated that:

> "Labour relations were unfortunately strained in Massdiscounters as management sought more labour flexibility from the labour union, SACCAWU, in order to extract productivity improvements from our three-year investment in the supply chain. Unfortunately, we were unable to reach resolution and had to resort to retrenchment, which was devastating for those employees. …"[315]

The disputes between the workers and Mass-Mart were recorded by SACCAWU in its June 2010 press release on the current disputes between the former and the latter.[316]

6 2 3 3 The deterioration of conditions of employment for workers and victimisation

Mass-Mart's CEO, Pattison, could not substantiate his statement that workers would like the union out of the way, and that they are excited about the Wal-Mart/Mass-Mart merger.[317] The

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311 Ibid.
312 Ibid.
313 Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 5.
314 Mass-Mart Annual Report 2009 25.
315 Mass-Mart Annual Report 2010 27.
316 See the SACCAWU Press Release, June 2010. The press release detailed the current disputes between Mass-Mart and the workers which included the following: "1) Retrenchment of 1500 workers, 700 permanent and 800 flexi-time employees 2) The imposition of ultra-flexi time contracts 3) 40 hour rolling week with Sundays as normal time 4) Compressed working week without overtime 5) Sunday and Public holidays compulsory work 6) All those not faced with retrenchment to reapply for their positions under new terms of employment 7) All re-applications to be considered after interviews to include psychometric testing, failing workers will be demoted 8) All those that will remain in employment will be given new job titles, job descriptions and for many new salary rates and 9) The introduction of new Green Light technology that requires tertiary vocational training and the refusal by the company to offer any training to staff except for management."
317 Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 5.

LRS held a workshop with Mass-Mart workers in February 2011 where three key points became apparent. These were:

> "1) Mass-Mart workers no longer want the union to be involved because 2) they are being increasingly victimised by Mass-Mart in what they understand to be a long-term strategy of Mass-Mart to drive the culture of repression 3) in preparation for the deal."[318]

While no protests and strikes in relation to the proposed Wal-Mart/Mass-Mart merger had occurred at the time of the writing of this thesis, there had been strikes and protests in relation to the conditions under which Mass-Mart workers worked.[319] The general sentiment of the participants in the strikes and protests was that due to the take-over by Wal-Mart, workers, including the shop stewards, felt intimidated in the workplace by the fact that they could lose their jobs and livelihoods in an instant.[320]

From their experience, the participants believed that this situation has been created so that by the time Wal-Mart took over, workers were already used to working in an intimidating environment in which they remained for the reasons given by Pattisson who stated that:

> "Also I suppose it would be fair to say that an employee of Mass-Mart can say well, at least it is us that got bought by Wal-Mart so if it is true and I certainly do not agree that it is true that competitors are going to suffer and suppliers are going to suffer, the employees of Mass-Mart should be fine".[321]

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[318] Ibid.

[319] Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 6. The LRS indicated that: "The key issue highlighted by the Mass-Mart workers is that far from sticking to "existing agreements" Mass-Mart has, over the past period been changing working conditions arbitrarily. They noted in particular that in their work environment: 1) Instructions are given for workers to work in departments that they do not work in and when this is pointed out to the manager then they are put before a disciplinary hearing for not carrying out instructions. 2) Disciplinary hearings don't follow procedures and dismissals or final warnings are dished out at the hearing. 3) Workers have also been given warnings and dismissed for not packing goods in the manner that it was set out for this, even though goods have never been packed in the set out manner before. 4) Workers have been dismissed for making simple errors when workers were not even given a warning before for the same kinds of mistakes. 5) At Makro it has been customary for workers who work two Saturdays a month to get a "day-off". However, management has introduced a rule that if a worker takes leave in that month then the worker loses the day off. This is clearly an attempt to get rid of the "benefit" which has not been negotiated but was customary in the company for many years. 6) Jobs that become vacant either through resignation or dismissal are not filled again and duties are allocated to existing workers 7) Conditions of employment are settled with employees individually and are often worse than what has existed before, especially making working time on a Sunday, that was considered as over time, normalise time. 8) There has been an introduction of performance management where all employees are continuously assessed according to performance standards that were not agreed and often arbitrary."

[320] Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 6.

[321] Ibid.

The LRS argued that the above statement itself made no sense. Either competitors or suppliers are going to suffer, and therefore Wal-Mart/Mass-Mart employees should feel lucky to even have a job, or they are not, in which case Wal-Mart/Mass-Mart workers are not going to have anything in particular to be grateful for on this count.[322] The precarious relationship between Mass-Mart workers and management as well as the union and management was what will carry over into the new company if the commitment by the merging parties is allowed to stand as the only assurance workers have.[323] And since Mass-Mart itself is not sticking to the current agreements, there is little to no reason to believe that Wal-Mart will do so unless conditions of the buy-out force them to.[324]

In its closing remarks, the LRS hoped that the Competition Tribunal saw South Africa's global competitiveness as something other than the race to the bottom for workers in terms of both wages and conditions in order to achieve lowest prices.[325] A ruling against the merger, or a ruling with strict conditions and monitoring placed on the merging parties, would therefore not be, as the Commission stated, an adverse ruling, but a positive ruling, positive for the workers not just in Mass-Mart but in all sectors of the national economy.[326] Further, given, as economist Dr Azar Jammine stated in January 2011, that "Wal-Mart only wants to use South Africa as a gateway to Africa and they can afford to comply with our strict labour laws because in other African countries the laws are much more relaxed,"[327] it is perhaps South Africa's duty as the regional head office of Wal-Mart/ Mass-Mart and certainly the regional power, to impose conditions on any deal that would protect workers wherever this company operates in the region.[328]

The issues noted are relevant to the social clause debate because they highlight what Mass-Mart management understands global competitiveness to be and how this differs from how South African workers and government should view the same concept. The LRS noted that:

> "Looking at the strategies of the company over the past years in the light of this statement reveals that to Mass-Mart management global competitiveness implies – high dividends to

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[322] Ibid.
[323] Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 7.
[324] Ibid.
[325] Ibid.
[326] Ibid.
[327] Ibid.
[328] Ibid.

> foreign shareholders, turning over smaller competition in takeovers and sell-offs, an attitude to competitors that earned the censure of the Competition Tribunal, and victimisation of workers who, despite Pattison's statements, are not in support of the merger and should be aggressively protected should one be permitted. It is also noted that any promises made by the current Mass-Mart management should be understood as being made prior to a new owner, Wal-Mart, taking control of the company should the deal be permitted. Therefore, a commitment from them is not sufficient; conditions must be set on the new entity that would arise after any proposed deal."[329]

The LRS then proposed that:

> "The new entity must therefore commit to the four core conventions of the ILO including the prohibition of child labour (ILO 138 and 192), the prohibition of forced labour (ILO 29 and 105), non-discrimination (ILO 100 and 111) and freedom of association and the right to collective bargaining (ILO 87, 98 and 135) in all operations."[330]

The above statement replicates the key aspects covered in the scope of a social clause with regards to core labour standards. The LRS further went on to make another crucial finding. It observed that:

> "While, as noted in statements by the company, Mass-Mart is committed to local procurement, this does not protect local producers and manufacturers as imported goods can and are procured locally resulting in very little benefit to the local and national economy. A condition of the deal should therefore be a commitment from Wal-Mart/Mass-Mart not only to procure locally but to procure locally produced and manufactured products. Without this commitment, as the CEO of Shoprite has stated as recently as the 25th of February, where Wal-Mart/Mass-Mart goes, the other retailers will follow. While Mass-Mart management might deny now that more imports are part of the plan, it is again the merged entity, not the current entity that must be held to conditions of supporting local producers and manufacturers."[331]

The LRS then concluded by recommending that the Competition Tribunal be wary of approving a deal that would come at the expense of the well-being of workers across the retail and related sectors in the interest of the so called "global competitiveness".[332] It recommended the putting in place of clear positive conditions and monitoring processes to protect workers should the deal be approved.[333] The deal has since been approved.

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[329] Labour Research Service "Mass-Mart/Wal-Mart Merger: Statement by Labour Research Service" 7.
[330] Ibid.
[331] Ibid.
[332] Ibid.
[333] Ibid.

SACCAWU was not at all impressed by the approval of the Wal-Mart/Mass-Mart merger. They launched an appeal with the Competition Appeal Court of South Africa.[334] The trade union argued that the Wal-Mart/Mass-Mart merger was a direct affront to the intended benefits of FDI to the host economy.[335] The trade union was basing its arguments on a 2011 South African National Treasury discussion document which provided that:

> "Cross-border investment is widely viewed as beneficial for South Africa because of the expected (positive) impact on employment, productivity and growth, including the transfer of skills and technology from multinational parent to the host economy, spillovers through the creation of linkages with domestic (supplier) firms, and prospects for stronger integration with international markets."[336]

Amongst some of the key concerns raised by the trade union was the notion that the merger could only be allowed if it did not amount to a "...race-to-the-bottom on the terms and conditions of workers employment at retailers and suppliers that will follow Wal-Mart's entry in South Africa."[337] Emphasis was placed on 503 workers retrenched in the face of an impending Wal-Mart/ Mass-Mart merger. In defence, the merging partners Wal-Mart and Mass-Mart argued that:

> "The specific public interest grounds raised by the intervening parties are, in particular, those relating to employment and procurement. The trade unions (and the Departments *a quo*) assumed that the proposed merger would adversely impact on employment (in that it would lead to job losses and poor work conditions); and negatively affect some industrial sectors, as a result of a reduction of local procurement (in that retail merchandise will, it is "feared", increasingly be sourced from foreign suppliers, instead of South African entities). Based on these "perceptions" it was contended before the Tribunal that the merger should either not be approved or that some wide-ranging conditions (which they themselves were unable to formulate in a practicable and implementable version) be imposed. The facts are to the contrary, however."[338]

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[334] See the case of *The Minister of Economic Development and Others v Wal-Mart Stores INC. and Others* CAC CASE NO: 110/CAC/Jun11. The trade unions involved were SACCAWU, and COSATU, FAWU and NUMSA, as well as the other members of the anti-Wal-Mart coalition in opposition to the proposed merger between Wal-Mart and Mass-Mart which included the Minister of Economic Development. However, of the trade unions, only SACCAWU made an appeal against the ruling of the Competition Tribunal.

[335] See the SACCAWU heads of argument in the case of *The Minister of Economic Development and Others v Wal-Mart Stores INC. and Others* para 4 http://www.comptrib.co.za/assets/Uploads/73LMNov10-Heads-of-Arguments/SACCAWU-heads-of-argument-3-October-2011.pdf (accessed 20-06-2012).

[336] National Treasury "A Review Framework for Cross-border Direct Investment in South Africa" http://www.treasury.gov.za/documents/national%20budget/2011/A%20review%20framework%20for%20crossborder%20direct%20investment%20in%20South%20Africa.pdf (accessed 17-06-2012).

[337] See the SACCAWU heads of argument in the case of *The Minister of Economic Development and Others v Wal-Mart Stores INC. and Others* para 6.

In substantiating their view that SACCAWU's appeal was unfounded, Wal-Mart and Mass-Mart argued that the conditions of the merger more than adequately addressed every relevant public-interest consideration contained in the Competition Act,[339] and that the Tribunal's ruling should be upheld on appeal.[340] Relying upon the case of *Harmony Gold Mining Company Limited v Gold Fields Limited*[341] Wal-Mart and Mass-Mart argued that they were not required to justify a merger affirmatively on public-interest grounds. They argued that only once a substantial public-interest concern had *prima facie* been established was an evidential burden of justification cast on the merging parties.[342] They also argued that opponents of a merger could not base their opposition on assumptions, perceptions or speculation.[343] They further argued that the evidence before the court amounted to no more than just "fears", "concerns" and "perceptions".[344] To them, none of the fears, concerns or perceptions was factually supportable.[345] They then stressed

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[338] See the Wal-Mart/Mass-Mart heads of arguments in the case of *The Minister of Economic Development and Others v Wal-Mart Stores INC. and Others* para 5 http://www.comptrib.co.za/assets/Uploads/73LMNov10-Heads-of-Arguments/Merging-parties-Heads-of-Argument.PDF- (accessed 17-06-2012).

[339] See Section 12A(3) the South African Competition Act 89 1998. Section 12A provides in relevant part:

> "(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and –
>
> . . .
>
> (b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).
>
> . . .
>
> (3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on
>
> (a) a particular industrial sector or region;
>
> (b) employment;
>
> (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
>
> (d) the ability of national industries to compete in international markets."

[340] See the Wal-Mart/Mass-Mart heads of arguments in the case of *The Minister of Economic Development and Others v Wal-Mart Stores INC. and Others* para 6.

[341] (2005) 2 CPLR 484 (CT).

[342] See the Wal-Mart/Mass-Mart heads of arguments in the case of *The Minister of Economic Development and Others v Wal-Mart Stores INC. and Others* para 10. See also *Metropolitan Holdings Ltd / Momentum Group Ltd* (2010) 2 CPLR 337 (CT) para 68.

[343] See the Wal-Mart/Mass-Mart heads of arguments in the case of *The Minister of Economic Development and Others v Wal-Mart Stores INC. and Others* para 10. See also *Medicross Healthcare Group (Pty) Ltd v Competition Commission* (2006) 1 CPLR 1 (CAC) para 20.

[344] See the Wal-Mart/Mass-Mart heads of arguments in the case of *The Minister of Economic Development and Others v Wal-Mart Stores INC. and Others* para 10.

that the merger was overwhelmingly in the public interest and brings the important advantages associated with foreign direct investment to South Africa.[346]

In its findings, the Competition Appeal Court (CAC) of South Africa dismissed the application for review made by the Ministers of Economic Development, Trade and Industry and Agriculture, Forestry and Fisheries which sought to set aside the decision of the Competition Tribunal to sanction the Wal-Mart/Mass-Mart merger.[347] The Ministers had argued that they did not enjoy a fair hearing before the Tribunal when it decided to approve the merger between Wal-Mart and Mass-Mart.[348] However, the CAC did uphold, in part, the appeal by SACCAWU. The Court held in favour of SACCAWU that 503 workers who had been retrenched were entitled to reinstatement.[349] The Court justified this conclusion on the basis that the circumstances in which these workers had been retrenched from Mass-Mart were so closely linked to the merger and its timetable that the suggestion that the decision to retrench had been taken some 6-8 years earlier was unsustainable.[350] The CAC found that SACCAWU's evidence indicated that the retrenchment was sufficiently 'merger specific' to justify the reinstatement of these workers.[351]

The Court however rejected the argument that SACCAWU was entitled to a condition that Mass-Mart would become the subject of a closed shop agreement and that there should be group centralised bargaining.[352] It found that these were issues which were the subject of the outcome of collective bargaining between Mass-Mart and SACCAWU.[353] SACCAWU could not obtain these protections through competition law, in circumstances where it would not be able to obtain these claims as of right in terms of labour law.[354] Although SACCAWU had raised significant concerns about Wal-Mart's labour policies (particularly in the USA) the concerns

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345 See the Wal-Mart/Mass-Mart heads of arguments in the case of *The Minister of Economic Development and Others v Wal-Mart Stores INC. and Others* para 10. See also *Metropolitan Holdings Ltd / Momentum Group Ltd* para 69.

346 See the Wal-Mart/Mass-Mart heads of arguments in the case of *The Minister of Economic Development and Others v Wal-Mart Stores INC. and Others* para 10.

347 See the Competition Appeal Court of South Africa Press Release http://www.comptrib.co.za/assets/Uploads/Wal-Mart-and-Mass-Mart-decision/110111CACJun11-Wal-Mart-press-release.pdf (accessed 17-06-2012).

348 See the Competition Appeal Court of South Africa Press Release para 2 1.

349 See the Competition Appeal Court of South Africa Press Release para 2 3.

350 Ibid.

351 Ibid.

352 See the Competition Appeal Court of South Africa Press Release para 3 2.

353 Ibid.

354 See the Competition Appeal Court of South Africa Press Release para 1 3.

were held to be well catered for by South African labour law and the independent institutions that adjudicate labour disputes.[355] Whilst the Court's decision was a step in the positive direction for the trade union concerning the protection of the retrenched workers, it left a serious question as to which approach must be taken in the face of persistent violations of core labour standards in countries where labour laws are in place. Flanagan and Khor do however establish one clear aspect to the effect that:

> "Poor labour conditions signal low productivity as well as low wages, and not all investments thrive in a low-productivity environment. Moreover, countries with poor labour conditions tend to be countries in which direct risks to investment are high. Risks of expropriation and repudiation of contracts are highest in countries with few civil liberties, for example. These risks effectively counter whatever advantages cheap labour might provide."[356]

6 3 CONCLUSION

This chapter gave a background to debates surrounding a trade-labour linkage in Southern Africa. Using South Africa as a benchmark for its fairly progressive labour laws in the region, the chapter sought to address how trade affects workers' rights and/or the quality of their employment and wages. It had been hoped that South Africa could inform other countries in the region on the best practices of linking trade with labour standards but it is clear that from its current experiences, South Africa is also finding it challenging to protect workers' rights in instances where trade and investment opportunities are availed. The resultant effect has been the lowering of the levels of protection of workers' rights and/or employment conditions. This development appears to be contrary to the findings made from the studies referred to in the chapter, which established that trade must not translate into poor working conditions. If at all, the studies suggest that trade should in fact lead to an improvement in the protection of workers rights and employment conditions. This position is clearly contrary to developments which are currently prevailing in South Africa with MNCs seemingly pushing the country to a race to the bottom by either threatening to pull out of the country if minimum wages are enforced or making low labour standards a condition to FDI.

An analysis of the views of the IMF and the World Bank's Doing Business on the link between trade and labour appeared to suggest that international monetary institutions compel

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[355] Ibid.
[356] Flanagan and Khor 279.

countries (especially developing countries) to ensure flexible labour market conditions and cost cutting measures such as low wages in order for the later to access development loans. This appears to justify developing countries' options of lowering labour standards in order to attract investment and resultantly resisting the incorporation of a social clause in the WTO. From the analysis made in this chapter, it may be concluded that the Bretton Woods institutions could be partly to blame for the decline in the protection of labour standards in developing countries.

The chapter also alluded to the existence of a new approach to protecting labour standards in business with the World Bank's Doing Business in its 2012 report acknowledging that there is a need to ensure the protection of workers' employment conditions in undertaking business. However the Doing Business approach has been heavily criticized by casting doubt doubt on its usefulness in improving the recognition of labour standards in the business environment. This view is also shared by the World Banking Group and the ILO amongst other parties who at the time of writing this study were in the second year of their research on how to improve labour conditions in business environments.

To its credit, the 2012 Doing Business report indicated that trade policies adopted by countries in the world might not entirely be sufficient as trade itself must have a positive indirect effect on labour conditions. This argument sets the basis for the analysis of the prevailing conditions concerning the trade-labour linkage debate in other SADC countries, excluding South Africa, in the next chapter. The chapter is the second part of the analysis of a trade-labour linkage in SADC. It acknowledges that Southern African countries have ratified most core labour standards conventions yet it reveals a sad story of unprecedented violations of core labour standards in the region. Even the SADC Social Charter referred to in this chapter is yet to have any tangible results in protecting workers rights with serious questions likely to be raised about SADC governments' commitments in achieving the objectives of the Charter. Perhaps something beyond national labour legislations and ratifying the core labour standards conventions is required. Could this be the void that a social clause in the WTO could fill? An analysis of the developments prevailing in other Southern African countries as regards the trade-labour linkage could give an insight in attempts to address this question.

CHAPTER SEVEN

Trade Agreements and the Social Clause: A Southern African Perspective (Part 2)

7 1 INTRODUCTION

The African Union (AU) is pursuing an integration agenda for the African continent with trade being used an important element to creating productive employment and reducing poverty.[1] The Southern African Development Community (SADC) is one of the AU's most recongnised regional economic communities and is regarded as a fundamental building bloc with member states that have a common objective of regional integration.[2] Trade between SADC member states is relatively high compared to other regions in Africa.[3] Recent studies have shown results that emphasise the essentially positive effect of regional integration in SADC and the importance of labour market policies to compliment trade policies in order to address employment concerns.[4] With regional integration being expected to increase wages and/or employment,[5] one wonders why other SADC countries, just like South Africa, are finding it difficult to implement their Social Charter obligations to the benefit of workers. One also wonders why SADC is also reluctant to support the incorporation of a social clause in the WTO if there is a fair measure of sustainable trade in the region.[6] Governments in the region have not been forthcoming with

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1 See the Agreement Establishing the African Tripartite Free Trade Area of 2009. See also Mashayekhi, Peters and Vanzetti "Regional Integration and Employment Effects in SADC" http://www.oecd.org/../50288660.pdf (accessed 17-06-2012). See also UNCTAD "Assessing the Evolution of the International Trading System and Enhancing its Contribution to Development and Economic Recovery" 2011 TD/B/C.I/15; McMillan and Rodrik "Globalization, Structural Change and Productivity Growth" in Bacchetta and Jansen (eds) *Making Globalization Socially Sustainable* (2011) 25; and Hoekman and Winters "Trade and Employment: Stylized Facts and Research Findings" in Ocampo, Sundaram and Khan (eds) *Policy Matters: Economic and Social Policies to Sustain Equitable Development* (2007) 18.

2 Mashayekhi *et al* 387. See also UNCTAD and African Union "Trade Liberalization, Investment and Economic Integration in African Regional Economic Communities: Towards the African Common Market" 2012.

3 Mashayekhi *et al* 387. See also UNCTAD "Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa's Development" 2009 18.

4 Mashayeki *et al* 387. See also McMillan and Verduzco "New Evidence on Trade and Employment: An Overview" in Jansen Peters and Salazar-Xirinachs (eds) *Trade and Employment: From Myths to Facts* (2011) 27.

5 Mashayekhi *et al* 387. See also OECD "South–South Trade: Vital for Development" August 2006 Policy Brief. See also ILO "Trade and Employment" Chapter 3 in *Prospects for Labour Market Recovery: Policies for Employment and Development* (2010) 17. See also Kwelke and Mboya "Regional Integration and Poverty: The Case of Tanzania" in Te Velde (ed) *Regional Integration and Poverty* (2005) 41.

policy positions as to why they continue to prefer trade gains over a balance between trade gains and the protection of core labour standards in trade. One can only ascertain their intention from the labour rights violations taking place in their countries and the complaints that are continuously lodged by trade unions and civil society organisations.

This chapter proceeds along the lines of the previous chapter by seeking to establish why SADC countries are struggling to recognise labour standards in trade when trade is supposed to ensure an improvement in employment conditions.[7] The study will also establish whether or not domesticating international labour legislation and using it as a tool to address the violation of core labour standards in trade may be adequate. In the chapter, it will also be argued that incorporating a social clause in regional trade agreements, though useful, may not exert the same force as it would on a multilateral level. Southern Africa has incorporated a social clause in its Southern African Development Community Agreement[8] with little or no effect on the livelihood of the workers in the region as this chapter will show.

A critical analysis of the current events taking place in Southern Africa in relation to trade-labour linkage will show that a more aggressive and sustainable legal strategy may need to be adopted in order to improve the protection of core labour standards in trade. The developments in Southern Africa might offer a basis for strengthening calls for a trade-labour linkage in multilateral trade. The basis of such an argument is that the conditions prevailing in the Southern African region could be a true reflection of challenges being faced by developing countries in other parts of the world. As such, any lessons drawn from the region's experiences could be of practical usage on a global scale. In the context of this thesis, it is also extremely important to ascertain whether or not SADC countries like any other developing countries would suffer by improving labour standards in trade.

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6 See World Bank "Harnessing Regional Integration for Trade and Growth in Southern Africa" 2011 World Bank 9. The World Bank indicated that, "The region has been growing and transforming. From 2000 to 2008, Southern African countries grew rapidly and at much higher rates that the world average, infusing the region with a new commercial vibrancy. Growth was fuelled, in part, by the commodity boom which led to very high increases in export values, especially for South African minerals, to new fast-growing markets such as India and China...for the smaller SACU countries, large increases in revenue transfers were derived on the back of significant increases in a few highly-taxed South African imports (especially motor vehicles and garments). Global markets were, and remain, the primary driver of the region's growth."

7 Klinger "Is South-South Trade a Testing Ground for Structural Transformation?" 2009 *Policy Issues in International Trade and Commodities Study Series,* No. 40, UNCTAD.

8 See Article 5(2)(d) of the SADC Treaty.

7 2 THE CURRENT STATE OF AFFAIRS IN SADC COUNTRIES

A number of developments currently inform the individual experiences of SADC countries regarding the trade-labour linkage. With most SADC countries being both recipients and providers of trade systems such as Foreign Direct Investment (FDI), there is growing concern that the process of competitive bidding between countries for investors may be inducing countries to offer concessions on regulation, taxes, environmental protection and labour standards that are unnecessary.[9] Many countries in the region have indeed sought to maximize trade gains at the expense of workers' rights and have preferred to lower their labour standards to attract investors, a development which appears to be advocated by influential institutions such as the International Monetary Fund (IMF) and the World Bank as already indicated in the previous chapter.[10] It could be argued that such policy positions apart from having a direct social impact in SADC countries may also impair the competitiveness of the domestic economy and reduce the potential for such investment to contribute to development.[11] A discussion of how the need to attract and retain investors has negatively impacted on workers' rights in the region follows. The countries discussed in this chapter have been chosen on the basis of availability of information regarding the violation of core labour standards in trade. An analysis of developments regarding a trade-labour linkage in these countries could be a fair reflection of the overall picture of the countries' attitude towards a social clause.

7 2 1 Democratic Republic of Congo (DRC)

Although the DRC is one of the richest African countries in terms of mineral resources it is struggling to develop. The 2012 Doing Business Report has indicated that the DRC is currently ranked 178th out of 183 economies in the world and classifies it as a low-income country.[12] It

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[9] Zapini "Developing a Balanced Framework for Foreign Direct Investment in SADC: A Decent Work Perspective" 2008 *Monitoring Regional Integration in Southern Africa Yearbook* Chapter 5 1.

[10] See Bretton Woods Update "Bank, Fund Sidestep Labour Standards: Promote Violation of Workers' Rights" 2006 1. See also the World Bank's 2007 Doing Business report which indicated that the World Bank would reward countries with labour market flexibility (low levels of labour protection) with loans. The IMF's World Economic Outlook (WEO) of 2007 also urged countries to deregulate their labour markets to attract foreign investment. See also Bibby "Multinationals and Socially Responsible Labour Practices: Better Business-Looking Back, Looking Forward" http://www.ilo.org/wow/Articles/lang--en/WCMS_091639/index.htm (accessed 05-08-2012).

[11] Zapini 2.

[12] See the World Bank "Doing Business 2012: Congo Democratic Republic" http://www.worldbank.org/en/country/drc (accessed 22-06-2012). The DRC's ranking records a 2 point decrease

has a high incidence of violations of core labour standards. The United Nations Children's Fund (UNICEF) revealed that 29 per cent of boys and 34 per cent of girls aged between 5 and 14 perform child labour in the DRC.[13] As far back as the year 2000, the ILO estimated that nearly 2 million children aged between 10 and 14 were economically active in the DRC, with an almost equal number of girls and boys.[14] Currently, children working in mines and quarries comprise on average about one third of the DRC workforce.[15] According to reports by NGOs and news agencies, the problem is prevalent in mining regions such as Katanga, Kasai and Kivu which are rich in cobalt, uranium, gold, diamonds, copper and other ores.[16] Such mines are key sources of competitive advantage for the DRC in mineral resources and hence are a key component of the country's international trade.[17] Children reportedly work in order to contribute to their family's income or to cover the education costs of other members of their family.[18] In 2009, the ILO invited the DRC government, trade unions and employers to discuss the issue of child miners in Katanga and to design appropriate policies and programmes to withdraw children from the mines.[19]

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from 2011. The decrease is regarded as being reflective the top three obstacles of running business in the DRC which include access to finance, electricity and practices of the informal sector. The doing business report makes no mention of the relationship between the low compliance with labour standards and the ease of doing business in the DRC. This could imply that prevailing low labour standards are a key factor to ease of doing business in the DRC in terms of the proposals of the Bretton Woods Institution which recommend flexible labour standards as a key component to the ease of doing business. See also chapter six of this study.

13 UNICEF "The State of the World's Children" http://www.unicef.org/sowc/ (accessed 17-06-2012).

14 See a report by the International Labour Organisation entitled "Global Child Labour Trends 2000-2004" http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=2299 (accessed 17-06-2012).

15 See the International Trade Union Confederation (ITUC) Report to the WTO General Council Review of the Trade Policies of the Democratic Republic of Congo (Geneva, 24 and 26-10-2010). See also Youant "Democratic Republic of Congo Children quit School for Mines" http://www.abscbnnews.com/lifestyle/youth/07/17/10/dr-congo-children-quit-school-mines (accessed 11-08-2012) and United States Department of State "2009 Country Reports on Human Rights Practices-Democratic Republic of the Congo" http://www.unhcr.org/refworld/docid/4b9e52ffc.html (accessed 12-08-2012).

16 See Guerin "Democratic Republic of Congo's Child Miner Shame" http://news.bbc.co.uk/2/hi/5071172.stm (accessed 12-08-2012). See also Human Rights Watch "Trail of Death: LRA Atrocities in North-eastern Congo" http://www.hrw.org/en/reports/2010/03/29/trail-death-0 (accessed 13-08-2012) and Freedom House "Freedom in the World 2010 - Congo, Democratic Republic of Congo" http://www.unhcr.org/refworld/docid/4c0ceafac.html (accessed 13-08-2012).

17 Cook "Conflict Minerals in Central Africa: U.S. and International Responses" 2012 *Congressional Research Service* 18.

18 See UNICEF *The State of the World's Children Report* 2009. See also the ITUC Report for the WTO General Council Review of the Trade Policies of the Democratic Republic of Congo 1.

19 See the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Reports, Individual Observations, general Observations and Direct Requests, 2008-2010. See also See also Peopledaily "Democratic Republic of Congo Frees 11,506 Children from Mines" http://english.peopledaily.com.cn/90001/90777/90855/7093280.html (accessed 14-08-2012).

In November 2010, the International Trade Union Confederation (ITUC) released a report on the state of core labour standards in the DRC.[20] The release was timed to coincide with the review of the trade policies of the DRC by the General Council of the WTO at the end of November 2010. The report found prevalent violations of all core international labour standards especially with regard to child and forced labour. The report revealed that the DRC has ratified all eight core ILO labour Conventions.[21] However, it noted that in view of restrictions on the trade union rights of workers, discrimination, child labour, and forced labour, resolute measures were needed to comply with the commitments the DRC accepted at Geneva and Doha in the WTO Ministerial Declarations during the period 1998-2001, and in the ILO's Declaration on Fundamental Principles and Rights at Work and its 2008 Social Justice Declaration.[22] The DRC Constitution recognises the rights to form and join a union, collectively bargain and the right to strike.[23] However, many trade unions are organised by employers and there are many cases of unionists being arrested, prosecuted and punished illegally.[24] In practice, the private sector is dominated by bogus unions with inactive members that have been created by employers in order to impede real trade unionism.[25]

Employees are entitled to join only one union which is established by the employers with independent trade unions being constant victims of harassment.[26] An example is that of the management of Société industrielle et forestière du Congo (Siforco), a wood production company belonging to the German group Danzer, which ordered the suspension of the union president and the dismissal of the trade union representatives at its facility.[27] Like most African countries' governments, it is difficult to stop or curb violations of labour standards practised by

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[20] ITUC "Annual Survey of Violations of Trade Union Rights" 2008 and 2010.

[21] See the ITUC Report for the WTO General Council Review of the Trade Policies of the Democratic Republic of Congo 1.

[22] Ibid.

[23] See Articles 38 and 39 of the 2006 DRC Constitution.

[24] See ITUC "Democratic Republic of Congo: Three Trade Unionists under Arrest" ITUC news 19 March 2009. See also the ITUC Report for the WTO General Council Review of the Trade Policies of the Democratic Republic of Congo 1.

[25] See the ITUC Report for the WTO General Council Review of the Trade Policies of the Democratic Republic of Congo 3.

[26] See the ITUC Report for the WTO General Council Review of the Trade Policies of the Democratic Republic of Congo 3.

[27] Ibid.

foreign companies as the governments tend to protect them.[28] The DRC government favours some foreign investors, like the China Railway Engineering Corporation (CREC),[29] that impede labour inspections, and discourages local authorities from enforcing trade union and other labour rights.[30] Working conditions and safety regulations are often not respected in such companies, whose management rely on the government's favouritism in order to lower wages or abuse other labour rights.[31] Furthermore, the authorities suppress attempts to report such abuses.[32]

It is clear though that aside from the violations of labour standards where foreign companies are involved, the DRC, like many African countries, just has a poor record of compliance with labour standards. It is thus not surprising that they would not support the calls to include a social clause in trade agreements. There have been numerous allegations of lack of independence and efficiency of the courts of justice in the DRC where general labour matters are involved, without specific reference to trade. In September 2009, the Congo Labour Centre (CCT) had to lodge a complaint with the ILO because, following a serious case of interference by the Director of Congo Customs dating back to 2005, the court did not call the Director to answer the charges.[33] It has also been reported that the police and the security authorities arrest persons arbitrarily.[34] On 19 January 2009, the president of the CCT, Nginamau Malaba, and two other trade union leaders were arrested by agents of the National Intelligence Agency after signing a memorandum denouncing the misappropriation of public funds by the Ministry of the National Economy and Trade.[35] The three unionists were held captive for a month and tortured.[36]

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[28] Ibid.

[29] China Railway Engineering Corporation (CREC) which operates through its main subsidiary China Railway Group is a construction and engineering services holding company offering surveying, design, construction, installation, manufacturing, research and development, and technical consulting services. The firm also is involved in property development and mining. Its more than 30 subsidiaries build and work on state projects including a large number of railways and miles of highways, industrial buildings, tunnels, and bridges. The company also offers its services internationally in North America, Europe, Africa, and the Asia Pacific. CREC is state-owned.

[30] See the ITUC Report to the WTO General Council Review of the Trade Policies of the Democratic Republic of Congo 3.

[31] Ibid.

[32] Ibid. For example, the report makes reference to an incident which occurred on 2010 in which a member of an African Human Rights NGO was given a one year suspended sentence for reporting abuses of power and negligence by the local authorities in the uranium mines.

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Ibid.

They were released on 23 March 2009 after each paying USD 150 bail but the magistrate refused to examine the unionists' complaint of torture.[37]

In another case, in March 2009, Mulumba Kapepula, an employee of the National Railway Company of Congo (SNCC) was arrested by agents of the National Intelligence Agency for "insulting members of the government" because he had addressed a demonstration of the SNCC workers protesting because their wages were in arrears for 36 months.[38] Mulumba Kapepula was savagely tortured and then charged with offences against the Head of State but acquitted on June 5 2009, for lack of evidence.[39] In other cases police used excessive force to disperse demonstrations.[40] In March 2008 in Katanga, the police fired into a crowd and killed a boy during a miners' strike and demonstration.[41] Freedom of assembly is not always respected.[42] As earlier stated, it is thus not surprising that the DRC does not support the inclusion of a social clause in trade. However, it is important to question whether this is the most plausible approach for a country that is struggling to achieve a level of development commensurate with its vast mineral resources.

It is advisable that the DRC government stops harassing independent trade unions and protect them from employers' harassment in order to improve the protection of the right to organise. Law enforcers should also address anti-union discrimination cases and facilitate the complaints procedures. The DRC government should also fight corruption especially among judges, public servants, law enforcers and prison officers, so as to achieve effective law enforcement. The police and the security authorities must be subject to the rule of law and must not be allowed to arrest persons arbitrarily or commit any other unlawful act. The National Intelligence Agency should not be used against strikers or citizens' assemblies. Freedom of assembly should be effectively guaranteed in the DRC. The police should not interrupt peaceful gatherings or arrest participants of assemblies. In this way, workers will be able to air their grievances without the fear of victmisation by government officials and employers.

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37 Ibid.
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid.

7 2 2 Malawi

The 2013 Doing Business Report on Malawi ranks Malawi as 133 out 183 economies in the world with reference to labour standards being made in respect to the redundancy cost regarding advance notice requirements, severance payments and penalties due to a redundant worker whose services are terminated.[43] Malawi, like the DRC, has its fair share of problems concerning a trade-labour linkage. In June 2010, the ITUC, as it did with the DRC, released a report on the state of core labour standards in Malawi.[44] The release was also timed to coincide with the review of the trade policies of Malawi by the General Council of the WTO in June 2010. The report indicated that Malawi ratified ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise in 1999, and Convention No. 98 on the Right to Organise and Collective Bargaining in 1965.[45] Malawi's Constitution allows workers to form and join trade unions, except those serving in the police and army.[46] Unions must register with the Registrar of Trade Unions and Employers' Organisations in the Ministry of Labour, without previous authorisation or excessive requirements.[47] The Registrar may suspend and cancel the registration of a union if it does not annually submit audited financial statements, a list of the names and postal addresses of its officers, and its number of members.[48]

The law stipulates that union activities should be conducted without government interference.[49] Labour laws apply in the country's sole export processing zone (EPZ) where 20 companies operate.[50] Nonetheless, many companies in the EPZ resist union activity and deny access to the zone to trade unionists.[51] The law also establishes a formal process for the

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[43] See World Bank *Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises* (2013) 101. The Doing Business Report reveals that Malawi has regulated for the procedures to be adopted when dismissing a worker. It is not easy to dismiss a worker in Malawi without following the procedures set down at law. However, protecting workers is deemed as making it difficult to conduct business in a country. This position must be analysed in view of the challenges being faced in Malawi concerning the need to protect labour violations, especially of children in the country's agriculture sector.

[44] See the ITUC Report to the WTO General Council Review of the Trade Policies of Malawi (Geneva, 9 and 11 June, 2010).

[45] See the ITUC Report for the WTO General Council Review of the Trade Policies of Malawi 1.

[46] See section 31(2) of the 1994 Malawi Constitution.

[47] See Part III of the Malawi Labour Relations Act (MLRA) No. 16 of 1996.

[48] See section 21 of the MLRA.

[49] See section 12 of the Malawi Employment Act (MEA) 6 2000.

[50] See the ITUC Report for the WTO General Council Review of the Trade Policies of Malawi 3.

[51] Ibid.

settlement of labour disputes with the mediation of the Labour Ministry.[52] The law provides for workers' right to strike if an agreement is not reached through the dispute settlement procedure.[53] The union has to give the employer and the Ministry of Labour seven days' notice after the lapse of the 21 days' notice to the Ministry's conciliators that the dispute is unresolved.[54] However, the procedure is long and unclear as in 2006, 12 branch officials of the Communication Workers Union, Telekom Networks Branch were dismissed on allegations that their agitation caused their colleagues to go on strike.[55]

Similarly, in August 2008, 297 members of the Tobacco Tenants and Allied Workers Union of Malawi (TOTAWUM) were sacked by the Limbe Leaf Tobacco Company, a company within the Philip Morris group supply chain,[56] for allegedly failing to respect the normal dispute settlement procedure, thus rendering their strike illegal.[57] The workers had demanded a wage increase and proper equipment to protect themselves against toxic substances.[58]

Malawi's biggest challenge concerning trade and labour is the use of child labour.[59] While it is acknowledged that child labour is on the decline in Asia and Latin America, the African situation appears to be different.[60] The variation may be accounted for by the causes of child labour. In many African cultural settings for instance, boys are expected to work hard especially helping their fathers within the household.[61] They are also expected to assist elderly people carry their load.[62] In this sense, the role of a child in a family or society, which is

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52 See section 64 of the MEA.
53 See section 46 of the MLRA.
54 See section 46(3) the MLRA.
55 See the ITUC Report to the WTO General Council Review of the Trade Policies of Malawi 3.
56 See The Telegraph "Suppliers for Tobacco Company Phillip Morris used Child Labour" Telegraph 15 July 2010.
57 See the ITUC Report to the WTO General Council Review of the Trade Policies of Malawi 3.
58 Ibid.
59 United Nations Committee on the Rights of the Child "Consideration of reports submitted by States parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: Malawi, 27 March 2009, CRC/C/MWI/CO/2" http://www.unhcr.org/refworld/docid/49d5f7a10.html (accessed 05-08-2012). See also United States Department of Labor, 2008 Findings on the Worst Forms of Child Labour- Malawi http://www.unhcr.org/refworld/docid/4aba3ed232.html (accessed 05-08-2012).
60 See the ILO Global Report on Child Labour, on May 9, 2010. The new report shows that "Asia-Pacific and Latin America and the Caribbean continue to reduce child labour, while sub-Saharan Africa has witnessed an increase. Africa also has the highest incidence of children working, with one in four children engaged in child labour." See also Wolf "Child Labour Declining but Rather Slowly" http://www.indepthnews.net/news/news.php?key1=2010-05-09%2014:54:33&key2=1 (accessed 17-06-2012).
61 See Mazonde "Culture and Education in the Development of Africa" http://unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN003347.pdf (accessed 17-06-2012).
62 Mazonde 3.

regarded as permeating social networks, is thus held as an important factor in promoting the use of child labour.[63] The scale of the problem in Africa is among the key remaining challenges in tackling child labour, according to Constance Thomas, Director of the ILO's International Programme on the Elimination of Child Labour (IPEC). Other challenges include a much-needed breakthrough in agriculture, where most child labourers work, and the need to address often hidden forms of child labour.[64] It is an acknowledged fact that most child labour is rooted in poverty. The way to tackle the problem is therefore clear. Thomas rightly points out:

> "We must ensure that all children have the chance of going to school, we need social protection systems that support vulnerable families-particularly at times of crisis-and we need to ensure that adults have a chance of decent work. These measures, combined with effective enforcement of laws that protect children, provide the way forward."[65]

The 2010 ILO Global Report on Child Labour also noted that:

> "A number of initiatives invoke the linkage between trade policy and child labour, including incentive schemes in both the United States and European Union Generalized Systems of Preferences (GSP). The issue has recently regained further ground in discussions about child (and forced) labour as certain Member States have introduced trade-related mechanisms to induce others to take action regarding the use of child labour in the production of certain internationally traded goods."[66]

It is issues such as the role of child labour in the African community that seem to also contribute to the African governments' resistance to the inclusion of a social clause in trade. Put in another way, the child labour issue highlights the significance of the problem of universal application of human rights in concrete cultural and social settings such as the African context. It is submitted that this issue cannot be simply ignored as much as the use of child labour can not also go unchecked. A balance must be sought between human rights implementation, economic interests and cultural as well as social interests. As Fiszbein *et al* observed: "Work may be physically or mentally harmful, may interfere with schooling, and can undermine educational attainment and future earnings".[67] The Global March against Child Labour stated that:

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[63] Harper, Jones and Tincati "Opportunities and Challenges in Promoting Policy and Practice-Relevant Knowledge on Child Rights" Overseas Development Institute Working Paper 318 July 2010 12.
[64] See the ILO Global Report on Child Labour 68.
[65] See the ILO Global Report on Child Labour 36.
[66] See the ILO Global Report on Child Labour 74.

> "While the definition of child labour usually only involves labeling the types of work and children involved in a workplace, child labour has to be understood not only as a problem faced by individual children, but also as a system engraved in society perpetuating poverty, social evil, inequity, and unfair economic and social norms. Often poverty is believed to be the major cause of child labour but the fact that child labour causes and perpetuates poverty is little known. Children are not the cause of child labour but are victims of inadequate public and economic policy and ill-managed social systems that suppress the most vulnerable in society."[68]

Malawi is considered to have one of the highest incidences of child labour in the world.[69] At the time of writing this thesis, Malawi had an estimated 1.4 million child labourers.[70] In 1999, Malawi ratified the ILO Minimum Age Convention[71] and the ILO Convention on the Worst Forms of Child Labour.[72] In Malawi, the law allows children older than 14 years of age to perform work in any public or private agricultural, industrial or non-industrial undertaking or any branch thereof.[73] The scope of the law does not extend to cases of work done in homes, vocational technical schools or other training institutions.[74] However, the law does prohibit hazardous work for children younger than 18 years of age.[75] On the other hand the Constitution sets the age limit at 16 years for acceptance into hazardous work creating a legislative collision which is currently being addressed by the Tripartite Labour Advisory Council.[76] Furthermore, the list of hazardous jobs is developed by the Labour Minister with the participation of

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67 Fiszbein, Schady, Ferreira, Grosh, Kelleher, Olinto, and Skoufias *Conditional Cash Transfers: Reducing Present and Future Poverty* (2009) 10. See also Miller and Tsoka "Cash Transfers and Children's Education and Labour among Malawi's Poor" 2012 *Development Policy Review* 502.

68 See The Global March Against Child Labour's Statement on the Tabling of the Tobacco Tenancy Bill in Malawi issued on the 12th of June 2012.

69 Bhalotra "Child Labour in Africa" *OECD Social Employment and Migration Working Papers* No. 4 2003.

70 Kasunda "1.4 Million Children in Child Labour-NGO" The Nation 15 June 2012. In his Article, Kasunda makes reference to the findings of The Child Rights Information and Documentation Centre a non-governmental organisation in Malawi which conducted a research which resulted in the number of child labourers in the country.

71 See Articles 6 and 7.1 of the ILO Convention No 138 1973. According to the Convention, child labour refers to any work that interferes with the completion of a child's education, or is mentally, physically, socially or morally dangerous and harmful to children by its nature or circumstances of the work.

72 See Article 3 ILO Convention No 182 1999.

73 See section 23 of the Constitution of Malawi which sets the minimum age for employment at 14 years. See also section 21 of the MEA.

74 See section 21(2) of the MEA.

75 See section 22 of the MEA.

76 See section 23(4) of the Constitution of Malawi. See also Chirwa *Human Rights under the Malawian Constitution* (2011) 193.

employers' organisations and trade unions.[77] Every employer is required to keep a register of child employees.[78] The law prescribes 20,000 Kwacha (about 134 USD) and imprisonment for five years as penalties for offenders.[79] Whether or not the amount of 134 USD is deterrent enough raises a lot of questions. The legislation provides for light work for children younger than 14 years of age without mentioning the lowest age limit allowed by the relevant ILO Convention, which is 12 years of age.[80] This has seen renewed calls for the passing into law of the Tobacco Tenancy Bill which could address the incidence of child labour in Malawi.[81]

Even though child labour is found in virtually all sectors of the Malawian economy, formal and informal, including 16 commercial farms, smallholdings, domestic work and micro-industries, Malawi's effort to deal with it is directed towards the formal sector especially commercial agriculture.[82] Commercial agriculture is important for the country's economy. Tobacco alone accounts for almost 70 percent of the country's foreign exchange earnings.[83] Tea is an equally important crop for Malawi's economy as it is considered the second major foreign exchange earner.[84] While accurate data on the magnitude of child labour is lacking, there are clear indications that child labour in Malawi is widespread and on the rise.[85]

To appreciate the significance of the problem of child labour and the seriousness with which it has been addressed in Malawi, it is important to consider the kinds of activities which children on tea and tobacco estates perform. On tobacco estates, children perform a number of

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77 See section 22(2) of the MEA.

78 See section 23 of the MEA.

79 See section 24 of the MEA.

80 See the ITUC Report to the WTO General Council Review of the Trade Policies of Malawi 3.

81 The Tobacco Tenancy Bill was first drafted in 1995 but has not yet been passed into law, despite thousands of deprived children being caught up in the tobacco fields instead of classrooms. When enacted, the Tobacco Tenancy Bill will, among other things, set a new minimum age limit of employment at 18 years, and institute punitive measures of imprisonment and a hefty fine of up to One Million Kwacha for estate owners using child workers.

82 Plan Malawi "*Hard Work, Long Hours and Little Pay: Research with Children Working on Tobacco Farms in Malawi* 2009 1.

83 Ibid. See also Otanez, Muggli, Hurt and Glantz "Eliminating Child Labour in Malawi: A British American Tobacco Corporate Responsibility Project to Sidestep Tobacco Labour Exploitation" 2006 *Tobacco Control* 224.

84 Edlring "Child Labour in the Tea Sector in Malawi: A Pilot Study" 2003 *Fafo Institute for Labour and Social Research* 6.

85 The ILO has classified child labour on tobacco estates as one of the "worst forms of child labour". See Global March against Child Labour-India http://www.cridoc.globalmarch.de/child_labour.html (accessed 10-06-2012). See also the Global March against Child Labour's Statement on the Tabling of the Tobacco Tenancy Bill in Malawi issued on the 12th of June 2012.

activities. As far back as the year 2000, Eldring *et al* observed that children as young as nine were involved in what were called "light tasks" such as:

> "clearing fields, making nursery beds and watering nurseries during the first phase of tobacco production; uprooting, transporting and transplanting seedlings and weeding during the second phase; picking, transporting, tying/sowing the leaf, picking down the dried tobacco and bundling during the last phase".[86]

In 2009, Plan Malawi reported almost similar activities done by children on tobacco estates.[87] Children do almost every job that adults do.[88] Their activities chiefly involve clearing the fields in preparation for planting, working in the nurseries, harvesting and grading the final product.[89] The report mentions other activities deemed hazardous like the spraying of pesticides.[90] The activities have been branded "hazardous" because they involve the use of dangerous chemicals harmful to children's health.[91] Chemicals can affect their respiratory systems.[92]

Tobacco production is physically demanding on the children. Children carry heavy loads of tobacco and work for long hours.[93] Some children help in operating heavy machinery when preparing tobacco bales.[94] The Plan Malawi report indicated that children worked as much as 12 hours or more for just US$0.17 a day.[95] The report also indicates that on humid days, during the cultivation and harvesting of tobacco, the average field worker may be exposed to as much as 54 milligrams of dissolved nicotine, equivalent to more than 50 average cigarettes, leading to Green Tobacco Sickness.[96] Tobacco not only exposes child workers to health hazards involved in its production, but also subjects children to long hours of work with little or no rest at all in order to

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[86] Eldring, Nkanyane and Tshoaedi "Child Labour in the Tobacco Growing Sector in Africa" Report prepared for the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF)/ International Tobacco Growers Association (ITGA) /British American Tobacco Conference on the Elimination of Child Labour Nairobi 8-9th October 2000 41.

[87] Plan Malawi 2009 10.

[88] Plan Malawi 2009 1.

[89] Ibid.

[90] Plan Malawi 2009 37.

[91] Plan Malawi 2009 37-39. See also McKnight and Spiller "Green Tobacco Sickness in Children and Adolescents" 2005 *Public Health Reports* 602-606 and Nyirenda "Epidemiology of Tuberculosis in Malawi" 2006 *Malawi Medical Journal* 147-156.

[92] Plan Malawi 2009 38.

[93] Ibid.

[94] Ibid.

[95] Plan Malawi 2009 19, 22.

[96] Plan Malawi 2009 39. See also McKnight and Spiller 2005 *Public Health Reports* 602.

make more money.[97] Just like the tobacco industry, employers on tea estates see nothing wrong employing children to perform tasks which they regard as "light and suitable for children and young persons".[98] Many African traditional communities place a high value on children's work at home or on the family farm.[99] This work is not perceived as harmful, but rather as socially necessary occupation, which is also of great benefit to children's experience.[100] Household activities are carried over to the tea and tobacco estates as they are perceived helpful to both the parents and the children besides earning some money.[101]

However what is not deniable is that most of the work that children perform on the tea and tobacco estates in Malawi is not good for their development. It would be of greater significance if the Malawian government were to establish a lower age limit of 12 years of age in the legislation on light work for children as prescribed by ILO Convention No 138. Urgent measures to withdraw children from farms where child labourers are exposed to pesticides, toxic substances and nicotine and to prosecute offenders must also be taken. Much emphasis must be placed on the educational development of the children, a factor which will lead to improved human capital on the continent. This, in turn, is likely to contribute to development rather than the continued increase in the number of uneducated people on the continent.

7 2 3 Mauritius

The Doing Business Report of 2012 regards Mauritius as number 1 in Africa and 23rd in the world when it comes to the ease of doing business.[102] Mauritius has a significant number of export processing zones (EPZs). It has also ratified all eight ILO core labour Conventions.[103] However restrictions of the principles and rights laid down in those binding international legal

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97 Plan Malawi 2009 15, 16 and 22.

98 Save the Children "*An assessment of Child Labour Practices in Selected Tobacco Estates in Lilongwe and Kasungu Districts*" 2006 4.

99 Wangila and Akukwe *Africa, AIDS Orphans and their Grandparents: Benefits and Preventable Hidden Dangers* (2006) 20.

100 Ibid.

101 Ibid.

102 See World Bank Doing Business 2012: Mauritius (2012). The report makes no reference to labour standards. This would appear to suggest that the country has no labour violations worth drawing any attention to. However an analysis of the labour standards violations in Mauritius does not appear to suggest that it is fairing any better than its Southern African counterparts in protecting core labour standards in trade.

103 See the ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius of 23 and 25 April 2008 1.

instruments are common.[104] Freedom of association and the right to collective bargaining are guaranteed in law,[105] and the corresponding rights also apply to workers in companies located in the EPZs.[106] However the effective exercise of those rights is systematically denied, causing the ILO's supervisory bodies to denounce practices that are in breach of the ratified conventions.[107] National law allows the public authorities to cancel the registration of a trade union,[108] and the procedures established in national legislation on the right to strike are ambiguous[109] thus preventing the effective exercise of that right.[110] There is still a very low level of collective bargaining in the EPZs, prompting criticism from the ILO which has urged the government to take measures to promote collective bargaining at production centres in the EPZs.[111]

Mauritius ratified ILO Convention 87 on Freedom of Association and Protection of the Right to Organise on 1 April 2005 and ILO Convention 98 on the Right to Organise and to Bargain Collectively on 2 December 1969.[112] Its Constitution protects the right of workers to form and join trade unions, and this right was strengthened by the ratification of ILO Convention 87 in April 2005.[113] However there are certain restrictions.[114] Authorities are entitled to cancel a union's registration if it does not adhere to specified legal obligations, including activities that may pose "a threat to public order".[115] The law protects collective bargaining and bans anti-union discrimination.[116] 20% of the active population of Mauritius are members of trade unions.[117]

The Mauritian Industrial Relations Act (MIRA) guarantees the right to strike.[118] However, the MIRA sets a deadline of 21 days following compulsory arbitration for industrial

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[104] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 1.
[105] See section 49 of the Mauritius Industrial Relations Act (MIRA) 67 of 1973.
[106] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 1.
[107] Ibid.
[108] See section 13 of the MIRA.
[109] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 1.
[110] Ibid.
[111] Ibid.
[112] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 2.
[113] Ibid.
[114] Ibid.
[115] See section 13(d) of the MIRA.
[116] See section 52 of the MIRA.
[117] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 3.
[118] See section 92 of the MIRA.

action, which in practice prevents the exercising of that right.[119] It gives the government 21 days in which to respond to any dispute and to refer it to the Permanent Arbitration Tribunal or the Industrial Relations Commission. If the government does not reply within 21 days the strike can proceed.[120] The MIRA states that participation in an illegal strike is a ground for dismissal.[121] The MIRA also allows the Prime Minister to declare a strike illegal should he or she consider that the strike could damage the country's economy.[122]

Foreign workers who take part in a strike can be deported.[123] In 2006, there were a series of reports that workers from China and India who had tried to form a trade union or protest against their employers had been summarily deported.[124] The unions have demanded that the right to strike be guaranteed by the Constitution.[125] The ILO has reminded the government that any restriction of the right to strike should be accompanied by appropriate, impartial and speedy conciliation and arbitration procedures.[126] It has stressed that the sacking of workers (for taking part in strikes) and the refusal to reinstate them were serious breaches of the right to freedom of association.[127] The law covers workers in the EPZs, but the unionisation rate is low there.[128] Special laws are applied in some EPZs, such as those providing for longer working hours in the zones (45 hours per week and ten hours compulsory overtime if required).[129] Some employer-controlled councils prevent unions from organising workers in companies based in the EPZs.[130]

It is extremely difficult to approach workers in Mauritian EPZs with a view to organising them into trade unions.[131] Generally, union officials have to wait outside the factory gates to meet workers whom they mostly do not know; in addition, they report that most of the workers are women who are in a hurry to get home to their families.[132] As a result, the organisation rate is

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[119] See section 92(2) of the MIRA.
[120] See section 92(b) of the MIRA.
[121] See section 50 of the MIRA.
[122] See section 93 of the MIRA.
[123] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 3.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 3.
[132] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mauritius 4.

quite low (less than 12%) in the EPZs across the country.[133] Owing to the lack of effective trade union representation, occupational health and safety hazards are sometimes not addressed in a timely fashion, if at all.[134] The unions have reported how difficult they find it to approach and organise migrant workers, particularly those from South-East Asia and Madagascar, who tend to have long working hours and to be cut off from other workers.[135] Some of them have intolerable living conditions, sleeping in dormitories on benches without mattresses or in tiny bedrooms housing up to a dozen people. Those who have tried to organise have been summarily deported.[136]

It has also been reported that unions are finding it hard to organise workers in the expanding sector of offshore companies.[137] Violations of workers' rights have been reported recently in the textile industry. Some employers have refused to recognise the union delegates and a wildcat strike in a clothing factory was brutally suppressed by the police.[138] The government and the unions have still not reached an agreement on the draft law amending the MIRA.[139] The unions fear that amendment to the law on collective bargaining could undermine the tripartite system.[140] Migrant workers are openly discriminated against as they have much lower wages than Mauritian nationals.[141]

The government of Mauritius must therefore do more to promote collective bargaining in enterprises based in the EPZs and ensure that the rights contained in ratified ILO Conventions 87 and 98 are observed in the production centres located there. Measures to ban interference by employers' organisations in the activities of workers' organisations, supported by sufficiently dissuasive sanctions must also be taken. In addition, the labour laws of Mauritius must be amended to remove the right of the Prime Minister to declare a strike illegal should he or she consider that the strike can damage the country's economy. Measures should also be taken to

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[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Ibid.

ensure that migrant workers also receive equal pay to that of Mauritian nationals and that they are fully informed of their rights.

7 2 4 Mozambique

In the 2012 Doing Business Report, Mozambique is ranked 139 out of 183 countries in the world.[142] Mozambique has ratified all eight core ILO labour Conventions.[143] However in view of restrictions on trade union rights, discrimination, child labour and forced labour, further measures are needed to comply with the commitments Mozambique accepted at Singapore and Doha in the WTO Ministerial Declarations of 1996-2001, and in the ILO Declaration on Fundamental Principles and Rights at Work.[144] The law allows for strikes in EPZs to be conducted on the same basis as strikes in essential services, although services provided by the export processing zones are not essential.[145] It is reported that in the Mozal export processing zone,[146] unionists face discrimination and unfair dismissals for going on strike or for trying to organise.[147] The Mozambique Workers' Organisation (OTM) trade union centre reports that collective agreements are not respected in Mozal.[148] However, up to now, there are not a large number of companies operating in Mozal.[149]

While Mozambique has ratified both ILO core conventions on trade union rights and progress has recently been made with the enactment of a new Labour Code, the right to bargain collectively is under pressure since the authorities do not take measures requiring employers to respect collective agreements.[150] Strikes are often suppressed and encounter violent reaction from employers and sometimes the police.[151] Anti-union discrimination remains a problem as

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[142] See World Bank *Doing Business 2012: Mozambique* (2012). The Doing Business Report for 2012 makes no mention of the relationship between the protection of labour standards and the ease of doing business. This again could indicate a lack of interest concerning the significance of labour standards protection in doing business.

[143] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mozambique Geneva 22 and 24 April 2009 1.

[144] See the ITUC Report for the WTO General Council Review of the Trade Policies of Mozambique 2.

[145] Ibid.

[146] Mozal is the largest aluminium producer in Mozambique and the second largest in Africa having an annual total production of around 530 000 tonnes. It is located in Southern Mozambique and is owned by the Mozambican government, Mitsubishi Corporation and BHP Billiton.

[147] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mozambique 3.

[148] Ibid.

[149] Ibid.

[150] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mozambique 1.

[151] Ibid.

adequate dissuasive sanctions have not been prescribed.[152] Trade unions' ability to operate freely is hindered due to regulations applied to private gatherings.[153] Trade union activities in the country's EPZs in Mozal are constrained due to the authorities' definition of work in EPZs as "essential" although clearly it does not fall under the ILO definition of "essential services".[154]

In 1977, Mozambique ratified both ILO Convention No. 100 on Equal Remuneration and ILO Convention No. 111 on Discrimination (Employment and Occupation).[155] Both the Constitution of Mozambique and the law prohibit discrimination against workers on the basis of gender and provide for every worker the right to receive equal salary and benefits for equal work.[156] The OTM claims that in the Mozal EPZ, the principle of equal pay for work of equal value is not respected with regard to remuneration of nationals and foreign workers.[157] In 2003, Mozambique ratified the ILO Convention No. 138 on the Minimum Age and Convention No. 182 on the Worst Forms of Child Labour.[158] The law of Mozambique prohibits child labour and sets the minimum working age at 18 years.[159] While child labour is not reported in industrial sectors, it is common in practice that children are involved as seasonal labour on family farms, in herding livestock and on commercial cotton, tobacco and tea plantations where they are paid on a piecework basis.[160]

The Mozambican government must ensure that strikes in export processing zones are not treated as strikes in essential services sectors. Furthermore the government's listing of "essential services" for which compulsory arbitration is imposed must be amended in order to exclude postal, meteorological and other services that are not essential in the ILO's sense of the term. Measures also need to be taken to enforce collective agreements and promote collective bargaining in the private sector.

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[152] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mozambique 1.
[153] Ibid.
[154] Ibid.
[155] See the ITUC Report to the WTO General Council Review of the Trade Policies of Mozambique 4.
[156] Ibid.
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] Ibid.

7 2 5 Zambia

The Doing Business Report for 2012 ranks Zambia 84th out of 183 countries in the world.[161] Zambia has ratified all ILO core labour Conventions.[162] In view of restrictions on trade union rights, discrimination, child labour and forced labour, resolute measures are needed to comply with the commitments Zambia accepted at Singapore, Geneva and Doha in the WTO Ministerial Declarations of 1996-2001, and in the ILO Declaration on Fundamental Principles and Rights at Work.[163] Zambia has ratified the ILO Conventions on trade union rights.[164] However the legislation on freedom of association and collective bargaining is not in full conformity with ILO Conventions.[165] In practice trade union rights are widely flouted in the mining sector in particular, which is dominated by foreign owners.[166] In view of the ITUC Report, the government must step up its efforts to ensure that workers' rights are respected in all companies including foreign companies and subcontractors.[167]

In recent years the unions have protested frequently about the worsening social climate in the mining industry, which is mainly owned by Chinese investors who are often accused of intimidating and brutal attitudes.[168] The government has not always been responsive. In March 2008, 500 striking workers at the Chambishi Copper Smelter (CCS) were sacked by their employer.[169] The day before, seven branch officials of the National Union of Miners and Allied Workers (NUMAW) had been arrested by the police after a conflict broke out between the 500 workers and 200 Chinese foremen, resulting in at least three people being injured.[170] The workers, employed to build a foundry, had gone on strike on 3 March to demand pay increases

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[161] See World Bank Doing Business: Zambia (2012). The report avoids any reference as with previous reports for other Southern African countries does not detail the relationship between the ease of doing business and labour standards. This creates the impression that paying little attention to labour standards could be at the centre of attracting business investments. That the World Bank through its Doing Business Reports pays little attention to labour matters in country specific reports signifies a negative attitude of the institution to a need to create a business-labour interest balance.

[162] See the ITUC Report to the WTO General Council Review of the Trade Policies of Zambia Geneva 27-29 July 2009 1.

[163] Ibid.

[164] Ibid.

[165] See the ITUC Report to the WTO General Council Review of the Trade Policies of Zambia 3.

[166] Ibid.

[167] Ibid.

[168] Ibid.

[169] Ibid.

[170] Ibid.

and better safety conditions.[171] The union officials were released, and the workers were reinstated after some intensive negotiations.[172]

In early June 2008, again in Chambishi, a union member working for another Chinese company, China Non-Ferrous Metal Industry's Foreign Engineering and Construction Company filed a complaint that he was assaulted by an engineer.[173] This trade unionist had repeatedly complained about the inadequate financial compensation paid to the family of a worker who died in an occupational accident.[174] After spending a few nights in prison, the engineer was released for lack of evidence.[175] The trade unionist was sacked. More and more sub-contractors are found in the mining industry.[176] When trade unions do manage to organize workers in these companies, they have to cope with employers trying to avoid any social dialogue. One specific result of this trend is that the number of occupational accidents, which are often fatal, is rising. The situation faced by foreign workers recruited by foreign investors is not always better. In May 2008, 24 Indians were summarily repatriated to Bombay after being identified as the "ringleaders" of a strike involving over 300 of their compatriots employed by Onshore Construction Company, an Indian sub-contractor hired to build a copper foundry in Chingola.[177] The workers were complaining about their pay and working conditions.[178]

While disputes are a common feature of labour relations under capitalist conditions, what draws global media attention to China in Africa is the sometimes brutal boss-employee model practiced by the continent's new "imperial masters".[179] Although China has come a long way in its domestic labour relations, mass social unrest, worker exploitation and walkouts over pay show the ugly side of its rapid industrialization.[180] Cheap labour has entrenched exploitative

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[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] See the ITUC Report to the WTO General Council Review of the Trade Policies of Zambia 3.
[175] Ibid.
[176] See the ITUC Report to the WTO General Council Review of the Trade Policies of Zambia 4.
[177] Ibid.
[178] Ibid.
[179] See Human Rights Watch "Zambia: Workers Detail Abuse in Chinese-Owned Mines" http://www.hrw.org/news/2011/11/03/zambia-workers-detail-abuse-chinese-owned-mines (accessed 10-06-2012).
[180] See The Guardian "Chinese Mining Firms in Zambia under fire for Mistreating Workers" http://www.guardian.co.uk/global-development/2011/nov/03/chinese-mining-zambia-mistreating-workers (accessed 10-06-2012).

labour practices which are now being exported to different countries around the world, some of which have poor labour records of their own.[181] China is no longer just exporting mainly cheap goods, but also cheap labour practices.[182] Chinese exploitation and ill-treatment of workers, sometimes like slaves, is rampant across the Continent, from Cape to Cairo.[183] For instance, in October 2010, two Chinese managers opened fire on hundreds of protesting Zambian miners at Collum Coal Mine.[184] The managers claimed it was in self-defence and the case was dropped. The decision not to pursue the matter meant that there was no justice for Zambians demonstrating against the US$4 per day wage and unsafe working conditions because China invests more than US$1 billion a year in infrastructure projects in Zambia.[185] The Zambian government should put in place mechanisms to ensure that workers' rights are respected in all companies, including foreign companies and sub-contractors.

7 2 6 Zimbabwe

The World Bank Doing Business Report 2012 ranks Zimbabwe 171st out of 183 countries in the world.[186] Zimbabwe ratified ILO Convention No. 29 on Forced Labour and Convention No. 105 on the Abolition of Forced Labour in 1998.[187] The Labour Act in section 4A prohibits forced labour but prescribes only a fine or two years imprisonment which is not deterrent.[188] Moreover, the Labour Act fails to address the need for specification of the various forms of forced labour and does not have a definition of forced labour. The Chinese appear to be at liberty to violate workers' rights in the country. A pattern of brutality now exists between the workers, the ruling

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[181] See the British Broadcasting Corporation "China Mines in Zambia 'Unsafe' says Human Rights Watch" http://www.bbc.co.uk/news/world-africa-15569310 (accessed 10-06-2012).

[182] See The Guardian "Chinese Mining Firms in Zambia under fire for Mistreating Workers" 3 November 2011.

[183] Human Rights Watch "You'll Be Fired if You Refuse" http://www.hrw.org/reports/2011/11/03/you-ll-be-fired-if-you-refuse (accessed 10-06-2012).

[184] See The Guardian "Chinese Mining Firms in Zambia under fire for Mistreating Workers" 3 November 2011.

[185] Ibid.

[186] See World Bank Doing Business: Zimbabwe (2012). This report as with the previous Doing Business reports on Southern African countries, serve for Malawi, excludes reference to an analysis of the linkage between the protection of labour standards and the ease of doing business. This again indicates an already developing pattern which indicates that the need to protect labour standards might not a significant factor to the ease of doing business. This could justify the argument that Bretton Woods Institutions are contributing to the worsening labour conditions in the world as their policies seem not to establish a balance between business interests and a need to protect workers' rights in the course of conducting business.

[187] See the ITUC Report to the WTO General Council Review of the Trade Policies of Zimbabwe 19 and 21 October 2009 1.

[188] See section 4A of the Labour Act Chapter 28:01 2005.

elite and the Chinese investors and their managers in Zimbabwe.[189] Arguably, the most well-known case involves Anjin Investments, a controversial diamond venture between Zimbabwe's security establishment, the army, police and intelligence services and Chinese investors.[190] Through Anjin, top political and security figures have reportedly staked their claim to the Marange diamond fields.[191] This has contributed to lack of transparency and accountability in the Marange diamond mining activities. Diamonds' contribution to the fiscus remains low due to lack of accountability.[192] Commenting on the structure of Anjin's management, Farai Maguwu, Director of the Marange-based Centre for Research and Development once said:

> "Some very senior military personnel and well placed politicians are directly involved in the mining operations of Anjin. The involvement of the army in diamond mining in Marange is the saddest thing that has happened to the find of the century."[193]

Such practices are inconsistent with the objectives of the Kadoma Declaration (KD),[194] entered into by government, business and labour to address the totality of the macro-economic problems and Country Risk Factors.[195] The KD identified elements of risk in the country to include the real or perceived selective observance of the rule of law.[196] It also identified one of the country risk manifestations as the commercial risk in which trading partners lack confidence in the investment policies of the country.[197] The KD also identified one of the risk factors as the lack of respect for human rights.[198] In his keynote address on the occasion of the official opening of the Tripartite Negotiating Forum (TNF) social dialogue retreat held in Kariba in July 2009, before the signing of the KD, Zimbabwean Prime Minister, Morgan Tsvangirai, said:

> "After almost two decades of relative stability and growth since independence in 1980, our macroeconomic indicators started to deteriorate, evidenced by soaring inflation and unemployment rates. It is also then that our negative balance of payments situation and

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[189] Marima "Outrage over Brutal Chinese Labour Practices" The Independent 12 April 2012.
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] The Kadoma Declaration arose as a result of the realisation of the Zimbabwean Tripartite Negotiation Forum that it was desirable for Zimbabwe to address the macro-economic issues causing the economic melt down in the country. It entered into force on the 4th of September 2009. It carried the theme, "Towards a Shared National Economic and Social Vision".
[195] See the preamble of the Kadoma Declaration.
[196] See Article 3(iv) of the KD.
[197] See Article 2(ii) of the KD.
[198] See Article 3(c)(12) of the KD.

> recurring budget deficits became untenable. On the back of such economic performance most businesses inevitably folded, leading to massive retrenchments and liquidations...Given this myriad of challenges, government and social partners decided to build partnership as a way to arrest further collapse."[199]

However the objectives of the KD and any hopes of re-building the country's economy seem to be eroding under the Chinese wave. Extensive research by international organisations such as Human Rights Watch and Global Witness shows that since its diamond mining venture began in Zimbabwe in 2009, a litany of abuses have also characterised Anjin's operations. In a report released in August 2011, Human Rights Watch noted with concern that "Zimbabwe police and private security guards are shooting, beating and unleashing attack dogs on poor, local unlicensed miners".[200] It is alarming that such violent methods of policing mines have become habitual practice in Marange since 2008 when 20 000 small-scale miners invaded newly-discovered fields before being removed by military force.[201] They were forcefully removed by soldiers and police; rights groups claim that an estimated 200 people were killed, but the government strongly denied this.[202]

In a separate incident workers at a glass-making factory in Harare accused its Chinese owner of forcing them to work overtime for as little as US$1 per hour.[203] It appears some politically-connected Chinese firms are exempted from abiding by the country's laws.[204] Maintaining good diplomatic relations is crucial to sustaining US$500 million worth of Chinese investments in Zimbabwe, but when the apparently "great friend of Africa" also starts to look like a brutal extractor of wealth, protecting the rights and interests of ordinary Africans must become critical.[205] This is a principle factor which developing countries appear to constantly ignore.

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[199] See the keynote address by the Prime Minister of the Republic of Zimbabwe, Morgan Tsvangirai on the 17th of July 2009 4.
[200] See The Human Rights Watch "World Report 2011: Zimbabwe" http://www.hrw.org/world-report-2011/zimbabwe (accessed 10-06-2012).
[201] See The Human Rights Watch Country Summary Report on Zimbabwe of January 2011 2.
[202] Ibid.
[203] Marima "Outrage over Brutal Chinese Labour Practices" The Independent 12 April 2012.
[204] Ibid.
[205] Ibid.

Zimbabwe has also ratified the ILO Minimum Age Convention[206] and Convention No. 182 on the Worst Forms of Child Labour in the year 2000.[207] Zimbabwean law sets the minimum age for admission to employment at 15 years of age.[208] However, the law does not prescribe for compulsory education up to the age of 15 or other age.[209] Also, the LRA does not apply to self-employed workers.[210] Children between 13 and 15 years old can be employed as apprentices and children between 15 and 18 can perform light work.[211] Permitting the employment of apprentices from the age of 13 years is not in conformity with Convention No. 138.[212] The LRA does not define child labour and does not cover many children's rights recognised in Convention 182 on the worst forms of child labour.[213] Hazardous work is prohibited for children.[214]

In practice, child labour is a problem in Zimbabwe. According to the latest state statistics, from 2004, 46 per cent of children between 5 and 17 years of age were at work.[215] The data showed that 4 per cent of working children had never attended school and 14 per cent had dropped out of school. The Zimbabwe Congress of Trade Unions (ZCTU) reported that young children engaged in work to pay for their school fees and proposed the reintroduction of free education at least at the primary level.[216] Rural children often work in tobacco, sugarcane, cotton, tea and coffee plantations and other farms as well as in diamond and gold mines and in forestry.[217] In many cases, children as young as 12 years old have been found in mines dealing with hazardous chemical and toxic substances without protective gear and operating dangerous machines without training in agriculture and mining.[218]

Zimbabwe's Export Processing Zones Act (ZEPZA) was enacted in 1995.[219] It provides, among other things, for the establishment of EPZs and an EPZ Authority. The EPZ Authority

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[206] ILO Convention No. 138 (1973).
[207] See section 11 of the Labour Relations Act Chapter 28:01.
[208] See the ITUC Report to the WTO General Council Review of the Trade Policies of Zimbabwe 9.
[209] See section 11 of the Labour Relations Act Chapter 28:01.
[210] Relevant to this, a 2008 ILO-IPEC Draft Rapid Assessment Survey on the worst forms of child labour found that 87 per cent of working children were self-employed.
[211] See section 11(1)(a) and (b) of the Labour Relations Act Chapter 28:01.
[212] See Article 6.
[213] See the ITUC Report to the WTO General Council Review of the Trade Policies of Zimbabwe 9.
[214] See section 11(4) of the Labour Relations Act Chapter 28:01.
[215] See the ITUC Report to the WTO General Council Review of the Trade Policies of Zimbabwe 10.
[216] Ibid.
[217] Ibid.
[218] Ibid.

was created in response to the need to develop a high value-added, export-oriented and technology-driven economy through the instrumentality of EPZs. The Authority facilitates the development of EPZs by granting permits to private developers and investment licences to companies, and monitors the EPZs based on guidelines set out in the ZEPZA. EPZs provide clear benefits to foreign investors. However, the ZEPZA provides for the non-application of the Labour Relations Act. It excludes key parties and authorities concerned with labour, basic health, and environmental standards from the EPZ Authority.[220]

The picture presented above of the selected SADC countries is worrisome. Clearly apart from South Africa, regardless of its current challenges concerning a social clause, not much is being done to suggest that there is concern regarding a need to protect core labour standards in trade. This raises a serious question as to whether policy makers in the region have a justifiable basis for regarding the inclusion of a social clause in the WTO as a North-South debate. Perhaps the SADC policy makers fear that their countries could suffer from the effects of incorporating a social clause in trade agreements. However, it is important to establish whether or not these fears are genuine.

7 3 WHO IS DISADVANTAGED BY THE EXCLUSION OF A SOCIAL CLAUSE FROM TRADE AGREEMENTS?

Countries are clearly finding it difficult to protect labour standards in trade. All this is taking place regardless of the adoption by the International Labour Organisation (ILO) of the 2008 Declaration on Social Justice and Fair Globalisation.[221] There is an apparent desire to retain the low level of compliance with labour standards as a competitive advantage. On the one hand governments are clearly determined to attract investment and increase their export competitiveness on the backdrop of a lowered compliance with labour standards whilst on the other hand multinational companies (MNCs) are also seeking out the most favourable business

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[219] See the Zimbabwe Export Processing Zones Act Chapter 14:07 1995.

[220] Section 56 of the Act reads as follows:

"1) The Labour Relations Act (Chapter 28:01) shall not apply in relation to licensed investors operating and employees employed in an export processing zone.

2) The Authority may, in consultation with the minister responsible for the administration of the Labour Relations Act (Chapter 28:01), provide rules for conditions of service, termination of service, dismissal from service, and disciplinary proceedings that apply in export processing zones."

[221] ILO "Deepening the Social Dimensions of Regional Integration" 2008 *International Institute for Labour Studies Geneva* 3.

environment defined by a lowered compliance with labour standards among other variables.[222] This has resulted in SADC countries competing for investors on condition of concessions which are likely to hamper development. An analysis of some of the key issues emerging from discussions of the violations of core labour standards in trade as undertaken in this chapter will possibly inform SADC countries on the appropriate course of action to adopt concerning the social clause.

7 3 1 Lowering labour standards in order to attract investors

The Namibian Ramatex case illustrates the dangers of SADC countries lowering labour standards in order to attract investors.[223] In 1995, the Namibian Government introduced the Export Processing Zones (EPZ) Act.[224] Amongst other incentives such as tax holidays, exemption from import duties on imported intermediate and capital goods, free repatriation of profits given to lure investors,[225] the Namibian government provided that the Labour Act of 1992 would not apply to the EPZ sector.[226] The government saw the non-application of labour laws in the EPZ sector as a delicate compromise in order to create employment.[227] However, the National Union of Namibian Workers (NUNW)[228] challenged the exclusion of the labour laws in EPZs the result of which was a compromise to the effect that labour laws would be allowed to apply in the EPZs with strikes and lock-outs being outlawed for a period of five years.[229]

In 2001, the Namibian Ministry of Trade and Industry claimed to have won a N$1 billion project ahead of South Africa and Madagascar which had also been considered as an investment

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[222] Mintz-Habib "Multinational Corporations' Role in Improving Labour Standards in Developing Countries" http://www.academia.edu/204742/MULTINATIONAL (accessed 29-11-2012).

[223] The Malaysian Ramatex was established in Namibia under the Africa Growth and Opportunity Act (AGOA) in 2001.

[224] Namibian Export Processing Zones Act 9 of 1995.

[225] Jauch "Africa's Clothing and Textile Industry: The Case of Ramatex in Namibia" in Jauch and Traub-Merz (eds) *The Future of the Textile and Clothing Industry in Sub-Saharan Africa* (2006) 214.

[226] Ibid.

[227] Cappucio "Labour and Environment: The Ramatex Textile Factory Case" http://www.unep.org/labour_environment/TUAssembly/case_studies/Cappuccio-ITGLWF.pdf (accessed 29-08-2012).

[228] The National Union of Namibian Workers (NUNW) is a national trade union federation in Namibia. It was founded on 24 April 1971 by the then in exile, South West Africa People's Organization (SWAPO) and remains closely linked to the party. SWAPO has been the governing party in Namibia since achieving independence in 1990.

[229] Zapini 6.

location by Ramatex.[230] This was achieved by offering even greater concessions than those offered to other EPZ companies and an incentive package which included subsidised water and electricity, a 99-year tax exemption on land use as well as over N$100 million to prepare the site including the setting up of electricity, water and sewage infrastructure.[231] This was justified on the grounds that the company would create three thousand to five thousand jobs during the first two years and another two thousand jobs in the following two years.[232] Considering that Ramatex employed up to seven thousand workers at N$500 per month, the subsidy was equivalent to 34 months' wage bill.[233]

In 2003, five thousand jobs were created in Namibia whilst Ramatex closed its Tay Wah Textiles and May Garments operations in South Africa.[234] Two thousand five hundred jobs were lost in South Africa.[235] In 2005, two thousand more jobs were created in Namibia but they were for mostly migrant workers from Asia.[236] According to Zapini:

> "In 2008, workers were told to go home at 16h00, due to a power failure at the plant. When they returned the next morning they found the factory gates closed and were told that Ramatex had closed operations. Upon pressure by the Namibia government they receive one month's severance pay and one week's wage for each year of service."[237]

Cappucio also observed that Ramatex's operations in Namibia were fraught with complaints concerning poor labour practices related to low wages, unfair labour conditions and poor occupational health and safety standards.[238] What then did Namibia gain from pricing investors away from South Africa with lowered concessions to attract investment? Zapini observed that the:

> "'Beggar-thy-neighbour' investment incentive competition may even distort the international allocation of FDI away from destinations with a potentially higher return in terms of development and to investors, as well as a reduction of world efficiency and

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[230] Ibid.
[231] Cappucio 3.
[232] Zapini 6. See also Jauch 214.
[233] Ibid.
[234] Naruseb "The End of the WTO Fibre Agreement and its impact on the local Textile Industry - Implication on the Namibian Economy and Employment" http://www.sarpn.org/documents/d0001528/Namibia_WTO_Employment_Aug2005.pdf (accessed 30-08-2012).
[235] Jauch 214.
[236] Jauch 215. See also Labour Resource and Research Institute "Asian Migrant Workers at Ramatex" Report prepared for the International Labour Rights Fund 2005.
[237] Zapini 6.
[238] Cappucio 4.

> welfare as compared to the level which could be attained if countries agreed not to pursue such policies."[239]

Zapini's comments were in apparent reference to the withdrawal of Ramatex's subsidiary firms from South Africa resulting in the loss of two thousand five hundred jobs. The net effect of Ramatex's business practices and the Namibian government's concessions was the loss of an estimated total of nine thousand five hundred jobs between South Africa and Namibia in addition to the huge financial losses incurred by the Namibian government in setting up structures to lure Ramatex. Does such an approach lead to sustainable development? The Ramatex case draws similarities to the Chinese companies' threats to re-locate from South Africa to Lesotho and Swaziland where labour standards are lower than those currently required in South Africa.[240]

The effects of the Ramatex case were so devastating that the ILO was forced to seriously consider the need to develop feasible governance solutions to the bidding war to attract FDI.[241] The result was a FDI Policy Dialogue held in Johannesburg, South Africa, in August 2008 during the SADC meeting of Heads of State and Government.[242] Amongst the issues addressed was the question of whether or not there should be a development-friendly regional policy framework for investment. In addressing this question, the factors behind investment decisions and the attraction of FDI had to be established. The ILO and SADC sought to ascertain how the business environment impacts on the relationship between labour standards and FDI. Since SADC countries are ranked by both ease of doing business indicators and FDI inflows,[243] it had to be established whether there was a link between FDI flows and ease of doing business. Labour argued that contrary to neo-liberal theoretical expectations linking FDI flows to the ease of doing business, there was no relationship between the two.[244]

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[239] Zapini 4.

[240] See Chapter Six for a detailed analysis of the treats made by the Chinese owners of garments factories in Newcastle, Durban to relocate to either Lesotho or Swaziland where there are low labour standards in comparison to South Africa. Without multilateral regulation of a trade-labour linkage, it is going to be impossible to control the behavior of the Chinese with respect to their low compliance with labour standards in their business practices in the world.

[241] Zapini 7.

[242] The ILO and SADC signed a Memorandum of Understanding (MoU) which was renewed in 2008 with a view to addressing issues such as the Ramatex case.

[243] See the World Bank and the International Financial Corporation: Doing Business Report 2008 and United Nations Conference on Trade and Development (UNCTAD) World Investment Directory, Volume X, Africa 2008. See also World Bank and the International Financial Corporation: Doing Business Reports 2011 and 2012.

[244] Zapini 8.

A study conducted by Flanagan and Khor, and published in 2012 established key findings of great significance to this thesis. First, Flanagan and Khor revealed that 19th century globalisation included significant international capital flows, but most FDI flowed from capital-rich European countries to less-developed countries, where capital was scarce and its marginal value was accordingly high.[245] They also revealed that:

> "Following the interwar retreat from global economic activity, international capital flows regained their earlier peaks during the 1990s, but with a distinctive change in the destination of investments. Most capital no longer flows toward the least developed nations where capital is scarce. Capital-poor developing countries received less than a quarter of world FDI flows during the late 20th century."[246]

In 2003, Obstfeld and Taylor argued that, "...capital transactions seem to be mostly a rich-rich affair, a process of diversification finance rather than development finance."[247] A 2010 UNCTAD World Investment Report indicated that only in the early 21st century did the share flowing to developing countries begin to increase, although it had reached only a third of FDI inflows by the end of the century's first decade.[248] The entire continent of Africa received less than 4% of world inflows in 2007 to 2009, little different from the 1990s.[249] The Report also showed that while the volume of FDI received by Asian countries increased throughout the period, their share of FDI inflows changed little over the past 20 years and their share of the flows to developing countries declined.[250] The above highlighted data led Flanagan and Khor to conclude that:

> "Even this snapshot of FDI flows undermines the notion that countries with inferior labour conditions attract international investment flows. With most FDI now flowing between industrialised nations, which offer superior labour conditions, efforts to find cheap labour and weak labour standards cannot be the primary factor motivating the international distribution of FDI."[251]

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[245] Flanagan and Khor "Trade and the Quality of Employment: Asian and Non-Asian Economies" 2012 *Policy Priorities for International Trade and Jobs* 275.
[246] Ibid.
[247] Obstfeld and Taylor "Globalization and Capital Markets" in Bordo, Taylor and Williamson (eds) *Globalization* in *Historical Perspective* (2003) 175.
[248] See UNCTAD, World Investment Report 2010, Annex Table 1.
[249] Ibid.
[250] Ibid.
[251] Flanagan and Khor 275.

The findings of Flanagan and Khor are reflected in the Table 2 below.

Table 2. Foreign direct investment inflows, 1990-2009

Share of World FDI Inflows, percentages

	1990-1992	**1999-2001**	**2007-2009**
World	100.0	100.0	100.0
Developed countries	75.3	78.1	60.7
Developing countries	24.3	21.1	33.6
East Asia	6.3	8.2	9.9
South Asia	0.3	0.5	2.5
South-East Asia	7.4	2.2	3.2

Source: UNCTAD, World Investment Report 2010.

Flanagan and Khor also tested for the influence of several institutional and regulatory factors that might influence the costs of doing business in a country. Their analysis found that countries with large markets, low investment risks, and a large trade share of GDP attracted larger shares of FDI inflows.[252] They also found no significant correlation between any of the measures of labour skill and FDI inflow shares.[253] They then concluded that, "...at least in the early 21st century, there was no evidence that FDI was attracted to countries with abundant unskilled labour, *ceteris paribus* (All things being equal)."[254] They proceeded to make a preliminary assessment of the effect of national labour regulations on FDI. The result was that countries in which business executives believed that labour regulations do not hinder economic activity received a larger share of world FDI, other influences being equal.[255] They also observed that unlike other measures of labour regulation by country, this variable was available for several years, but it provided no indication of which labour regulations concern potential foreign investors the

[252] Flanagan and Khor 277.
[253] Ibid.
[254] Ibid.
[255] Ibid.

most.[256] Flanagan and Khor also tested for the influence of a country's labour conditions on FDI by adding measures of working conditions and labour rights to the baseline econometric model.[257] The results indicated that high FDI shares were not significantly correlated with poor labour conditions such as low pay, long working hours, and limited freedom of association rights.[258] This argument is sunstantiated by the data in Table 3 below.

Table 3. Trade and labour conditions, 2005-2009

Working conditions	In Per capita GDP	Trade share of GDP	Asia	Number of Countries
Hourly Pay	1.36 (.11)	-0.00015 (0.0035)	0.08 (0.26)	48
Annual Work Hours	-152.05 (57.44)	0.85 (-1.29)	-13.96 (107.23)	55
Labour Rights				
Civil Liberties	-0.46 (-0.63)	-0.01 (0.02)	1.94 (1.28)	56

Source: UNCTAD.

The estimates in Table 3 confirm the powerful effect of per capita GDP growth in improving working conditions. The estimates also indicate that trade expansion in early 21st century had only indirect effects on labour conditions via increased per capita GDP. They also reveal that the direct effect of trade expansion on labour conditions is positive. The above detailed information thus leads to the question of whether or not a social clause in the WTO legal framework would harm a developing region like SADC. The discussion follows.

7 3 2 Would a social clause in the WTO core agreements disadvantage SADC countries?

The incorporation of a social clause in trade agreements has been viewed as a legal arrangement which will make SADC countries suffer. However an analysis of how a social clause would ensure that child labour decreases and MNCs comply with labour standards will show that a

[256] Ibid.
[257] Ibid.
[258] Ibid.

social clause might not after all result in future economic losses for SADC countries. This chapter has revealed that child labour is one of the problematic forms of labour violations within SADC. Businesses as already shown in this chapter prefer child labour because it is cheap. SADC governments seem unable to regulate effectively against child labour as doing so is deemed as an act limiting family incomes in the poor region.[259] Such policy options will slow down the rate of elimination of child labour.

Developing country governments and international development agencies have long been aware that human capital accumulation, more than physical capital accumulation, is the mainspring of economic and civil progress.[260] However many children in poor developing countries fail to complete even primary education, and some do not go to school at all with child labour being inefficiently high as according to Baland and Robinson, "…parents are either credit or bequest constrained."[261] Fuwa *et al*[262] and Pouliot[263] demonstrated that parents' inability to insure against the risk of a low return causes education investment to be inefficiently low and child labour to be inefficiently high. Beegle *et al* established that parents respond to a negative income shock by making their children work more, suggesting that households cannot insure against that kind of risk either.[264] However, Fitzsimons reported that parents responded in this way to a downturn not in their own income, but in village aggregate income, suggesting that idiosyncratic income shocks are neutralized by informal insurance arrangements at the local level.[265] Insuring families against the risk of a downturn in parental income could lead to the reduction of child labour.[266]

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[259] Freedom House "The Global State of Workers' Rights: Free Labor in a Hostile World" www.freedomhouse.org/ (accessed 18-08-2012).

[260] Cigno "How to Deal with Covert Child Labor and Give Children an Effective Education, in a Poor Developing Country" 2011 *The World Bank Economic Review* 61.

[261] Baland and Robinson "Is Child Labor Inefficient?" 2000 *Journal of Political Economy* 663.

[262] Fuwa, Ito, Kubo, Kurosaki and Sawada "How Does Credit Access Affect Children's Time Allocation? Evidence from Rural India" 2009 Japan External Trade Organization, Institute of Developing Economies, Chiba, Japan Discussion Paper 183.

[263] Pouliot "Introducing Uncertainty in Baland and Robinson's Model of Child Labour" 2006 *Journal of Development Economics* 264.

[264] Beegle, Dehejia and Gatti "Child Labor and Agricultural Shocks" 2006 *Journal of Development Economics* 80.

[265] Fitzsimons "The Effects of Risk on Education in Indonesia" 2007 *Economic Development and Cultural Change* 25.

[266] Epstein and Kahana "Child Labor and Temporary Emigration." 2008 *Economics Letters* 545. See also Dessy and Rambeloma "Is Temporary Emigration of Unskilled Workers a Solution to the Child Labor Problem?" 2010

International trade can positively contribute towards increasing the incomes of parents hence ensuring that children concentrate on education with a view to improving the human capital of their countries which may boost future economic returns than working to increase family incomes for short term gains. However such a development can only produce the intended results if a social clause is incorporated in trade agreements. The simple reason for this argument lies in the attitude of MNCs and governments towards labour standards in developing countries. Flanagan and Khor made the following observations:

> "The impact of a multinational company on working conditions in a host country depends on the extent to which it must compete with other MNCs or host country firms for its workers and on the local elasticity of labour supply. If multinationals establish inferior conditions in newly-constructed plants, they will face recruiting and retention difficulties when competing with other firms for labour. If they instead acquire local companies and try to worsen working conditions, they will encounter increased quit rates as workers leave to join host country firms offering superior conditions."[267]

Flanagan and Khor further noted that:

> "Whether the arrival of MNCs can improve working conditions depends on labour supply conditions in the host country and the human resource management policies of the firm. In markets with a limitless supply of labour available at the current wage, increased labour demand from MNCs or host country firms will raise employment, but not wages. When workers require inducements to overcome the costs of changing employers, however, labour supply is less elastic, and increases in labour demand from MNCs will raise both wages and employment. When firms compete for labour, the effect of increased demand on wages depends on what workers are willing to accept-not on what firms may wish to pay."[268]

Their study led them to conclude that:

> "If MNCs do not compete with other firms for labour services, they may force labour conditions below competitive levels. Firms in isolated locations, such as some mining districts, may have such-monopsony power, but situations in which labour has no choice of employers seem too rare to accept monopsony as a general phenomenon. Indeed, by adding to the number of employers in a labour market, the arrival of MNCs should improve labour conditions by reducing monopsony power in host-country labour markets."[269]

Centre Interuniversitaire sur le Risque, les Politiques E´ conomiques et l'Emploi, Montre´al, Canada Cahiers de Recherche 1037.

[267] Flanagan and Khor "Trade and the Quality of Employment: Asian and Non-Asian Economies" 2012 *Policy Priorities for International Trade and Jobs* 279.

[268] Ibid.

[269] Ibid.

Flanagan and Khor made reference to the observations of Lipsey and Sjoholm who observed that, "It seems to be a universal rule that, in every country, foreign owned firms and plants pay higher wages, on average, than domestically owned ones. That is true not only in developing countries, but also in high income countries, such as Canada, the United States and the United Kingdom."[270]

Table 4. Ratio of compensation in Multi-National Corporations (MNCs) and local manufacturing in 2000 and 2008

	2000(a)	2008(b)	Average annual % Change
Bangladesh	21.29	19.28	-1.2
Brunei	8.48 a	15.23	11.4
China	7.24	3.10	-7.1
Hong Kong, China	2.24	2.27 b	0.2
India	11.63	11.43 b	-0.2
Indonesia	20.58	13.56	-4.3
Japan (1)	1.36	1.14	-2.0
Korea (1)	2.01	1.73	-1.7
Malaysia	2.66 a	2.29	-3.5
New Zealand (1)	1.24	1.08	-1.6
Philippines	4.99	3.22	-4.4
Singapore (1)	1.46	1.27	-1.6
Sri Lanka	21.25	11.39	-5.8
Taipei, China (1)	1.73	1.69	-0.2
Thailand	4.02	4.05	0.1
Viet Nam	3.62	6.87	11.82

a) 2000 data: Brunei-2001, Malaysia-2004.

b) 2008 data: Hong Kong-2007, India 2007.

Source: ILO

[270] Lipsey and Sjoholm "Foreign Direct Investment and Wages in Indonesian Manufacturing" (2001) National Bureau of Economic Research Working Paper No. 8299.

Some of the superior productivity and pay of foreign affiliates reflects differences in industry, firm size, and use of skilled labour.[271] Nevertheless, many studies find that foreign-affiliate pay premia (on the order of 3% to 5%) remain after controlling for differences in the characteristics of these MNCs and host-country firms.[272] The premia themselves may reflect the tendency of MNCs to provide more specific training than host-country firms and other unobserved workforce or management quality differences between foreign and domestic firms.[273] Evidence of this practice is reflected in Table 4. As such SADC governments must ensure that their concessions concerning FDI and their policies concerning the protection of labour standards in their countries must be in the best interests of their citizens. Such a principled disposition may ensure that the incomes that families receive are adequate to allow them educate their children leading to human capital investment for the countries and justifying the prohibition of child labour, a development which could lead to future sustainable development. However concessions such as those made in the Namibian Ramatex case, the state of child labour in the DRC, Zimbabwe and Malawi added to the Chinese trade practices in Zimbabwe, South Africa and Zambia amongst other issues discussed in this chapter may not be of great significance for SADC governments in pursuit of their aim of attaining development in their countries. It may thus be concluded that a social clause is likely to work in the best interests of SADC countries if they were to fully implement it. However, it is appropriate to question whether or not SADC countries and their African counterparts are ever going to recognise the significance of a social clause, let alone implement it?

This question is made all the more important when one considers that the SADC Social Charter's effects are hardly being noticed with working conditions in the region deteriorating and the proposed Tripartite Free Trade Area (TAFTA) for Africa[274] hardly showing any sign of sensitivity to the idea of a social clause. If the picture portrayed by the framework of the TAFTA is anything to go by, then a disturbing truth has been revealed which could depict African leaders

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[271] Flanagan and Khor 280.
[272] Ibid.
[273] Ibid.
[274] See the preamble of The Declaration Launching the Negotiations for the Establishment of the Tripartite Free Trade Area for Africa signed on the 12th of June 2011. The Tripartite Free Trade Area for Africa includes member states of the Common Market for Eastern and Southern Africa (COMESA), the partner states of the East African Community (EAC) and the member states of the Southern African Development Community (SADC).

as having lost sight of one key vehicle to development,[275] the protection of core labour standards in trade. Maybe the omission is temporal as the TAFTA was still in its infancy at the time of the writing of this thesis. A social clause could find its way into the TAFTA before it becomes operational, or a side agreement on labour could be drafted and adopted in due course. An examination of the TAFTA follows.

7 4 THE TRIPARTITE FTA FOR AFRICA (TAFTA)

As already alluded to in the previous chapter, regional trade agreements now incorporate social clauses to try and fill the gap created by the continued deadlock in efforts to incorporate a social clause into the multilateral trading system.[276] Whilst debates have been dragging on regarding the effectiveness of social clauses in protecting core labour standards in trade, they can still be viewed as a positive step in trying to address the violation of labour standards in trade. SADC in its agreement and later its Social Charter has also incorporated a social clause. However, the proposed TAFTA appears not to have followed this route. Its framework is clearly devoid of any allusion to a social clause. The Declaration launching the negotiations for the establishment of the TAFTA signed on the 12th of June 2011 (Herein after referred to as the Declaration) provides that the Heads of State or their elected representatives must:

> "1. Adopt a developmental integration approach built on three pillars of industrial development, infrastructure development and market integration;
> 2. Direct that a programme of work be prepared on the industrial development pillar;
> 3. Note progress made, and encourage further work, on the programmes on the infrastructure pillar;
> 4. Launch negotiations for the establishment of a Tripartite Free Trade Area open to participation by all Regional Economic Communities and/or Member and Partner States on the market integration pillar;
> 5. Note that the negotiations shall be Regional Economic Community and/or Member and Partner State driven and shall be in two phases
>
> a) The first phase will be for negotiations on trade in goods. Movement of business persons will also be negotiated during the first phase through a separate track in a committee to be established by the Tripartite Sectoral Ministerial Committee;

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[275] Jansen and Von Uexkull "Trade and Employment in the Global Crisis" 2010 *International Labour Office; Academic Foundation-Geneva: ILO* 19. Jansen and Von Uexkull noted that: "Over the past decades trade has played an increasingly important role in the world economy and has contributed significantly to economic growth, both at the global level and within individual countries. Many people have benefitted from trade through increases in wages and household incomes, and this has in particular been the case for those involved in export-related activities."

[276] See chapter 5.

b) The second phase will cover the built-in agenda in services and trade-related areas.

6. Agree on the principles for the negotiations; a Roadmap providing the timelines for key activities relating to the negotiations and their conclusion; and the implementation of the outcomes as well as the institutional framework for the negotiations."[277]

From the provisions of the Declaration, there is no clear reference to a social clause. One would by inference assume that a social clause could be dealt with in terms of Article 5(b) which makes reference to "trade-related areas". From this perspective, one could view trade-related areas to include labour standards. However when reference is made to the Guidelines for Negotiating the Tripartite Free Trade Area among the Member/Partner States of COMESA, EAC and SADC (Herein after referred to as the Guidelines),[278] there appears to be a list of trade-related areas. The Guidelines provide that: "The second phase will cover negotiations on the following areas: trade in services, intellectual property rights, competition policy, and trade development and competitiveness."[279] Assuming this provision contains a closed list of trade-related areas, it may be correct to contend that a social clause may have been excluded from the TAFTA. However, when one considers the area of "trade development and competitiveness", a social clause could be inferred as falling within the scope of the TAFTA.

But, the rationale behind not making direct reference to a social clause in the TAFTA by the African States must be established. Clearly when one also makes reference to the Memorandum of Understanding between The Department for International Development of the United Kingdom and The Tripartite Task Force of The Common Market for Eastern and Southern Africa, The East African Community and The Southern African Development Community,[280] there is no reference to labour matters at all. The basis of the partnership is given as working towards eradicating poverty, promoting economic growth and regional integration in

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[277] See The Declaration Launching the Negotiations for the Establishment of the Tripartite Free Trade Area for Africa signed on the 12th of June 2011 Articles 1, 2, 3, 4, 5 and 6.

[278] See the Tripartite Free Trade Area Negotiating Principles, Processes and Institutional Framework of 12 June 2011.

[279] See Article 2(iii) of the Tripartite Free Trade Area Negotiating Principles, Processes and Institutional Framework.

[280] See The Memorandum of Understanding (Herein after referred to as the MoU) between The Department for International Development of the United Kingdom and The Tripartite Task Force of The Common Market for Eastern and Southern Africa, The East African Community and The Southern African Development Community signed on the 27th of January 2010.

East and Southern Africa.[281] Maybe the TAFTA will eventually have a side agreement on labour as an appendage. But a question that quickly comes to mind is why African states did not prioritize the interface between trade and labour in a region majority of whose inhabitants survive on less than a dollar per day?

If developing countries labeled the trade-labour linkage as a North-South debate, could the omission of a "direct reference" to a social clause be a manifestation of the views of developing countries to exclude labour matters from all their trade agreements, even amongst fairly equal partners? If it is, then some developing countries have not been sincere in their arguments against a trade-labour linkage. This gives credence to the argument that debates concerning a trade-labour linkage also include the violation of labour standards in trade between developing countries which in turn raises doubts about the credibility of the argument that a social clause will be used as a protectionist mechanism by developed countries against developing countries.

However, since the TAFTA is still at its inception stage, it may be improper to reach definite conclusions as to whether or not there is room for a social clause in its framework since the North American Free Trade Agreement later established the North American Agreement on Labour Co-operation (NAALC) as a side agreement. It would be wise for African countries to draw lessons from other trade agreements which have successfully incorporated a social clause. The successes obtained in other regional trade agreements such as the NAALC, USA-Cambodia Textile Agreement,[282] ASEAN Agreement,[283] USA-Chile Trade Agreement[284] amongst others raises serious questions as to whether or not adequate effort is being made by policy makers in Africa to dedicate sufficient time and resources to research work which could guide them in making policy decisions informed by their societal contexts and demands. Cases of violation of core labour standards in Southern Africa might just be an indication that free trade alone is not the answer to the growth challenges of developing countries' economies but a balance between

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[281] See Article 2 of the MoU.

[282] Polaski *Protecting Labor Rights Through Trade Agreements; An Analytical Guide* (2004) 21f. See also Wells *"Best Practice" in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement* (2006) 363.

[283] Lukas and Steinkellner "Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements" 2010 *Lugwig Boltzman Institute of Human Rights* 6.

[284] Grandi "Trade Agreements and their Relation to Labour Standards. The Current Situation" http://ictsd.org/downloads/2009/11/lazoweb_final_opt.pdf (accessed 10-08-2012).

free trade and trade-related areas such as labour. Could this provide sufficient basis for developing countries to review their position regarding trade-labour linkage in trade? This issue will not go away and at some point in the not so distant future, core labour standards might become a feature of the WTO system. As already indicated in this chapter, some countries are using trade measures to address the problem of the use of child labour for significant economic gains.[285] This argument becomes more appealing if one considers that the recently published Economic Report for Africa for the year 2012 strongly recommends a change in the approach taken by African countries concerning human capital development.[286]

Measured against the Economic Report for Africa, the fact that the agreement establishing the TAFTA clearly excludes a direct reference to labour matters might be a sign that African countries are not willing to ensure a balance between trade and the protection of core labour standards.[287] Further, the fact that other areas linked to trade such as the environment have been included might be a clear indication that the exclusion of a direct reference to a social clause was deliberate. Should this be the position, it might be an opportunity lost in trying to alleviate poverty in Africa and ensure development through trade.

7 5 IS THE WTO LIABLE FOR THE VIOLATION OF CORE LABOUR STANDARDS IN TRADE RELATED MATTERS IN SADC

The WTO currently does not have jurisdiction over labour standards.[288] In 1999, four years after the formation of the WTO, Wilkinson made reference to increasing calls for action on the labour standards issue, and requests for a "human face on the world economy".[289] The United Nations (UN) also added its criticism of the current WTO system, and called for a shift to a human rights oriented approach to trade, with steps to be taken, "....to ensure that human rights principles and obligations are fully integrated in future negotiations in the WTO, as the primacy of human rights law over all other regimes of international law is a basic and fundamental principle that

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[285] See the Global Report on Child Labour 2010 74.
[286] See Economic Commission for Africa 113.
[287] See the Agreement Establishing the TAFTA of 2009.
[288] See GATT Article XX (e) "relating to the products of prison labour" which is the only place in which labour standards are mentioned in the entire set of WTO Agreements.
[289] Wilkinson "Labour and Trade Related Regulation: Beyond the Trade-Labour Standards Debate?" 1999 *British Journal of Politics and International Relations* 165.

should not be departed from".[290] It is clear that states have both a legal and a moral obligation to uphold human rights standards, inclusive of their activities in the economic sphere. The UN Charter states that, "...in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".[291] The UN Charter explicitly advocates the upholding of human rights and fundamental freedoms.[292] This should be taken to mean that respect for human rights, and in particular, labour standards, effectively supersedes any conflicting WTO obligations. Such a position however may be different with respect to WTO members who are not members of the UN which scenario does not apply to SADC countries.

Charnovitz, a former Director of the Global Environment and Trade Study (GETS)[293] has claimed that the issues of labour and environment are steadfastly ignored.[294] He argued that the WTO, "...should begin to address the link between trade and labour and environmental concerns."[295] He also argued that, "...in the absence of proper environmental regulation and resource management, increased trade might cause so much adverse damage that the gains from trade would be less than the environmental costs."[296] In 2006 Kennedy argued that, "Labour unions condemn the labour rights record of developing countries, arguing that to the extent the WTO succeeds at promoting globalization do the environment and labour rights suffer in equal measure."[297] However, Khor adopted a different perspective from Charnovitz and Kennedy. He argued that, "If environment and labour were to enter the WTO system ... it would be

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[290] Ibid.

[291] See Chapter XVI, Article 103 of the Charter of the United Nations. The Charter of the United Nations is the foundational treaty of the international organization called the United Nations. It was signed at the San Francisco War Memorial Veterans Building and Performing Arts Center in San Francisco, United States, on 26 June 1945. It entered into force on 24 October 1945. As a charter, it is a constituent treaty, and all members are bound by its Articles.

[292] See the preamble of the Charter of the United Nations and Article 62(2).

[293] See the Global Environment and Trade Study, 1995-1996 Biennial Report 2. The Global Environment and Trade Study (GETS) was a non-profit research institute established in 1994 to study the complex linkages between international trade and environmental sustainability.

[294] Charnovitz "Labor and Environmental Issues" http://www.charnovitz.org/IIE.htm (accessed 29-08-2012).

[295] Ibid.

[296] Ibid.

[297] Kennedy "The World Trade Organization: Ultimate Arbiter of International Sanitary and Phytosanitary Standards?" in Lawrence (ed) *Agricultural Standards: The Shape of the Global Food and Fiber System* (2006) 46.

conceptually difficult to argue why other social and cultural issues should also not enter."[298] Khor also argued that, "...trade measures have become a vehicle for big corporations and social organizations in promoting their interests."[299]

Bhagwati appeared to support Khor's view and was also critical of what he regarded as, "...rich-country lobbies seeking on imposing their unrelated agendas on trade agreements."[300] According to Bhagwati, these lobbies and especially the "...rich charities have now turned to agitating about trade issues with much understanding."[301] Bhagwati then concurred with Panagariya in their criticism of the introduction of Trade-Related Aspects of Intellectual Property Rights (TRIPS)[302] into the WTO framework, fearing that such non-trade agendas might overwhelm the organization's function. According to Panagariya, "Taken in isolation, TRIPS resulted in reduced welfare for developing countries and the world as a whole."[303] Bhagwati argued that, "Intellectual property does not belong in the WTO, since protecting it is simply a matter of royalty collection ... The matter was forced onto the WTO's agenda during the Uruguay Round by the pharmaceutical and software industries, even though this risked turning the WTO into a glorified collection agency."[304] Whilst they are worth noting, Bhagwati and Panagariya's views do not appropriately recognise the links that exist between trade and non-trade related areas. They also do not consider the advantages which could be realized through the effective implementation of the TRIPS.[305]

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[298] Khor "The WTO's Doha Negotiations and Impasse: A Development Perspective" 2006 *Third World Network* 16.
[299] Ibid.
[300] Bhagwati "Reshaping the WTO" 2005 *Far Eastern Economic Review* 28.
[301] Ibid.
[302] The TRIPS Agreement came into effect on 1 January 1995 and is a comprehensive multilateral agreement which deals with all aspects on intellectual property.
[303] Panagariya "TRIPS and the WTO: an Uneasy Message" http://www.twnside.org.sg/title/davos2-cn.htm (accessed 18-08-2012).
[304] Bhagwati "From Seattle to Hong Kong" 2005 *Foreign Affairs* 15.
[305] See Mercurio "Resolving the Public Health Crisis in the Developing World: Problems and Barriers of Access to Essential Medicines" 2007 *Northwestern University Journal of International Human Rights* 1. Mercurio observed that, "…appropriate national legislation, providing for compulsory licensing and parallel imports, is needed to ensure that chemical intermediates, raw materials and finished pharmaceutical products are available at competitive prices in the world market." However, Mercurio also points out that developing countries have not taken it upon themselves to maximize the benefits of the TRIPs a situation he views as sad as developing countries are supposed to be the beneficiaries of the TRIPs. Developing countries have the fear that the TRIPs would prevent them from developing for example their own public health legislation(s). The views of developing countries could be justified as there is a view that TRIPs should place intellectual property rights protection in the context of the public interest of social and economic welfare. See Asia Pacific Research Network "Re-

The differences in opinions concerning key issues in the WTO as indicated above leads to another point of criticism leveled against the WTO. There is a serious lack of consensus in decision making which currently faces the WTO. In the year 2000, green room[306] discussions in the WTO were branded as unrepresentative and non-inclusive by Blackhurst.[307] Furthermore, the existence of more active participants, representing more diverse interests and objectives has complicated WTO decision-making and the process of consensus-building appears to have broken down.[308] Blackhurst then concluded that the WTO thus could be viewed as being a non-transparent international organisation because the vast majority of developing countries have very little real say in the WTO system.[309] The apparent lack of consensus has indeed affected the trade-labour linkage debate. Contrary to Blackhurst's assertion that the majority of developing countries have very little real say in the WTO, the developing countries have been leading the resistance to a trade-labour linkage in the WTO.

Could it be that the powerful countries in the world who are member states of the WTO have so far given in to the resistance of developing countries knowing fully well that such position greatly benefits them? If one considers that MNCs come from the developed countries, then perhaps this view could be plausible. This can only lead to the conclusion that the WTO could indeed be playing a role in addressing the problems faced in developing regions such as the SADC through adopting trade policies that facilitate realisation of the development agenda of such countries. However, the lack of consensus concerning the trade-labour linkage also partly shifts the criticism to the WTO member states, whether developed or developing, for not taking serious steps to address unfair trade practices that lead to businesses profiteering at the expense

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thinking TRIPs in the WTO: NGOs Demand Review and Reform of TRIPS at Doha Ministerial Conference" http://www.aprnet.org/index.php?a=show&t=issues&i=21 (accessed 25-11-2012).

306 The Green Room refers to a process, rather than a specific location, in which heads of delegation seek consensus informally under the chairmanship of the WTO Director-General. The term "Green Room" has its origins in British theatre and refers to the room where performers would wait when they were not needed on stage. Green Room meetings serve a useful purpose in that their informal nature allows negotiators to explore new approaches to settling difficult issues. Ministerial Green Room consultations deal with the most sensitive political issues, including tariff or subsidy cuts, or the degree of flexibility regarding those cuts. See also Jones "Green room politics and the WTO's crisis of representation" 2009 *Progress in Development Studies* 349.

307 Blackhurst "Reforming WTO Decision Making: Lessons from Singapore and Seattle" 2000 Center for Research on Economic Development and Policy Reform Working Paper No. 63 20.

308 Ibid. See also Patel "New Faces in the Green Room: Developing Country Coalitions and Decision-Making in the WTO" Global Economic Governance Working Paper Series 2007/WP33.

309 Ibid.

of poor workers. Surely some form of compromise could be reached in the best interests of both developed and developing countries otherwise the WTO may lose its credibility.

7 6 CONCLUSION

This chapter analysed the linkage between trade and labour standards from a Southern African perspective with a view to showing that it may be necessary for the multilateral trade system of the world to adjust to the new realities of the linkages that exist between itself and other disciplines such as labour. Developing countries have strongly resisted such a linkage arguing that it is a threat to their competitive advantage based on cheap labour. The chapter showed that most Southern African countries have ratified the key ILO core labour standards Conventions and have labour legislations that capture the objectives and essence of those Conventions. However the chapter showed that most of the countries are reluctant to enforce the labour standards in favour of quick economic gains without paying much attention to the future as proposed by the 2012 Economic Report for Africa. This could suggest that domestication of the core ILO Conventions without their enforcement by international institutions such as the WTO might not lead to the attainment of the Conventions' intended objectives. The Bretton Woods institutions have not made the situation any easier by proposing labour market flexibility as a precondition for countries' ability to access development loans. Modern day trade has become very different and more multifaceted than it was before. In that sense, trying to isolate certain institutions from recognising core labour standards might be an act of rendering them inefficient in practice.

It was also the objective of this chapter to show that the failure of sustainable economic growth to take hold in the SADC countries could demonstrate free trade's inability to deliver on its key objective of bringing prosperity to the poor. It has also been made clear that the new global economy forces SADC countries to compete based on their willingness to offer the lowest possible wages to multinational firms, ensuring that workers remain poor. Accordingly, it is proper to observe that if the major goal of the trading regime is to eradicate poverty, then there is a need to make explicit in the trading rules an enforceable social clause that prevents the worst forms of worker exploitation and protects fundamental labour rights.

Furthermore, the chapter showed that even though developing countries have a "weaker capacity" to implement core labour standards in trade than developed countries, they need not fear a trade labour linkage but should rather see it as an important vehicle for development. If not, global economic growth might take place with little or no tangible benefits to the majority of people in Africa. The harnessing of all development strategies which drive the development agenda of developing countries must be made a priority by SADC countries. As the analysis of violations of core labour standards in Southern Africa has shown, countries like the Democratic Republic of China and other private actors stand to benefit at the expense of African people. Clearly, there have been little or no attempts to vigorously support a trade labour linkage in Southern Africa with the exception of South Africa. This has resulted in the social clause incorporated in the SADC agreement and its Social Charter bearing little fruit.

It is also disappointing that there is a reluctance to accept the inclusion of a social clause in trade agreements amongst African countries which could explain why the proposed TAFTA currently excludes any direct reference to a social clause resulting in a missed opportunity to exploit the opportunities offered by the agreement to the countries for the promotion of labour standards. This would have been an opportunity to dismiss arguments that developing countries are naive and not genuine in their calls against the inclusion of a social clause in the WTO system. The TAFTA could have shown how deep regional integration amongst African countries themselves could be pursued in a strategic and selective manner that advances the protection of core labour standards in trade. Perhaps it is an area which the TAFTA Member States will fully consider in due course.

Clearly trade gains should now be balanced with human rights protection. The next chapter will thus look at the practical implications of a contemporary trade labour linkage provision in the WTO system. The chapter will seek to show that it is practical to incorporate social clauses in multilateral trade agreements since labour market policies related to trade cannot be dealt with at the national level alone. Broader policies concerning a trade-labour linkage should be formulated at the multilateral level to complement trade-labour linkage arrangements already in place at the regional level. Considerable opportunities exist for policy makers to analyse in-depth how and why regional policy coordination and policy making is being pursued differently in different regions and how such policy formulations could be

integrated and implemented on a multilateral level. Only then will developing countries be able to grasp the potential significance of a trade-labour linkage in ensuring human and economic development in the world.

CHAPTER EIGHT

Practical Implications of Incorporating a Social Clause in the World Trade Organisation

8 1 INTRODUCTION

The World Trade Organisation (WTO) as a multilateral trade institution has tried to give consideration to the trade-labour linkage proposals.[1] However, Member States of the WTO have failed to reach a consensus on the need to link trade to labour standards.[2] As a result of the lack of consensus, a multilateral legal framework to address concerns related to trade distortions having direct, negative impacts on core labour standards is yet to be established. However, it is clear that there might now be need for a new social contract for countries in the world to address and/or reduce the inequitable as well as unacceptable imbalances between those who own businesses in the world and the workers.[3] Recently, the European Union (EU) acting under the Treaty on the Functioning of the European Union,[4] recommended that the International Labour Organisation (ILO) be given Observer Status at the WTO as a matter of priority and should gradually become involved in its trade policy review mechanism.[5] The European Economic and Social Committee also recommended that the United Nations (UN) draw up a global charter setting out a minimum number of rights linked to the ILO's Social Protection Floor initiative,[6] which could be appended to the Millennium Development Goals review scheduled for 2015.[7]

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1 See Charnovitz "Triangulating the World Trade Organization" http://www.asil.org/ajil/wto3.pdf (accessed 07-08-2012).

2 See Lim "The Social Clause: Issues and Challenges" http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/hoelim.htm (accessed 07-08-2012).

3 See Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services which both highlight the importance of balancing trade and non-trade policies. It must be submitted that the WTO is not a perfect organisation which must from time to time be reformed in order to adhere to the aims and objectives it has been established for (depending on the circumstances, in this case, the challenges brought about by the process of globalisation).

4 See Article 304 of the Treaty on the Functioning of European Union of 1958.

5 European Union "Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy" 2012 *Official Journal of the European Union* 73.

6 The Social Protection Floor is a United Nations initiated global social policy approach promoting integrated strategies for ensuring access to essential social services and income security for all. See ILO "ILO-UN Social Protection Floor Initiative: The role of social security in crisis response and recovery, and beyond" http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_141818/lang--en/index.htm (accessed 9-09-2012).

7 European Union para 1.5.

The global charter is intended to provide a coherent link between the commitments on trade and development.[8]

The proposals by the European Union suggest that a social clause might soon form part of the WTO's legal framework. Negotiations on climate and environment[9] also highlight the practicality of developing a new WTO framework which contributes to a more socially sustainable growth and economic development.[10] Therefore, this chapter will examine the WTO's capacity to protect core labour standards in trade. Its objective is to argue for the transformation of the WTO from a traditional trade centred institution into a dynamic institution which will supplement efforts currently being made by the ILO in trying to advance workers' rights in the face of the current global economic crisis. It is important to note that the WTO has the power to review nations' domestic laws that create unfair trade advantages which could potentially include labour laws.[11] With trade continuously overlapping with non-trade areas, the WTO could re-define fair trade to include the protection of core labour standards. A trade-labour linkage would be a historic change in the world's multilateral trading regime.

It is apparent that gains from trade are well known from a business point of view.[12] However, what is less valued is that resources generated from trade present governments with an opportunity to broaden the scope of their political choices beyond the sphere of trade and respond to new challenges, such as raising social and humanitarian standards and for purposes of

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[8] Ibid.

[9] See WTO "Negotiations on Trade and Environment" http://www.wto.org/english/tratop_e/envir_e/envir_negotiations_e.htm (accessed 12-08-2012). The negotiations on trade and the environment are part of the Doha Development Agenda launched at the Fourth WTO Ministerial Conference in Doha, Qatar, in November 2001. The overarching objective is to enhance the mutual support of trade and environmental policies.

[10] See WTO "The WTO and Millennium Development Goals" http://www.wto.org/english/thewto_e/coher_e/mdg_e/mdg_e.pdf (accessed 20-08-2012). See also United Nations "The Future We Want" http://www.uncsd2012.org/content/documents/370The%20Future%20We%20Want%2010Jan%20clean%20_no%20brackets.pdf (accessed 20-08-2012).

[11] See WTO "Evolving Debates on Trade and Labour Standards" http://www.wto.org/english/forums_e/ngo_e/posp63_ioe_e.pdf (accessed 15 August 2012). See also Howse "The World Trade Organisation and the Protection of Workers' Rights" http://worldtradelaw.net/Articles/howseworkers.pdf (accessed 15-08-2012).

[12] Corcos, Del Gatto, Mion and Ottaviano "Productivity and Firm Selection: Quantifying the 'New' Gains from Trade" 2012 *Economic Journal* 754. See also Melitz and Ottaviano Market Size, Trade and Productivity (2008) 295 and Melitz, Marc, and Trefler "Gains from Trade When Firms Matter" 2012 *Journal of Economic Perspectives* 91.

this study, the protection of core labour standards.[13] It should be appreciated that the multilateral trade system is not only of significance to achieving trade goals but to realizing national objectives in other areas where governments aim to maintain orderly international relations and encourage international policy coordination.[14] The trading system has the potential to increase international solidarity and provide a long-term basis for countries to remain on friendly terms with their neighbours with friendship being the best possible foundation from which to exert moral influence and build mutual respect.[15] Obstructing the functioning of the trade system in any significant way would most certainly mean closing off opportunities to agree on other international policy objectives in a cooperative spirit with one's trading partners.[16] Re-emphasizing the significance of trade in this manner must not be taken to imply that trade is positioned higher than other international policy objectives. This chapter will examine practical implications of incorporating a social clause into the WTO framework. It starts by evaluating misconceptions related to the likely outcomes of incorporating a social clause into the WTO framework.

8 2 MISCONCEPTIONS CONCERNING THE SOCIAL CLAUSE

There are a significant number of misinterpretations and/or misconceptions concerning the scope and implications of a social clause in the WTO. Opponents to incorporating a social clause into the WTO framework have often argued that no consensus exists on what constitutes core labour

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[13] Vos, Ganuza, Morley and Robinson *Who Gains from Trade Liberalisation? Export-led Growth and Poverty in Latin America* (2004) 30. See also Behrens and Murata "Globalization and Individual Gains from Trade" 2009 *Centre of Economic Policy and Research Discussion Paper* 7438 and Andrews, Das, Elder, Ovadiya and Zampaglione "Social Protection in Low Income Countries and Fragile Situations: Challenges and Future Directions" Background Paper for the World Bank 2012-2022 Social Protection and Labour Strategy 3.

[14] See the United Nations Conference on Trade and Development (UNCTAD) Report on the third UNCTAD Public Symposium: Making Trade and Finance work for People and the Planet 2011 14. See also the International Centre for Trade and Sustainable Development (ICTSD) "The Future and the WTO: Confronting the Challenges" http://ictsd.org/downloads/2012/07/the-future-and-the-wto-confronting-the-challenges.pdf (accessed 17-08-2012).

[15] Holzer and Shariff "The Inclusion of Border Carbon Adjustments in Preferential Trade Agreements: Policy Implications" Swiss National Centre of Competence in Research Working Paper No 2012/16. See also World Trade Report 2011 "The WTO and preferential trade agreements: From Co-existence to Coherence" 6 and European Commission "Global Europe: Competing in the World - A contribution to the EU's Growth and Jobs Strategy" http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf (accessed 20-08-2012).

[16] UNCTAD "Trade and Development Report, 1981-2011: Three Decades of Thinking Development" http://unctad.org/en/PublicationsLibrary/gds2012d1_en.pdf (accessed 18-08-2012).

standards,[17] that a social clause will destroy the world trading system,[18] lead to a global minimum wage, undermine national sovereignty, and slow down economic growth. These and other misconceptions concerning the impact of incorporating a social clause into the WTO are examined below.

8 2 1 Absence of consensus on what constitutes core labour standards

According to Lee, the claim that a consensus on core labour standards is not practical is "puzzling" since it is evident that such a consensus not only exists but has existed for decades.[19] Tsogas has noted that the ILO's membership is nearly universal amongst developed and developing countries, a notion which implies acceptance of the principles enshrined in the ILO Constitution such as freedom of association, the right to collective bargaining, and the rejection of inhumane treatment of labour.[20] Lee has opined thus:

> "These principles have never been questioned; on the contrary they have…been reaffirmed repeatedly…in the Declaration of the World Summit on Social Development and the Singapore meeting of the WTO. This must indicate that some genuine, unforced consensus exists on labour standards. The argument that workers of different nationalities or races should be treated differently is extremely dangerous."[21]

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[17] WTO "Labour Standards: Consensus, Coherence and Controversy" http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (accessed 18-08-2012).

[18] Kolben "The New Politics of Linkage: India's Opposition to the Worker's Rights Clause" 2006 *Indiana Journal of Global Legal Studies* 226.

[19] Lee "Globalization and Labour Standards: A Review of the Issues" 1997 *International Labour Review* 184. See also Trebilcock *Understanding Trade Law* (2011) 173. Trebilcock also shares Lee's views and opined that, "…the precise content of several of the core labour standards (and indeed the scope of international human rights more generally) is subject to debate." However, Lee and Trebilcock's views could be disputable as core labour standards are identified in the ILO Declaration and the Universal Declaration of human rights. In addressing the trade-labour-linkage debate, care must be taken not to generalize all labour standards as core labour standards. Core labour standards are fundamental principles that protect basic human rights in the labour market. Their aim is given as follows: 1) eliminating all forms of forced or compulsory labour; 2) effectively abolish child labour; 3) eliminating discrimination in respect of employment and occupation; and 4) ensuring the freedom of association and the right to collective bargaining. The specific definitions of the core labour standards are then spelt out in the ILO's eight core labour standards conventions which are: 1) The Elimination of Forced and Compulsory Labour Conventions 29 and 105; 2) Abolition of Child Labour Conventions 138 and 182; 3) Elimination of Discrimination in Respect of Employment and Occupation Conventions 100 and 111; and 4) Freedom of Association and Collective Bargaining Conventions 87 and 98. One would assume that the above should serve as adequate guidelines of what constitutes core labour standards.

[20] See the preamble of the ILO Constitution which entered into force on 4 June 1934. See also Tsogas "Labour Standards in International Trade Agreements: An Assessment of the Arguments" 1999 *The International Journal of Human Resource Management* 366.

[21] Lee 184.

It is worrying to hear suggestions that core labour standards are inherently "culturally" unequal.[22] The universality of labour standards has been specifically addressed within the ILO framework through the Declaration of the Fundamental Principles and Rights at Work[23] and is widely recognised to be of particular importance.[24]

ILO Conventions also contain a built-in flexibility which makes them applicable for all countries whatever their level of development.[25] They are universally applicable, regardless of whether the relevant Conventions have been ratified, the level of development of a country or its cultural values.[26] The ILO points out that, "These standards are composed of qualitative, not quantitative standards and do not establish a particular level of working conditions, wages or health and safety standards. They are not intended to undermine the comparative advantage that developing countries may hold."[27] Core labour standards are important human rights and are recognised in widely ratified human rights instruments including the Convention on the Rights of the Child (CROC), the most widely ratified human rights treaty with 193 parties, and the International Covenant on Civil and Political Rights (ICCPR) with 160 parties.[28] The core labour standards are: freedom of association;[29] the right to collective bargaining[30]; the prohibition of all forms of forced labour[31]; the elimination of the worst forms of child labour[32]; and non-discrimination in employment: equal pay for equal work.[33]

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[22] Tsogas 366.

[23] See International Labour Organisation (ILO) "Core Labour Standards Handbook" http://www.adb.org/Documents/Handbooks/Core-Labor-Standards/default.asp (accessed 12-08-2012).

[24] See Organisation for Economic Cooperation and Development "Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade" 1996 248.

[25] Tsogas 366.

[26] See the principles on labour in business adopted by the United Nations Global Compact http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/labourStandards.html (accessed 20-08-2012).

[27] See Asian Development Bank and ILO Core Labour Standards Handbook (2006) 10.

[28] See Office of the United Nations High Commissioner for Human Rights, Ratification and Reservations: Convention on the Rights of the Child, http://www.ohchr.org/english/countries/ratification/11.htm (accessed 19 - 08-2012). See also Office of the United Nations High Commissioner for Human Rights, Ratification and Reservations: International Covenant on Civil and Political Rights, http://www.ohchr.org/english/countries/ratification/4.htm (accessed 19-08-2012).

[29] See ILO Convention 87. See also Article 22 of the International Covenant on Civil and Political Rights (ICCPR). The right to Freedom of Association entails that workers may join trade unions that are independent of government and employer influence.

[30] See ILO Convention 98. See also ICCPR Article 22. The right to Collective Bargaining entails that workers may negotiate with employers collectively, as opposed to individually.

[31] See ILO Convention 105. Forced labour includes issues related to security from prison labour and slavery, and prevents workers from being forced to work under duress.

Whilst it is acknowledged that a few ILO member countries have not ratified all of these Conventions due to domestic constraints the fact that the rights contained in the conventions are also recognised in the Universal Declaration for Human Rights, and form a part of customary international law implies that all countries in the world are committed to respect these rights. The ILO in its supervision of the standards does not attempt to impose a global harmonization of labour laws but rather examines whether the effects of such laws and their practice achieve the objective for which the conventions were promulgated.[34] This understanding must be embraced concerning proposals to incorporate a social clause into the WTO framework. The strength of ILO Conventions is that they summarize core values which enable trust and respect between nations, a prerequisite for an effective multilateral trade regime to evolve as a solid foundation for co-operation.[35]

"Culture" has been customarily advanced as the basis for employing child labour, advancing poverty wages to workers and subjecting them to unhealthy employment conditions.[36] Tsogas has observed that, "The fatalistic argument goes like this; it is just the way things are done here, so nothing much can be done."[37] Nichols noted that, "…the truth of the matter is that no culture considers factory work a desirable experience for children, condones the payment of poverty wages, or approves of working in unhealthy conditions."[38] Tsogas has summed up by arguing that:

> "All these are economic choices. Nevertheless…not everyone seems able to distinguish (or at least so it appears) what constitutes a cultural attribute and what is, in effect, an economic choice that can maintain wages and working conditions at an artificially low level."[39]

Yeager and Tuerck have argued that:

> "There would be a genuine distortion only if the especially low wages were due to something else than supply and demand factors (including productivity). It is hard to

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[32] See ILO Convention 138. See also Convention on the Rights of a Child (CROC) Article 32. The elimination of the worst forms of child labour requires countries to implement a minimum working age and certain working condition requirements for children

[33] See ILO Convention 100 and 111.

[34] Tsogas 366.

[35] Ibid.

[36] Ibid.

[37] Ibid.

[38] Nichols "Third-World Families at Work: Child Labour or Child Care?" 1993 *Harvard Business Review* 21.

[39] Tsogas 366.

> imagine what this 'something else' might be. One conceivable possibility would be an effective conspiracy among employers in the particular foreign industry to hold down wages and keep the workers ignorant of better opportunities in other jobs. . . . Removal of the wage distortions and correction of the price signals would benefit the exploited … workers and their country as a whole."[40]

Whether the above arguments sound like a conspiracy theory or not, Tsogas maintains that it is not at all difficult to see that this "something else" referred to by Yeager and Tuerck that keeps wages and conditions of employment artificially low is not "culture" or "the way things are done here", but oppressive regimes that deny their citizens basic human rights and forbid unions and collective bargaining, often with the active support, encouragement or non-involvement of Multi-National Companies (MNCs).[41] Removing these distortions and reinstating universally accepted basic human rights in trade would certainly benefit workers and their countries.[42] Accordingly, there is actually more agreement than there is disagreement on what constitutes core labour standards. Tsogas notes importantly that core labour standards represent basic human rights and should not be confused with labour codes governing pay, working-time, health and safety, welfare and social security.[43] Undoubtedly, there is general acceptance among Member States of the UN, even those that have not acceded to the International Covenant on Civil and Political Rights (ICCPR)[44] and International Covenant on Economic, Social and Cultural Rights (ICESCR),[45] of the universality of the human rights embodied in these core labour standards.[46]

8 2 2 Low wages lead to economic success

Governments of developing countries insist that low wages form part of their competitive advantage in trade. However, Tsogas has argued that if low wages automatically translated into economic success, then the world's poorest countries would be economic superpowers.[47] They

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[40] Yeager and Tuerck *Foreign Trade and U.S. Policy: The Case for Free International Trade* (1976) 136.
[41] Tsogas 367.
[42] Ibid.
[43] Tsogas 366.
[44] The ICCPR is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and came into force on 23 March 1976. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial.
[45] The ICESCR was adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976.
[46] Tsogas 366.
[47] Tsogas 356.

are not, because differences in wages reflect differences in productivity.[48] Low wages tend to go hand in hand with low productivity.[49] Countries must not lower wages but raise productivity.[50] A practical example of how increase in productivity leads to economic success is offered by Brazil. Brazil's minimum wage policy which is regarded as a benchmark for social security benefits in the world is premised on the basis that workers can have a high minimum wage set for them in order to increase productivity and ensure economic growth.[51] In 2006, the minimum wage in Brazil was set at a figure which was more than five percent points above inflation.[52] Brazil today is one of the fast developing countries with a successful economy which provides evidence that labour standards play an important role in enhancing productivity and the resultant economic growth.[53]

In addition, the most successful exporters in the developing countries do not suppress core labour standards to reduce production costs.[54] The economic performance of the East Asian newly industrializing countries (NICs) was not due either to the brutal exploitation of labour or to downward real wages.[55] What have been of greater importance are the productivity gains from education, infrastructure development and the restructuring of markets from low-wage labour-intensive to higher value-added and skill-intensive techniques.[56] A Citicorp representative at the 88th Annual Meeting of the American Society of International Law opined that:

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[48] Klein "Real Wage, Labor Productivity, and Employment Trends in South Africa: A Closer Look" http://www.imf.org/external/pubs/ft/wp/2012/wp1292.pdf (accessed 11-09-2012).

[49] See the UNCTAD Trade and Development Report for 2012 10.

[50] See the World Economic Forum Global Competitiveness Report 2012–2013 http://www3.weforum.org/docs/CSI/2012-13/GCR_Chapter1.1_2012-13.pdf (accessed 15-09-2012).

[51] Lemos "Minimum Wage Policy and Employment Effects: Evidence from Brazil" 2004 *Economic* 219. Brazil's minimum wage policy aims at increasing the minimum wage of all workers in different economic sectors without changing the shape of wage distribution and destroying jobs.

[52] Hirsch "Lula Bolsters Brazil Minimum Wage" BBC News 27 December 2006. See also ILO "Increase Productivity amongst the Workers ILO Notes" http://www.ilo.org/../wcms_limd3_11_en.pdf (accessed 11-08-2012).

[53] See Newfarmer and Sztajerowska "Trade and Employment in a Fast-Changing World" 2012 *Policy Priorities for International Trade and Jobs* 20-21. See also World Bank "Labour Standards and Productivity in the Garments Export Sector: A Survey of Managers and Workers" 2012 *Poverty Reduction and Economic Management Department East Asia and Pacific Region* 24. See also Government of Ireland "Towards 2016 Ten-Year Framework Social Partnership Agreement 2006-2015" 2006 Part Two para 1.2.

[54] See Salem and Rozental "Labor Standards and Trade: A Review of Recent Empirical Evidence" 2012 *Journal of International Commerce and Economics* 4.

[55] See Yue "Singapore: Towards a Knowledge based Economy" http://www.d1074616.domain.com/worldcapitalinstitute/makciplatform/files/Singapore_Towards%20k-Economy_0.pdf (accessed 14-08-2012).

> "In the long run, an educated and healthy workforce is necessary for continued economic development. It is logical for business to encourage government policies that support these goals. Employees whose basic nutritional and medical needs are met will be better and more productive workers. Company policies that assure adequate wages, workplace access to a good meal and most importantly superior local health care, will all support this objective."[57]

8 2 3 A social clause will lead to a global minimum wage

Stern and Terrell have argued that core labour standards do not set minimum wages, but ensure that workers have a say in what their conditions of work and remuneration should be.[58] Furthermore, Golden has noted that ILO Conventions do not attempt to impose a rigid global harmonisation of labour laws.[59] In a similar view Vandenbroucke has observed that since levels of productivity, price structures and the supply of labour vary so dramatically between countries, it is inconceivable that greater respect for core labour standards such as freedom of association would lead to a global minimum wage.[60] Dingli has noted that most developing countries with low labour standards have virtually an unlimited supply of labour.[61] Hossan *et al* have noted that under such circumstances, there will be little or no opportunity for workers to negotiate for the raising of wages above the market clearing rate.[62] Brooks *et al* in a study of Asia have observed that globalization by bringing labour markets together actually creates an even larger pool of workers which further strengthens the ability of employers to force wages down, potentially to a level below the optimal market clearing rate.[63] The only conclusion that can be drawn from this analysis is that compliance with core labour standards such as freedom of association and

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[56] Ibid. A similar approach has been adopted by South Africa with the hope that it will also ensure economic growth and development for the country. See Moneyweb "The New Growth Path: The Framework" http://www.moneyweb.co.za/mw/action/media/downloadFile?media_fileid=9594 (accessed 18-08-2012).

[57] Tsogas 356.

[58] See Stern and Terrell "Labour Standards and the World Trade Organisation" 2003 Research Seminar in International Economics Discussion Paper No. 499 3.

[59] Golden "The Effects of Working Time on Productivity and Firm Performance: A Research Synthesis Paper" 2011 Conditions of Work and Employment Series No. 33 16.

[60] Vandenbroucke "Europe: The Social Challenge. Defining the Union's Social Objective is a Necessity rather than a Luxury" 2012 Observatoire Social European Opinion Paper No 11 20.

[61] Dingli "The Manufacturing Industry-Coping with Challenges" 2012 Maastricht School Working Paper No. 2012/05 6.

[62] Hossan, Sarker and Afroze "Recent Unrest in the RMG Sector of Bangladesh: Is this an Outcome of Poor Labour Practices?" 2012 *International Journal of Business and Management* 208.

[63] Brooks, Go and the Asian Development Bank "Trade, Employment and Inclusive Growth in Asia" 2012 *Policy Priorities for International Trade and Jobs* 329.

collective bargaining would act as a counterbalance to labour standards violations in trade and actually aid the attainment of an efficient market outcome for both business and labour.

8 2 4 A social clause will erode the comparative advantage of developing countries and is protectionist

Conceptually or empirically, it is not clear that compliance with core labour standards results in increased labour costs.[64] Improving compliance with labour standards does not necessarily result in a significant increase in total costs in low-standard countries but could in fact improve labour market efficiency and worker productivity.[65] It has also been established that low-income to medium-income countries demonstrated export dynamism, regardless of their labour standards.[66] From this point of view, it may be argued that improved compliance with core labour standards could facilitate human capital development, which is one of the key drivers of long-term economic growth.[67]

Friedman has observed that, "Economists often do disagree, but that has not been true with respect to international trade…there has been virtual unanimity among economists, whatever their ideological position on other issues, that international free trade is in the best interests of trading countries and of the world."[68] It is submitted that free trade is important to world development and does not translate into the lowering of standards, including labour standards. That core labour standards are lowered in trade is not only a feature of the so-called protectionist agenda of developed countries but of developing countries as well.[69] The use of the

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[64] See Sinaga and Scherrer "Core Labour Standards and Non-Compliance" 2012 *International Center for Development and Decent Work* 3. See also Bernaciak "Social Dumping: Political Catchphrase or Threat to Labour Standards?" 2012 European Union Trade Union Institute Working Paper 2012.06 25.

[65] Anner, Bair and Blasi "Buyer Power, Pricing Practices, and Labour Outcomes in Global Supply Chains" 2012 Institutions Program Working Paper Series: INST2012-11 2.

[66] Santos-Paulino "Trade, Income Distribution and Poverty in developing Countries: A Survey" 2012 *United Nations Conference on Trade and Development* 2. See also Page "Can Africa Industrialise" 2012 *Journal of African Economies* ii 87 and McMillan and Rodrik "Globalization, Structural Change and Productivity Growth" International Food Policy Research Institute: International Growth Centre.

[67] OECD "Reducing Income Inequality while Boosting Economic Growth: Can it be done?" 2012 OECD Economic Policy Reforms 2012 *Going for Growth* 182.

[68] See Friedman "The Case for Free Trade" 1997 *Hoover Digest* No. 4.

[69] Ibid. Friedman observed that: "Today, as always, there is much support for tariffs-euphemistically labeled 'protection' a good label for a bad cause. Producers of steel and steelworkers' unions press for restrictions on steel imports from Japan. Producers of TV sets and their workers lobby for 'voluntary agreements' to limit imports of TV sets or components from Japan, Taiwan, or Hong Kong. Producers of textiles, shoes, cattle, sugar-they and myriad others complain about 'unfair' competition from abroad and demand that government do something to 'protect' them. Of course, no group makes its claims on the basis of naked self-interest. Every

protectionist agenda by it proponents (mostly developing countries) whilst not entirely questionable,[70] could have significant shortfalls in that it ignores the interests of the workers. Freidman has observed that:

> "One voice that is hardly ever raised is the consumer's. That voice is drowned out in the cacophony of the 'interested sophistry of merchants and manufacturers' and their employees. The result is a serious distortion of the issue. For example, the supporters of tariffs treat it as self evident that the creation of jobs is a desirable end, in and of itself, regardless of what persons are employed to do. That is clearly wrong. If all we want are jobs, we can create any number-for example, have people dig holes and then fill them up again or perform other useless tasks. Work is sometimes its own reward. Mostly, however, it is the price we pay to get the things we want. Our real objective is not just jobs but productive jobs-jobs that will mean more goods and services to consume."[71]

The protectionist agenda argument by developing countries, against the inclusion of labour standards in the WTO framework should also be analysed from globalization's record of alleviating poverty. There is little doubt that exports and foreign investment have played and still play a role in development.[72] However, justifying why social welfare in developing countries has not improved is difficult to comprehend. However Rodrik has opined that:

> "…while global markets are good for poor countries, the rules according to which they are being asked to play the game are often not. Caught between WTO agreements, World Bank strictures, IMF conditions, and the need to maintain the confidence of financial markets, developing countries are increasingly deprived of the room they need to devise

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group speaks of the 'general interest' of the need to preserve jobs or to promote national security." The argument which Friedman raises is not synonymous with developed countries only but has been frequently used by developing countries as a basis to safeguard themselves from the so-called unfair approach to trade by developed countries. This argument has been central to the trade-labour linkage agenda with proposals to incorporate a social clause into the WTO legal framework being viewed as a protectionist agenda of the developed countries. Whilst the argument cannot be entirely dismissed, it must be analysed with a view to establishing whether it is entirely correct.

70 See Wolf "Traumatized by Trade" in Wolf (ed) *Why Globalization Works* (2004). Wolf argued that, "Assume that real wage does not rise at all, but the 'total factor productivity'-the out put that can be produced by a unit of capital and labour-does continue to increase. It will then become profitable to take advantage of this productivity increase through rapidly increasing employment of still cheap labour. Increases in productivity per worker will then remain low, but growth in industrial employment will be rapid. This is exactly as it ought to be in a country so early in its industrialization. Then the supply of labour begins to tighten, wages and labour productivity will both explode upwards. That also happened to South Korea after a decade or two of rapid growth." Wolf's argument is plausible where governments implement policies which lead to growth. Most importantly, South Korean workers, as compared now earn significantly higher wages than their Chinese counterparts whose country has also followed a similar growth path as China. Questions should therefore be asked as to what accounts for such disparities. It must be borne in mind that China has been at the centre of the violation of core labour standards in trade. Has China not reached a reasonable level of growth to ensure an improvement in its levels of adhering to human rights protection?

71 See Friedman *Hoover Digest* No. 4.

72 See Lester, Mercurio and Davies *World Trade Law: Texts Materials and Commentary* (2012) 34.

> their own paths out of poverty. They are being asked to implement an agenda of institutional reform that took today's advanced countries generations to accomplish. The US, take a particularly telling example, was hardly a paragon of free-trade virtue while catching up with and surpassing Britain. In fact, US import tariffs during the latter half of the nineteenth century were higher than in all but a few developing countries."[73]

Rodrik's view appears to give credence to the view that incorporating a social clause in the WTO legal framework could be a protectionist agenda for developed countries in that it provides obligations beyond what developing countries could possibly manage. Rodrik also questions the role of free trade in achieving development. However it cannot be doubted that free trade is central to development.[74] As such, great care must be taken by developing countries when they suggest that a social clause erodes their comparative advantage. The argument is protectionist by nature and cannot be any different from what they contend about developed countries. It could be advisable if developing countries focus on policies which could help them integrate economical growth and the improvement in the social welfare of their people. Free trade can achieve this and lead to the improved protection of core labour standards in trade in the long run.

Cheap manufactured goods from the developing countries are increasingly being blamed for job losses in industrialised countries, hence the ever-growing support for populist demands for protection in one form or another.[75] The increase in unemployment in developed countries is likely to result in an increase in public pressure to restrict the flow of what are regarded as "unfairly" produced goods.[76] The United States (US)[77] and the European Union (EU)[78] already

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[73] See Rodrik "Globalization for Whom? Time to Change the Rules-and Focus on Poor Workers" 2002 *Harvard Magazine* 29. Rodrik argued that for China to develop, it did not "...liberalize its trade regime to any significant extent...China resolutely refused to open its financial markets to foreigners...Most striking of all, China achieved its transformation without adopting private-property rights, let alone privatizing its state enterprises."

[74] Ibid. Rodrik appears to acknowledge the role of free trade when he remarks that, "If investment were the crux of the matter, centrally planned economies would have been the world's best performers over the long run. Ultimately, the return investment matters a great deal." The significance of these investment returns is that they are the ones which then allow governments to improve the standards of living of their people, including perhaps core labour standards.

[75] Alcorta and Nixson "The Global Financial Crisis and the Developing World: Impact on and Implications for the Manufacturing Sector" 2010 UNIDO Development Policy and Strategic Research Branch Working Paper 06/2010 40. See also Crean "Protectionism and the Global Economic Crisis-the Role of Trade in the Response" in *The Collapse of Global Trade, Murky Protectionism, and the Crisis: Recommendations for the G20* 2009 Centre for Economic Policy and Research 13.

[76] Ahearn "Globalization, Worker Insecurity, and Policy Approaches" 2012 *Congressional Research Service* 5.

[77] See Section 301 of the US Trade and Tariff Act of 1974 (as amended in 1988). The Act provides that US Trade Representatives with discretionary authority to recommend a wide variety of trade sanctions against countries which amongst other things engage in acts, policies and practices that constitute a persistent pattern of conduct

have legislation which could be used to enforce such restrictions on a unilateral basis as has already been discussed in chapter five of this thesis. Whether or not this argument has an economic basis it poses a serious challenge to the world trading system, with greater use of unilateral measures and regional trade agreements resulting in a possible demise of the rule of law in international trade and potentially to the establishment of even higher levels of protectionism.[79] It may be argued that a social clause could restrict these unilateral measures and offer a clear, just, impartial and reasonable means for settling trade disputes. From this point of view, a social clause could lower rather than raise protectionist tendencies and help keep markets open by sharing the benefits of trade more fairly.

8 2 5 A social clause in the WTO will lead to an indiscriminate use of sanctions

The International Labour Organisation (ILO) has no binding enforcement mechanism, although it does monitor it Member States' compliance with labour standards.[80] The ILO Constitution prescribes that complaints can be initiated by an ILO Member State where it has reason to believe that another Member State was not implementing a convention it would have ratified.[81] Such a complaint, if successful, could give rise to the establishment of a commission to investigate the alleged non-compliance with labour standards with the possibility of 'measures of an economic character' being recommended as a penalty, amongst other possible remedies.[82]

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denying internationally recognized workers rights. An example which has already been referred to in this chapter is that of the Burma Freedom and Democracy Act. For a detailed analysis see chapter 5 of this thesis.

78 See Trebilcock and Howse 576. Trebilcock and Howse noted that: "In 1995, the EU amended its Generalised System of Preferences (GSP) programme so as to condition the granting of a margin of preferentiality in excess of a base rate upon, *inter alia*, respect for certain core labour rights; the relevant EU regulations refer explicitly to ILO Conventions concerning freedom of association and collective bargaining, as well as child labour. The provision came into force in 1998. In addition, GSP status may be withdrawn altogether where a country permits any form of slavery or the exportation of products made with prison labour."

79 Ibid.

80 Hoekman and Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* (2009) 625.

81 See Article 33 of the ILO Constitution. Article 33 provides that: "In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith." It is important to observe that whilst the ILO Constitution theoretically authorizes sanctions in the event of non-compliance, in practice the ILO prefers a soft law approach. See Lester, Mercurio and Davies *World Trade Law: Text, Materials and Commentary* (2012) 877. Lester *et al* opined that the ILO "…in practice prefers to adopt a soft approach to the enforcement of its norms, relying on public identification, embarrassment and shaming, and technical assistance to promote compliance. the ILO does not even do this very well, as the ILO's 'special list' of transgressions of core labour standards garners little international publicity and even less government attention; in fact, the list has not produced any substantial improvements in compliance with core labour standards."

82 Ibid.

Charnovitz observed that this procedure has never been used,[83] yet there is a plausible argument that core labour standards, by virtue of being human rights, inherently deserve protection.[84] The ILO's enforcement record is clearly inadequate.[85]

A practical illustration of the ILO's weaknesses in enforcement is observed in the organization's response to the use of forced labour by Myanmar (formerly Burma) for both public and private purposes. The ILO Commission of Inquiry investigated and established that

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[83] See Charnovitz "Should the Teeth Be Pulled? An Analysis of WTO Sanctions" in Kennedy and Southwick (eds) *The Political Economy of International Trade Law* (2002). That the possibility of economic measures being preferred against Member State that violates labour standards has not been used has led Hoekman and Kostecki to note that: "As is the case with Intellectual Property Rights, the primary reason proponents are seeking to introduce labour standards into the WTO is because the WTO (unlike the ILO) has a functioning dispute settlement and enforcement system."

[84] See Chartes and Mercurio "A Call for an Agreement on Trade-related Aspects of Labour: Why and How the WTO Should Play a Role in Upholding Core Labour Standards" 2012 *North Carolina Journal of International Law and Commercial Regulation* 672. Chartes and Mercurio have argued that: "...the human rights approach shows that imposing trade restrictions on products manufactured in a manner that fails to comply with universally acknowledged human rights is not an economic regulation *per se*, but rather a form of international social regulation driven by the fundamental premise that human rights are universal and indivisible. Viewed in this manner, it becomes clear that the enforcement of human rights is not a merely convenient opportunity to engage in protectionism, but an obligation to respect, protect and fulfill their responsibilities under international human rights treaties, including the ILO Declaration." See also Trebilcock and Howse *The Regulation of International Trade Law* (2005) 564. Trebilcock and Howse observed that there is nothing discriminatory about linking trade rights to compliance with core labour standards as this will not amount to an imposition of a discriminatory set of conditions since the protection of human rights is something which the countries would have already committed to. Furthermore, Trebilcock and Howse observed that: "'Soft' or voluntary approaches (to prohibiting violations of core labour standards in trade) suffer from a number of limitations...they apparently apply to a small percentage of exports in a number of sectors where non-compliance with core labour standards is thought to be common...and they vary widely in various dimensions, for example (1) which core labour standards are recognized; (2) how these core labour standards are defined, if at all; and (3) how effectively adherence to these standards is monitored, if at all." The point here is that the protection of core labour standards cannot be left to consultative processes alone without protection through hard law, which in most cases imposes sanctions for non-compliance with specific standards. The lack of concern by consumers in importing countries about human rights values and conditions under which products for trade are obtained makes soft law an inefficient legal instrument for protecting core labour standards in trade. In most instances, consumers in importing countries do not have information on how the products are produced in the exporting countries. To these consumers the cost of acquiring such information exceeds the value they place on the information itself. For example, that diamonds are produced at the expense of human rights protection in the Democratic Republic of Congo and Zimbabwe is likely to be of little interest to a consumer in the United Kingdom and such a consumer is unlikely to be willing to obtain information, at any cost, concerning the conditions prevailing in the exporting country or country of source.

[85] See Chartes and Mercurio 673. Chartes and Mercurio point out that: "One such impediment is that the ILO suffers from a disparate, and sometimes rather low rate of ratification of its treaties (including by leading developed countries such as the United States). This in turn creates a 'patchwork of inconsistent legal obligations' and serves as a major impediment to the global enforcement of labour standards. Moreover a number of ILO conventions are ratified but not implemented." The implication of Chartes and Mercurio's observations is that the ILO approach could be viewed as a lip service approach to the protection of labour standards. This may need to be addressed with the reinforcement of the ILO's dispute settlement structures to perhaps include direct reference to penalties and sanctions.

there were extensive violations amounting to, "…a saga of untold misery and suffering, oppression and exploitation of large sections of the population inhabiting Myanmar by the Government, military and other public officers."[86] Regardless of the recommendations made by the ILO Commission of Inquiry requesting the Myanmar government to comply with the ILO Forced Labour Convention,[87] no compliance could be obtained. The ILO Governing Body did evoke provisions of Article 33 of the ILO Constitution authorizing the International Labour Conference to take any necessary measures it would deem necessary to ensure compliance. Countries could not impose sanctions as this would be contrary to WTO rules.[88]

The reason why countries could not impose sanctions lies in the current framework of the WTO/General Agreement on Tariffs and Trade (GATT) system. Trebilcock has observed that:

> "Trade sanctions raise difficult questions under the GATT/WTO system as it currently exists. For example, conditioning the Most Favoured Nation (MFN) treatment on adherence to core labour standards is likely to raise questions as to whether this form of conditionality violates the requirement of 'unconditional' extension of MFN treatment to all GATT/WTO members under Article 1 of the GATT."[89]

An analysis of the existing WTO law and case law could inform whether sanctions can be imposed against WTO Member States which violate core labour standards in trade. Under Article 1 of the GATT, every WTO Member is required to provide unconditional MFN treatment to every other WTO Member with respect of like products. This could possibly imply that "unconditionality" might exclude the possibility of distinguishing between products based upon labour conditions prevailing in the exporting country.[90] In the *EC-Asbestos*[91] case, the WTO

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86 See Lester *et al* 877.

87 See ILO Forced Labour Convention No. 29 of 1930.

88 See Lester *et al* 877. Only the US proceeded to impose a ban on all trade with Myanmar in terms of the Burmese Freedom and Democracy Act (BFDA) of 2003. The BFDA was signed into law on 28 July 2003 by the then US President, George W Bush and has since been renewed annually. Among other measures the BFDA bans imports of Burmese/Myanmar products. It also freezes assets of senior Burmese officials and bans virtually all remittances to Burma/Myanmar. However regardless of the US' sanctions, ILO Member States such as China and India maintained their trade with Myanmar whilst the European Union (EU) and Australia's trade restrictions only targeted the senior military officials and their family members. The approach taken by the US, EU and Australia (smart sanctions have a spill over effect and could have the force of outright sanctions as the military junta would likely abuse the limited resources left for their benefit at the expense of the masses) as opposed to India and China represents the divide in the debate to a trade-labour linkage.

89 Trebilcock 175.

90 GATT Article III:4 requires that products which are imported must receive treatment which must be no less favourable than that to be afforded to imported products. This therefore raises questions as to whether products have to be regarded as unlike if it is determined that the production processes and methods of one set of goods

Appellate Body established a framework for determining whether products are 'like' under Article III: 4.[92] According to Trebilcock and Howse, the process, "neither explicitly endorses nor rejects the idea that process and production methods are relevant to the assessment of likeness."[93] They further observed that:

> "…the WTO Appellate Body's reasoning strongly suggests that products may be considered 'like' based on the consumer tastes and habits. thus if there is sufficient evidence that consumers between products produced in conditions violating core labour standards and those produced in conditions consistent with core labour standards, or would distinguish these products if they had perfect information, then the…products would be 'unlike'…"[94]

Should likeness be proven in a case where products are produced in conditions that violate core labour standards, it would be necessary to further show that the difference in treatment between the 'like' products leads to less favourable treatment of the group of imported products as compared to the group of like domestic products, before a violation of GATT Article III: 4 can be proven.[95] Satisfying this requirement is almost impossible concerning core labour standards. As such sanctions preferred for violating labour standards in trade would be deemed to violate Article I of the GATT. This serves as reason why the ILO Member States did not impose sanctions on Myanmar.

However, another argument for the possibility of invoking sanctions against a WTO Member State that violates core labour standards in trade could be justified through the principle of "public morals".[96] In the *United States-Measures Affecting the Cross-Border Supply of*

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involved the violation of core labour standards whilst the other did not. See also Trebilcock and Howse *The Regulation of International Trade Law* (2005) 572.

91 See *European Communities-Measures Affecting Asbestos and Asbestos Containing Products* WT/DS135/R and Addendum 1 as modified by the WTO Appellate Body Report WT/DS135/AB/R 5 April 2001.

92 See Trebilcock 175-176. The question to be addressed in this case would be whether goods produced in exporting countries in circumstances that do not conform to core labour standards are like products produced in importing countries that conform to these standards. This question would have to be addressed on the understanding that should sanctions be imposed against a country producing like products yet violating core labour standards, a case of quantitative restrictions in terms of GATT Article XI would be raised.

93 See Trebilcock and Howse 572.

94 Ibid. In determining 'likeness' the WTO Appellate Body placed emphasis on the need to avoid protectionism in terms of Article III:1 of the GATT.

95 See *EC-Asbestos* case para 100.

96 See GATT Article XX(a). GATT Article XX(a) permits otherwise GATT inconsistent measures "necessary to protect public morals" to be invoked to justify trade sanctions against products that violate labour standards. See also Marceau "WTO Dispute Settlement and Human Rights" 2002 *European Journal of International Law* 753 and Charnovitz "The Moral Exception in Trade Policy" 1998 *Journal of International Law* 68.

Gambling and Betting Services (*Gambling* case)[97] the WTO Panel in interpreting what could constitute the exception of 'public morals' in terms of the WTO General Agreement on Trade and Services (GATS) held that:

> "In the Panel's view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[98]

The Panel further suggested that each WTO Member has the discretion to determine which practices would violate the moral code of their community.[99] Judging from the Panel's reasoning in the *Gambling* case, there would be no basis of objecting to a need to impose sanctions for the violation of core labour standards in trade on the basis of 'public morals'. This study has already established that there is no objection to the need to protect human rights in trade, with calls for the WTO to adopt a legal framework that acknowledges a need to protect human rights ever increasing.[100]

Whilst the MFN provision and GATT Article I may pose serious challenges to imposing sanctions on countries that violate core labour standards in trade, there could be a legal basis for imposing sanctions in terms of the 'public morals' principle under Article XX(a) of the GATT. Such enforcement mechanisms could be viewed as ideal alternatives to augment the weak enforcement mechanisms of the ILO. It is submitted that the WTO has a powerful enforcement mechanism at its disposal,[101] so powerful in fact that great care has to be taken not to abuse it. The economic prosperity of many countries in the world is now highly dependent upon international trade, and the process of "globalization" is increasing their dependence further.[102]

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[97] See *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285/R* 10 November 2004.

[98] See the *Gambling* case para 6.461.

[99] Ibid. See also Trebilcock and Howse 573.

[100] See Trebilcock 176. Trebilcock observes that, "...a cogent argument can be made that the 'public morals' exception under Article XX(a)...should be viewed as embracing the body of core international labour standards and universal human rights more generally...A recent decision by a WTO Panel and the WTO Appellate Body in the *Gabling* case, in interpreting the public morals-public order exception in Article XIV of GATS, which is analogous to the 'public morals' exception in Article XX(a) of the GATT lends some support for this view."

[101] Bruce "UN, World Bank, WTO: Reform Them All" 2005 *National Journal* 220. Bruce argued that WTO decisions can so often affect domestic regulations, destroy jobs, and create new industries. See also Charnovitz "The World Trade Organisation in 2020" 2005 *Journal of International Law & International Relations* 170.

[102] See the UNCTAD Trade and Development Report, 1981-2011. See also UNCTAD "DOHA Mandate and DOHA Manar" 2012 UNCTAD XII 19. See also UN "World Economic Situation and Prospects" http://www.un.org/en/development/desa/policy/index.shtml (accessed 14-09-2012).

Countries' growing prosperity is widely acknowledged to be key to their ability to adopt higher social and humanitarian standards.[103] Therefore, it may be argued that arming the trading system with the means to threaten their prosperity for breaches of non-commercial behavioral norms in increasingly competitive global markets could easily turn the use of trade restrictions into a first-choice protectionist instrument rather than the measure of last resort which proponents of the so-called "social clause" have claimed it should be. In doing so the social clause may create a tantalizing target for protectionist pressures and undermine international trade on a significant scale.[104] A small number of WTO members would contend that they meet the entire extensive list of multilateral standards which the UN and other international bodies have established and are continuing to negotiate. It is therefore evident that most countries would not be compliant to a certain extent and as such are exposed to the threat of trade restrictions.

Assuming that trade restrictions are to be applied in terms of the social clause, it is likely that there would be a significant obstruction of the trading system as well as collateral damage to international co-operation and other policy objectives. As such, if a social clause is to work, it must follow a transparent procedure which allows disputes to be resolved through negotiations. Safeguards against the indiscriminate use of sanctions must be incorporated in such a framework in which case, there would be the need for a multilateral agreement on how sanctions could be used. Sanctions perhaps would have to be used only as a last resort, when all other permitted legal steps have failed to persuade the offending party to address its violation of core labour standards in trade.

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[103] United Nations Development Programme (UNDP) "Beyond the Midpoint: Achieving the Millennium Development Goals" http://www.sl.undp.org/B6020566-1CD2-4DDF-A954-A356894EC5D0/FinalDownload/DownloadId-9ED97E854D30C32360417F1A414165C0/B6020566-1CD2-4DDF-A954-A356894EC5D0/1_doc/MDG_mid_point.pdf (accessed -09-2012).

[104] Howse "From Politics to Technocracy- and Back Again: The Fate of the Multilateral Trading Regime" http://www.asil.org/B6020566-1CD2-4DDF-A954-A356894EC5D0/FinalDownload/DownloadId-92968700DF2236AA5F97DFA9CC1F52D6/B6020566-1CD2-4DDF-A954-A356894EC5D0/ajil/wto6.pdf (accessed 12-09-2012).

8 2 6 Incorporating a social clause in the WTO threatens national sovereignty

The principles established by core labour standards should not be compromised. However, how they are translated into national law and practice may differ, depending on the institutions and customs of the country concerned.[105] Lim has argued that:

> "…by virtue of being members of the UN, States have already committed themselves to uphold basic human rights. These are in most respects synonymous with core labour standards. The social clause would not create any new human rights obligations but would strengthen the existing international enforcement mechanism. At the same time, the sovereignty of even major industrial countries on economic and social policy matters is being increasingly undermined by globalization. An internationally agreed social clause would strengthen national sovereignty by making countries less vulnerable to manipulation by powerful private economic actors, and would enhance their ability to pursue national economic and social objectives."[106]

The argument based on sovereignty is clouded by the new global realities.[107] The position that sovereignty should not be ceded on issues such as domestic labour policy regulation needs to be re-assessed.[108] The reality is that sovereignty has already been ceded and policy is being shaped to an increasing extent by the demands of the global market.[109] The issue is not whether but how policy will be determined internationally through the market or through political negotiations. The problem is no longer avoiding a potential loss of sovereignty, but whether to take an opportunity to reclaim some measure of it.[110] Lester *et al* concluded that:

> "Indeed, on a practical level, the sovereignty argument does not stand up to scrutiny when one considers that all Members of the WTO (including developing countries) allow some degree of sovereignty erosion by virtue of membership in the organization (or, in fact, by membership in any international organization)." In exchange for the reduced sovereignty,

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[105] Bagwell "Domestic Policies, National Sovereignty, and International Economic Institutions" 2001 *The Quarterly Journal of Economics* 519.

[106] Lim "The Social Clause: Issues and Challenges" http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/hoelim.htm (accessed 05-07-2012).

[107] Jackson "Sovereignty-Modern: A New Approach to Outdated Concept" 2003 *The American Journal of International Law* 783. See also Jackson "The WTO "Constitution" and Proposed Reforms: Seven "Mantras" 2001 *Journal of International Economic Law* 67.

[108] Hoy "Discourses on Empire: From National Sovereignty to Global Power Distributions in the 21st Century" 2005 *The Bulletin of the Centre for East-West Cultural and Economic Studies* 2.

[109] ILO "Global Employment Trends 2012: Preventing Deeper Jobs Crisis" http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_171571.pdf (accessed 12-09-2012).

[110] Wheeler "Humanitarian Intervention in World Politics" http://cadair.aber.ac.uk/dspace/bitstream/handle/2160/1925/Wheeler?sequence=1 (accessed 10-09-2012).

Member States receive benefits of membership in an organization which assists in making trade more stable, predictable, and free, and in improving the overall wealth of citizens."[111]

8 2 7 A social clause in the WTO will threaten national culture

Fear of a threat to culture due to international trade is something felt more strongly in some countries than in others.[112] The notion that a social clause in the WTO will threaten national culture is a myth created by vested interests; in fact it is the pervasive commercialism of the free market which is the real threat.[113] National culture cannot survive where people have no power to control the market for their own and their community's benefit.[114] The social clause by promoting respect for human rights would effectively empower people and their communities to maintain their cultural identity in a global economy.[115] Human rights and labour standards are culturally specific: numerous contemporary arguments against universal human rights, and by association international labour standards, hide behind the shield of cultural relativism but are often not supported by any discernible cultural basis.[116] Arguments of cultural relativism tend to be made by economic and political elites. The very same elites who raise culture as a defence against external criticisms based on universal human rights often ruthlessly suppress inconvenient local customs, whether of the majority or the minority. Heyns and Stefiszyn have argued that all too often:

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[111] See Lester *et al* 879.

[112] See Lester *et al* 864. See also Dymond and Hart "Abundant Paradox: The Trade and Culture Debate" http://www.ctrc.sice.oas.org/geograph/north/dymond.doc (25-11-2012). Dymond discussed the concerns raised by Canada about the loss of their culture in the face of American or other cultural exports such as films, TV shows and magazines, as well as fast food restaurants and snack foods, among others. Dymond observed that: "The debate is replete with paradox. The argument of cultural industries-that the production of cultural goods and services is so close to the national soul that it requires special treatment-echoes the haunting argument that international trade threatens the family farm. The demand by some in the cultural industries that the government support (i.e subsidize) domestic production and consumption, their complaint that foreign products occupy too much shelf space in the international market, their pleading for tax exemptions, and their appeals for more content quotas, are reminiscent of the equally passionate pleas from the representatives of protected or threatened sectors in earlier years. Their long-standing demand that trade agreements provide a total exemption for cultural products and services is the polar opposite to a cardinal principle of Canadian trade and foreign policy: Canadian interests are best advanced and protected through international agreements. "

[113] Hestermeyer "Economic, Social and Cultural Rights in the World Trade Organization: Legal Aspects and Reality" http://www.boletinderecho.udp.cl/docs/PaperHestermeyer.pdf (accessed 12-09-2012).

[114] UNDP "Globalization and Cultural Choice" http://hdr.undp.org/en/media/hdr04_chapter_5.pdf (accessed 13-09-2012).

[115] Ibid.

[116] Ross *Slaves to Fashion: Poverty and Abuse in the New Sweatshops* (2004) 296. See also Lim 10.

> "…leaders sing the praises of traditional communities while they wield arbitrary power antithetical to traditional values, pursue development policies that systematically undermine traditional communities, and replace traditional leaders with corrupt cronies and party hacks. Such cynical manipulation of tradition occurs everywhere".[117]

In the Bangkok NGO Declaration, it is stated that:

> "We can learn from different cultures in a pluralistic perspective....Universal human rights are rooted in many cultures. We affirm the basis of universality of human rights which afford protection to all of humanity....While advocating cultural pluralism, those cultural practices which derogate from universally accepted human rights,....must not be tolerated. As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered an encroachment upon national sovereignty."[118]

This position is in line with the Vienna Declaration, adopted by States at the Second World Conference on Human Rights, which provides that:

> "All human rights are universal, indivisible, and interdependent and interrelated.....While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[119]

8 2 8 Child labour cannot be replaced

Common explanations given for using children are that they incur lower costs and have irreplaceable skills.[120] Based on this reasoning, it is often argued that a social clause to eradicate exploitative forms of child labour is unrealistic. However, ILO studies have shown that the notion that only children with small fingers have the necessary skills to work in a number of industries, especially the production of for example fine hand-knitted carpets is simply not

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[117] Heyns and Stefiszyn *Human Rights, Peace and Justice in Africa: A Reader* (2006) 102.

[118] In the Bangkok Declaration adopted by Ministers of Asian states meeting in 1993 in the lead up to the World Conference on Human Rights held in the same year, Asian governments reaffirmed their commitment to the principles of the United Nations Charter and the Universal Declaration of Human Rights. They stated their view of the interdependence and indivisibility of human rights and stressed the need for universality, objectivity and non-selectivity of human rights. At the same time, however, they emphasized the principles of sovereignty and noninterference, calling for greater emphasis on economic, social, and cultural rights, particularly the right to economic development, over civil and political rights. The Bangkok Declaration is considered to be a landmark expression of the Asian Values perspective, which offers an extended critique of human rights universalism.

[119] See Section I, para. 5 of the Vienna Declaration. The Vienna Declaration and Programme of Action, also known as VDPA, is a human rights declaration adopted by consensus at the World Conference on Human Rights on 25 June 1993 in Vienna, Austria. The United Nations High Commissioner for Human Rights was created by this Declaration endorsed by General Assembly Resolution 48/121.

[120] Stella "A Ban on Child Labour: The Basu and Van's model applied to the Indian "carpet-belt" Industry" http://www-3.unipv.it/webdept/q2-2003.pdf (accessed 19-08-2012).

true.[121] In most industries, adults can be found working side by side with children performing unskilled tasks.[122] In most cases, child workers are paid less than their adult counterparts.[123] But the lower wages and other advantages claimed for child labour are not always as clear and compelling as is suggested.[124] ILO studies in India in industries producing carpets and bangles estimated that labour cost savings resulting from the employment of children, calculated as a proportion of the final price of carpets or bangles were surprisingly small.[125] The ILO calculations showed that the savings were less than 5% for bangles and between 5 and 10% for carpets.[126] These findings only lead to the conclusion that protecting core labour standards in trade is in the best interests of the countries of the world regardless of whether or not they are developed. Therefore, it is necessary to examine the proposals on how to incorporate a social clause in the WTO framework which have been advanced to date. A discussion of the proposals follows.

8 3 PROPOSALS FOR RESPONDING TO VIOLATIONS OF CORE LABOUR STANDARDS IN TRADE

A number of proposals suggesting mechanisms to protect the violation of core labour standards in trade have been advanced. It is important to examine the strengths and weaknesses of such proposals in order to identify the shortfalls that have led to the current lack of consensus on whether or not to link trade to core labour standards.

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[121] ILO "Supporting Children's Rights through Education, the Arts and the Media" http://knowchildlabor.org/pdf/basic_information_en.pdf (accessed 12-08-2012).

[122] Galli "The Economic Impact of Child Labour" http://www.lex.unict.it/eurolabor/ricerca/altri_wp/econ_impact_child.pdf (accessed 19-08-2012).

[123] Njoloma "Child Labour in Malawi' Agriculture Sector-The Socio-Economic and HIV/AIDS Impact Nexus" http://www.eclt.org/site/wp-content/uploads/2012/09/Njoloma-Socio-Economic-Issues-CL-in-Agriculture.pdf (accessed 18-08-2012).

[124] Hoop and Rosati "Does Promoting School Attendance Reduce Child Labour? Evidence from Burkina Faso's Bright Project" http://www.ucw-project.org/attachment/Does_Promoting_School_Attendance_Reduce_Child_Labour20120625_132316.pdf (accessed 11-09-2012).

[125] ILO "A Decade of ILO-India Partnerships: Towards a Future without Child Labour" 2004 ILO International Labour Office 15.

[126] Ibid.

8 3 1 Incorporating a social clause into the General Agreement on Tariffs and Trade (GATT)

It might be possible to use the current WTO Agreement's general exceptions provisions to protect core labour standards in trade. Eres has argued that general exceptions in GATT Article XX could be used to protect specific human rights.[127] GATT Article XX could be used to impose restrictive trade measures on countries which disregard the protection of core labour standards in trade.[128] Such an approach would ensure that countries conform to their obligations of raising standards of living and ensuring full employment whilst pursuing their economic endeavors and/or relations in trade.[129] However, difficulties posed by the wording of GATT Article XX have made it almost impossible to use the general exceptions as a mechanism for incorporating core labour standards into the WTO Agreement.[130] This is due to the fact that that GATT Article 1, the principle of most favoured nation (MFN) treatment, comes into play even when trade restrictive measures are successfully applied to a state.[131] The MFN principle stipulates that if a

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[127] See Eres "The Limits of GATT Article XX" 2004 *Georgetown Journal of International Law* 597.

[128] See in particular GATT Article XX paragraphs (a), (b) and (d). GATT Article XX provides that:
"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(*a*) necessary to protect public morals;
(*b*) necessary to protect human, animal or plant life or health;
……
(*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
(*e*) relating to the products of prison labour;
……"

[129] See the preamble of the Marrakech Agreement establishing the WTO signed on 15 April 1994.The Agreement developed out of the GATT and was supplemented by a number of other agreements on issues including trade in services, sanitary and phytosanitary measures, trade-related aspects of intellectual property and technical barriers to trade.

[130] Aaronson and Zimmerman "Fair Trade? How Oxfam Presented a Systematic Approach to Poverty, Development, Human Rights and Trade' 2006 *Human Rights Quarterly* 1014.

[131] See WTO "Regional Trade Agreements: Goods Rules" http://www.wto.org (accessed 3-09-2012). Members of the WTO have agreed to accord MFN status to each other. Exceptions allow for preferential treatment of developing countries, free trade areas and customs unions. The MFN together with the principle of national treatment is one of the cornerstones of WTO law. See also McClure and Smith "Most Favoured Nation Clauses-No Favoured View on how they should be Interpreted" 2011 Wolters Kluwer Law and Business 1.

WTO member treats another country in a particular manner it then has to give identical treatment to all other WTO members.[132]

The implication of the MFN principle is that if trade sanctions are preferred against a country for violating core labour standards in trade then all countries who abuse the same core labour standards must also have the same sanctions applied to them.[133] If a social clause would be equally applicable to all WTO member states irrespective of their levels of development, it may be plausible to argue that the proposal to incorporate a social clause in GATT Article XX in its current state could be misdirected with substantial economic and political consequences. Developing countries are unlikely to attain economic growth as they are likely to be on the receiving end of sanctions which will impact negatively on their economies. Perhaps the proposal could have been more favourably received if it considered the differences in the levels of development of the countries. An analysis of the developments surrounding the linkage between trade and environment undertaken later in this chapter will reveal this omission.

Apart from the political challenges of incorporating a social clause in GATT Article XX, technical legal problems concerning such an approach have been raised.[134] Aaronson and Zimmerman have argued that, "The wording in the relevant sections of GATT Article XX means that it must be proved that it is "necessary" to restrict trade in a product in order to protect human, animal or plant life or health."[135] The retention of the word "necessary" implies that for legal unilateral trade restrictive measures to be taken by one country against another, a "necessity test" must be applied.[136] Theoretically, such a test would possibly have three steps. It would have to be determined whether or not the interests protected are of importance.[137] It would also have

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[132] Aaronson and Zimmerman 1014.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Eres 598. See also the US-Gasoline WTO case Nos 2 and 4 ruling adopted on 20 May 1996. This case was brought by Venezuela and later Brazil before the WTO Panel in 1995 and later the WTO Appellate Body in 1996. The central question in this case was whether or not the measures taken by the US in protecting environmental standards discriminated against imported gasoline and were in favour of US's domestic refineries. The US had imposed stricter rules on the chemical characteristics of imported gasoline than it did for domestically refined gasoline. Venezuela argued that this was unfair because US gasoline did not have to meet the same standards. Such an approach violated the national treatment principle in GATT Article III. The US was found by the WTO panel to be violating WTO rules because it discriminated against the gasoline imports. As such WTO panel and WTO Appellate Body had to address whether or not treating domestic and imported

to be assessed as to whether or not any alternative measures to address the problem at hand are reasonably available and lastly be determined whether or not such alternate measures are less inconsistent with GATT.[138] The implication of these steps would be that a link must be established between both the targeted risk, the product being targeted and the trade measures being undertaken, with the burden of proof solely upon the party seeking to invoke the clause.[139]

Black's Law dictionary provides that the word "necessary" does not have to carry the meaning "indispensable" but can refer to the most appropriate or convenient option.[140] In the case of *Korea-Beef* the word "necessary" was taken to mean "nearly indispensable".[141] Context is very important, and the greater the risk posed by a product the more leniency is granted when proving a link.[142] From this perspective it may be extremely difficult to justify cases of labour standards abuse under GATT Article XX. Even if the necessity test is satisfied, the member wishing to use the impugned measures still has to show that they will neither be applied in a manner so as to constitute arbitrary or unjustifiable discrimination, nor be a disguised restriction on international trade.[143] The test of whether or not a measure imposed is GATT consistent is particularly important as there are arguments to the effect that inserting a social clause into the WTO framework would amount to permitting disguised restrictions on trade.[144] Therefore it could be argued that a proposal which offers a mechanism that prevents the abuse of the WTO legal framework which includes a social clause would likely result in less resistance to a social clause.

8 3 2 Unilateral trade sanctions as an enforcement mechanism for the social clause

It is difficult to enforce international law within the international system, particularly with regard to human rights. The former WTO Director General Renato Ruggeiro has argued that using trade sanctions as a coercive measure is an appealing prospect to ensure cooperation with core labour

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products equally was necessary. They both agreed that it was necessary as not doing so discriminated against gasoline imports from domestic gasoline.

138 Eres 598.

139 Ibid.

140 Black's Law Dictionary is a widely used law dictionary in the US. It was founded by Henry Campbell Black and is a reference of choice for definitions in legal briefs and courts opinions and has been cited as a secondary legal authority in US Supreme Court cases.

141 See the *WTO Appellate Body Report, Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161, 169/AB/R Para 156 (11 December 2000).

142 Eres 636.

143 Ibid

144 See Trebilcock and Howse 572.

standards but is an inappropriate mechanism for enforcing them in the WTO.[145] Sanctions are generally contrary to WTO principles, and can only be used in very limited circumstances that are authorized by the WTO agreements, such as anti-dumping and countervailing measures.[146] Politically, it is unlikely that unilateral action would be allowed for breaches of labour standards. Even assuming that labour standards are able to be enforced through trade measures within the WTO, either through amendments to GATT Article XX, the introduction of a social clause or any other measure, they do not provide a solution to the complexity of the labour standards issue and should not be used to deal with disputes over labour standards.[147] The UNDP has observed that trade measures have the effect of constraining access to markets, which is why they are effective as a deterrent but noted that this could be counterproductive, resulting in developing countries becoming even poorer without helping the workers.[148] Flasbarth and Lips have argued that, "Trade sanctions are a blunt instrument, penalizing the country as a whole, not just those responsible for rights violations."[149]

Greenfield has argued that social clauses and the resulting sanctions could only be applicable to export sectors a limitation which will as cause considerable problems.[150] He opined that:

> "For example, if sanctions were applied to the export sector because of the use of child labour, affected children would simply move into employment opportunities in the non-export sector. Working in the unregulated and non-accountable 'shadow economy' can lead to even worse conditions and human rights abuses."[151]

Greenfield has also argued that since sanctions would only apply to exported goods the abuse of core labour standards could occur domestically with few legal repercussions.[152] Greenfield has

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[145] WTO "WTO Press Brief: Trade and Labour Standards" http://www.wto.org/english/thewto_e/minist_e/min96_e/labstand.htm (accessed 10-08-2012).

[146] See GATT Article I: 1, Article III: 4 and Article XI. However, as already alluded to in this chapter, a possibility to impose sanctions is raised by GATT Article XX(a) on 'public morals.'

[147] Ibid. As already alluded to in this chapter with respect to the Burma/Myanmar case, even if Article 33 of the ILO Constitution were to allow for the imposition of sanctions against a Members State which violates core labour standards in trade, such an approach would be impracticable as it would automatically violate WTO laws.

[148] See Chapter 4 of the UNDP Human Development Report 2000 "Human Rights and Human Development" http://hdr.undp.org/reports/global/2000/en/ (accessed 13-09-2012).

[149] Flasbarth and Lips "Effects of a Humanitarian World Trade Organization Social Clause on Welfare and North-South Trade Flows" 2006 *Aussenwirtschaft* 159.

[150] Greenfield "Core Labor Standards in the WTO: Reducing Labor to a Global Commodity" 2001 *Working USA* 9.

[151] Ibid.

[152] Ibid.

refered to the notion that the ILO Convention against Forced Labour was blatantly violated in the US where prison inmates make commercial products.[153] The UN has expressed the view that where goods are supplied solely to the domestic market, the WTO would not have jurisdiction hence trade sanctions would not be applicable.[154] However it is clear that the issues giving rise to the need to incorporate a social clause into the WTO relate to the violation of core labour standards in regional or multilateral trade practices and is not limited to domestic violations of such standards. Greenfield's argument may have been overtaken by events with the emergence of countries like the Democratic Republic of China as key trade actors whose products are exported and who also export cheap labour.

Poor labour standards are usually rooted in poverty and this is not something that sanctions can resolve.[155] If the root cause of the problem is not addressed and a worker loses his/her job because of a heavy handed approach such as trade measures resulting in mass lay-offs, the family will lose its income and be plunged into greater poverty.[156] However it has already been established in chapters six and seven that trade has the potential to address poverty concerns as the entry of foreign investors ought to force wages upwards. If wages increase, poverty is likely to decrease. Trade has been known to boost the Gross Domestic Product of developing countries a fact which must naturally lead to poverty reduction. Should poverty persist, it could be argued that it may not be a result of the policy measures aimed at improving the protection of labour standards but the overall economic policies adopted by the governments which may not be suitable to their countries' demands.

8 3 3 Strengthening the relationship between the WTO and ILO

Institutionalizing the relationship between the WTO and ILO has also been advanced as a way of addressing the need to link trade to core labour standards. The WTO Secretariat currently has some restricted interaction with the ILO "compiling statistics, research and technical assistance

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[153] Ibid.

[154] UN "The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the full Enjoyment of Human Rights" http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.13.En?Opendocument (accessed 22-11-2012).

[155] Ibid.

[156] Ibid.

and training".[157] Initially, the International Trade Organisation was supposed to have a strong working relationship with the ILO and "consult and co-operate" in all labour related matters, as well as cooperating in regards to economic development and reconstruction.[158] The current WTO system is but a shadow of this, with very limited collaboration.[159] During the Geneva Ministerial Conference, the US, EU and South Africa pushed for a more substantive relationship between the WTO and ILO which was strongly opposed by a group of developing countries led by Brazil.[160] But despite the controversy and discussion about the issue, the Ministerial Declaration failed to make any mention of it.[161]

The obvious reluctance of the WTO to deal with labour standards means that the link between the WTO and ILO is crucial in regulating labour standards. This relationship has never been formalised within the WTO and so will remain ineffective at best without proactive change.[162]

The examination of proposals to establish a trade-labour linkage has revealed that there could be available legal options for incorporating a social clause into the WTO framework. However, it is also evident that none of the proposals advanced take into consideration the need to address the dangers of setting international standards which must be equally complied with by both developing and developed countries. Even so, the developing countries themselves are not of the same economic growth levels hence one would argue that the proposals discussed in this chapter to link trade to core labour standards are inadequate. A social clause in the WTO legal framework could act as a pro-development initiative which the WTO's Doha Development

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[157] WTO "Work with other organisations: The WTO and International Labour Organisation" http://www.wto.org/english/thewto_e/coher_e/wto_ilo_e.htm (accessed 15-08-2012).

[158] See Articles 7.3 and 10 of the Havana Charter.

[159] See WTO "Singapore WTO Ministerial 1996: Ministerial Declaration WT/NIM(96)/DEC" http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (accessed 10-08-2012). When the issue of labour standards was raised at the 1996 Singapore Ministerial conference, Article 4 of the resultant Ministerial Declaration ruled that the WTO and ILO Secretariats will continue their existing collaboration. See also concluding remarks by the Chairman of the Singapore Ministerial Conference Yeo Chow Tong available at Yeo Cheow Tong http://www.twnside.org.sg/title/tong-cn.htm (accessed 10-08-2012). Mr Tong clarified in his concluding remarks that this collaboration respects fully the respective and separate mandates of the WTO and the ILO.

[160] Wilkinson "Labour and Trade Related Regulation: Beyond the Trade-labour Standards Debate?" 1999 *British Journal of Politics and International Relations* 165.

[161] Ibid.

[162] Wilkinson 167.

Round of trade negotiations has so far failed to deliver.[163] In particular, the special treatment rules for developing countries known as the special and differential treatment rules[164] were supposed to have been reviewed to make them precise, effective and operational in relation to the social clause issue. But nowhere is the option or possibility raised.

It is arguable that special and differential treatment rules could have been used to address the challenges posed by the inequalities amongst trade partners with regard to the recognition of non-trade matters in the WTO. This may necessitate the establishment of legal mechanisms which may lead to the incorporation of a social clause into the WTO framework without creating obligations for developing countries which they are unable to comply with. The efforts taken to link environmental concerns with trade could be useful in attempts to establish a framework for linking trade with core labour standards. However, it must be appreciated that the efforts made in the environment case have not been easy. It is submitted that there could be valuable lessons to be learnt from the approach taken by WTO members to date.

8 3 4 Lessons learnt from the efforts to link trade and environment

Just like trade and labour, trade and environment have a linkage.[165] The linkage between trade and environment has resulted in the WTO assuming a limited competence on trade related

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[163] See WTO "Lamy: Members Continue to Explore Opportunities for Doha Progress" WTO: 2012 News Items 2 May 2012. See also BBC "World Trade Talks end in Collapse" BBC 29 July 2008; Fergusson "World Trade Organization Negotiations: The Doha Development" 2008 *Congressional Research Service* 1 and Charles and Scnepf "WTO Doha Round: The Agricultural Negotiations" 2007 *Congressional Research Service* 2.

[164] See WTO Ministerial Declaration (Doha Declaration) adopted on 14 November 2001 para 44. The special and differential treatment rules include: longer time frames for implementing WTO agreements and commitments; measures to increase trading opportunities for least developing countries; provisions requiring all WTO members to safeguard the trade interests of developing countries; support to help developing countries build the infrastructure for WTO work, handle disputes, and implement technical standards. See also WTO Ministerial Conference, Implementation-related Issues and Concerns: Decision of 14 Novemebr 2001 para 12.1; Finger "Developing Countries in the WTO System: Extending Robert Hudec's Historical Analysis to the Doha Round" paper presented at the Cordell Hull Institute Trade Policy Roundtable "Lessons of the Doha Round for Developing Countries" 2007 11, 16; WTO *World Trade Report* (2007) 293-294; and Lewis "WTO Winners and Losers: The Trade and Development Disconnect" 2007 *Georgetown Journal of International Law* 165.

[165] Hufbauer and Kim "The WTO and Climate Change: Challenges and Options", a paper prepared for the Inaugural Conference of Thinking Ahead on International Trade (TAIT): Challenges Facing the World Trade System (17-18 September 2009), organized by the Centre for Trade and Economic Integration (CTEI) at the Graduate Institute of International and Development Studies, Geneva, in collaboration with the Economic Research and Statistics Division of the Secretariat of the World Trade Organization. Hufbauer and Kim observed that, "Aside from the broad debate as to whether economic growth and trade adversely affect the environment, linkages are recognized between existing rules of the WTO and rules established in various Multilateral Environmental Agreements (MEAs)."

aspects of environmental policies.[166] The WTO's limited competence has been acknowledged regardless of the fact that it is not a global environmental protection agency.[167] In 2001, WTO members agreed to launch negotiations that would address the link between trade and environment at the Doha Ministerial Conference.[168] The Doha Declaration adopted at the Doha Ministerial Conference mandates negotiations on three issues: the relationship between WTO rules and specific trade obligations set out in Multilateral Environmental Agreements (MEAs); procedures for regular information exchange between MEA secretariats and the relevant WTO committees; and the reduction or elimination of tariff and non-tariff barriers to environmental goods and services.[169]

Cooperation between the WTO and the MEAs has already started.[170] The UN Framework Convention on Climate Change (UNFCCC)[171] representatives attend regular meetings of the WTO Committee on Trade and Environment (CTE) and the WTO CTE members in turn attend

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[166] World Trade Organization "Trade and Environment at the WTO" http://www.wto.org (accessed 18-08-2012). See also Trebilcock and Howse 507. Trebilcock and Howse observed that: "The relationship between trade and the environment has only recently attained a prominent place on the trade agenda, although it has been a concern of environmentalists for some time. Much of the debate on this issue (just like the trade-labour linkage debate) has been highly emotive and polarized. Often, environmentalists tend to identify liberal trade with environmentally destructive unrestrained economic growth. Many free traders, on the other hand, are largely dismissive of the environmentalists' concerns as either disguised protectionism or irrational fanaticism."

[167] The WTO Ministerial Decision on Trade and Environment, adopted in the Marrakesh Agreement that created the WTO, acknowledged the importance of sustainable development and called for creation of the Committee on Trade and Environment (CTE).

[168] See paragraph 6 of the Doha Declaration. The Doha Declaration includes a negotiating mandate on clarifying the relationship between MEA and WTO rules. See also Paragraph 31 (iii) of the Doha Declaration. In order to improve market access to environmental goods and services, the Declaration in paragraph 31(iii) called for negotiations on, "…the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services."

[169] See paragraph 31 of the Doha Declaration. It provides that, "With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on: (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question; (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status; (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services."

[170] See Steinberg "Power and Cooperation in International Environmental Law" in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 506.

[171] See Article 2 of the United Nations Framework Convention on Climate Change (UNFCCC) of 1992. The UNFCCC is an international environmental treaty negotiated at the UN Conference on Environment and Development informally known as the Earth Summit held in Rio de Janeiro, Brazil, in June 1992.The objective of the treaty is to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

the UNFCCC Conferences of the Parties (COP).[172] Gatherings of world leaders such as the Group of 20 London Summit held in April 2009,[173] the Group of Eight L'Aquila Summit held in July 2009,[174] and most recently the November 2011 Durban COP 17 Climate Change Summit in South Africa[175] all urgently called for the conclusion of the Doha Round negotiations. Of significance concerning measures to be taken to combat climate change is the notion that such measures should not distort international trade. The UNFCCC states that, "…Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."[176] The Kyoto Protocol[177] also states that, "…Parties … shall strive to implement policies and measures … in such a way as to minimize adverse effects, including the adverse effects of climate change on international trade."[178]

While countries have repeatedly affirmed the importance of a successful conclusion, gaps between the positions expressed by developed and developing countries as in the debates concerning a trade-labour linkage are hindering any such conclusion.[179] At an informal group meeting under the Ad Hoc Working Group on Long Term Cooperative Action (AWG-LCA) held

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[172] See Hufbauer and Kim 3. See also Paragraph 32 of the Doha Declaration which directs the WTO CTE to work on: (i) the effect of environmental measures on market access, especially in relation to developing countries; (ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs); and (iii) labeling requirements for environmental purposes. See also World Bank "International Trade and Climate Change: Economic, Legal, and Institutional Perspectives" 2007 Washington DC: World Bank 2.

[173] See the full text of the communiqué of the Group of 20 London summit in April 2009 at http://www.londonsummit.gov.uk/resources/en/news/15766232/communique-020409 (accessed 20-08-2012).

[174] See the full text of the the communiqué of the Group of Eight L'Aquila summit in July 2009 at http://www.g8italia2009.it/static/G8_Allegato/G8_Declaration_08_07_09_final,0.pdf. (accessed 20-08-2012).

[175] See UN "Durban Climate Change Conference-November/December 2011" http://unfccc.int/../6245.php (accessed 20-08-2012). The UN Climate Change Conference in Durban delivered a breakthrough on the international community's response to climate change. A decision was taken by the Parties to the Convention, the Kyoto Protocol, the Bali Action Plan and the Cancun Agreements to adopt a universal agreement on climate change by no later than 2015.

[176] See Article 3.5 of the UNFCC.

[177] The Kyoto Protocol is an international agreement which was adopted in 1997 and is linked to the UNFCCC. The key feature of the Kyoto Protocol is that it sets binding targets for 37 industrialised countries and the European community for reducing green house gas (GHG) emissions. The Protocol differs from the Convention in that the latter encouraged industrialised countries to stabilize GHG emissions whilst the former commits them to do so.

[178] See Article 2.3 of the Kyoto Protocol.

[179] See Charnovitz "Trade and Climate: Potential Conflicts and Synergies" 2003 Washington DC: Pew Centre on Global Climate Change. Charnovitz pointed out that, "Climate change presents an extreme case of market failure namely, the failure to build the damage done by GHG emissions into the prices of goods and services and that a classic role for governments is to correct market failures. Normally, however, governments want great flexibility in the choice of national instruments to correct market failures, because they need to balance the economic characteristics of alternative measures against their political acceptability."

in August 2009 in Bonn, India proposed the inclusion of a draft paragraph in the negotiating text, which reads as follows:

> "Developed country Parties shall not resort to any form of unilateral measures including countervailing border measures, against goods and services imported from developing countries on grounds of protection and stabilization of climate. Such unilateral measures would violate the principles and provisions of the Convention, including, in particular, those related to the principle of common but differentiated responsibilities (Article 3, Paragraph 1); trade and climate change (Article 3 paragraph 5); and the relationship between mitigation actions of developing countries and provision of financial resources and technology by developed country Parties (Article 4, Paragraphs 3 and 7)."[180]

While developing countries are seeking ways to prevent countries from using border measures against them, the US Congress is seeking ways to address competitiveness concerns and incorporate them into a post-Kyoto treaty.[181]

The differences between the developed and developing countries emanate from the fact that at the 13th UNFCCC COP meeting held in Bali, Indonesia, in December 2007, countries agreed to launch negotiations to write a successor accord to the Kyoto Protocol and adopted the Bali Action Plan.[182] While the Bali Action Plan requires both developed and developing countries to take action to protect the environment, its requirements differ between the two groups, expressed by the principle of "common but differentiated responsibilities."[183] The Bali Action Plan requires all developed countries to adopt "measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, while ensuring the comparability of efforts among them, taking into account differences in their national circumstances."[184] For developing countries, the Plan requires "nationally appropriate mitigation actions (NAMAs) by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and

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[180] See TWN Bonn News Update "Unilateral Trade Measures to Protect Climate Change Violate Climate Treaty - say Developing Countries" 13 August 2009.

[181] Hufbauer and Kim 3.

[182] The Bali Action Plan is a comprehensive process which was adopted to enable the full, effective and sustained implementation of the Kyoto Protocol through long-term cooperative action, up to and beyond 2012. The full text of the Bali Action Plan is available at http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3 (accessed 21-08-2012).

[183] Hufbauer and Kim 5.

[184] Ibid.

capacity-building, in a measurable, reportable and verifiable manner."[185] Hufbauer and Kim have observed that:

> "Sharp differences in interpretation of this principle have separated the two groups. The United States and other developed countries want binding commitments from all major greenhouse gas (GHG) emitters, notably the BICs – Brazil, India, and China – and their peers among developing countries. In pointed disagreement, India and China assert that "best efforts" are the most they are required to make under the principle of "common but differentiated responsibilities."[186]

The sharp differences observed by Hufbauer and Kim's are compounded by the argument that:

> "…to the extent that the economic policies promoted by the WTO rules lead to growth and industrialization, there is a concern that the Earth's resources will continue to be used in a way that is not sustainable. The current rate of consumption of resources is perceived by some as too high and policies that increase this consumption in developed countries…will further deplete an environment that is already strained."[187]

However, reconciling the plausible argument of a need to preserve the earth's resources and the Bali Action Plan principle might be a difficult objective. As the case has been in the polarized trade-labour linkage debate, an argument of protectionism has been raised by developing countries against developed countries.[188] As in the trade-labour linkage debate, fears of a 'race to

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[185] Ibid.

[186] Hufbauer and Kim 6.

[187] Lester *et al* 852.

[188] Lester *et al* 854. Lester *et al* have observed that: "...there is a concern that the laws of developed countries which create higher standards domestically or try to promote environmental goals abroad will be challenged as disguised protection that violates trade rules, and thus environmental protection will be undermined in this way." See also Mann and Porter "The State of Trade and Environment Law-2003: Implications for Doha and Beyond" http://www.iisd.org/pdf/2003/trade_enviro_law_2003.pdf (accessed 25-11-2012). See also Veel "Carbon Tariffs and the WTO: An Evaluation of Feasible Policies" 2009 *Journal of International Economic Law* 749. Veel argued that imposing carbon tariffs on countries that do not comply with environmental laws in trade is to "...ensure that foreign producers in countries without carbon taxes or equivalent schemes do not benefit from an artificial comparative advantage stemming from more lax regulations on greenhouse gas emissions." Veel's argument was acknowledged by the WTO's Director General who at the 24th Session of the Governing Council/Global Ministerial Environment Forum in Nairobi, Kenya, on the 5th of January 2007once remarked that: "Trade, no doubt, leads to a more efficient allocation of resources on a global scale. However, for this efficient allocation to truly materialize, we all know that resources must be properly priced to start with-that externalities would have to be internalized. In today's world our policies are not fully synchronized. Greater awareness of the need for this synchronization is, first and foremost, required of governments...The Doha Round of trade negotiations contains a promise for the environment. A promise to allow for a more efficient allocation of resources-including natural ones-on a global scale through a continued reduction of obstacles to trade (tariffs and subsidies)." See Lamy "Globalization and the Environment in a Reformed UN: Charting a Sustainable Development Path" http://www.wto.org/english/news_e/sppl54_e.htm (accessed 25-11-2012). However the failure of the Doha Round raises questions as to whether a trade-environment linkage will be realised in the WTO legal framework as would be a trade-labour linkage.

the bottom' have been raised.[189] In response to the 'race to the bottom' phenomena Stiglitz has proposed that countries such as the, "US or any country which refuses to agree to or to implement emission reductions from inflicting harm on the rest of the world..." should have tariffs being imposed on them so that they avoid creating a race to the bottom.[190] He has further argued that:

> "Fortunately, we have an international trade framework that can be used to force states that inflict harm on others to behave in a better fashion. Except in certain limited situations (like agriculture), the WTO does not allow subsidies-obviously, if some country subsidizes its firms, the playing field is not level. A subsidy means that a firm does not pay the full costs of production. Not paying the cost of damage to the environment is a subsidy, just as not paying the full cost of the workers would be."[191]

However, whilst attempts to justify the imposition of tariffs for the violation of environmental standards may be plausible and not far-fetched (under limited circumstances) in terms of the WTO law,[192] doing so would violate provisions of the Agreement on Subsidies and Countervailing Measures (SCM).[193] Neumayer opined:

> "No doubt, we continue to observe environmental degradation on a large scale. There is also no doubt that trade liberalization can at times lead to increased environmental degradation if strong environmental policies are not in place. Where massive negative environmental externalities are allowed to exist, trade liberalization can be like a fresh breeze of wind on a house that is already set on fire. But it is the responsibility of the

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[189] Lester *et al* 854. Lester *et al* have observed that there is concern that, "...trade rules will lead to multinational companies (MNCs) seeking out countries with weak regulatory standards for products and production processes, often in developing countries, in order to lower their compliance costs. The result will be that more production takes place in areas with lower standards (e.g. environment and labour). There is a further concern that this behaviour among MNCs will lead countries 'in a race to the bottom' in lowering standards to attract investment, as well as harmonisation of laws around these low standards."

[190] See Stiglitz "A New Agenda for Global Warming" http://www.bepress.com/ev/vol3/iss7/art3 (accessed 25-11-2012.

[191] Ibid.

[192] See GATT Article XX(b) which justifies measures "necessary to protect, human, animal or plant life or health" and Article XX(g) which justifies measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

[193] The definition of a 'subsidy' in terms of Part I of the SCM Agreement is not consistent with the construction of a subsidy advanced by Stiglitz. The SCM Agreement defines a subsidy as containing the following basic elements: (i) a financial contribution; (ii) by a government or any public body within the territory of a Member; (iii) which confers a benefit. The three elements must be satisfied in order for a subsidy to exist. However, it is submitted that the failure to regulate green house gas emissions, as Lester *et al* observe, is not and cannot be a subsidy in terms of the SCM Agreement's definition of the term. As such it would be impossible in terms of WTO rules to justify the imposition of tariffs in order to ensure compliance with environmental laws.

policy-makers from its member states, not the WTO itself, to put these policies in place."[194]

Whilst Neumayer's argument may be plausible under a multilateral trade regime in which WTO Member States fully comply with their environmental obligations at national level, Lester *et al* have observed that there is a significant concern regarding MNCs which seek out countries with weak environmental standards within which to conduct their businesses.[195] Lester *et al* further note that, "This significance has arisen from disparities in the extent to which states have undertaken (if at all) to reduce emissions of greenhouse gases under the Kyoto Protocol."[196] It is thus submitted that leaving compliance to environmental laws (as is the case with core labour standards) in trade in the hands of WTO Member States might be misguided. As Hufbauer and Kim have noted:

> "In the absence of parallel commitments, and given the resistance by India and China to accept binding emission targets, some developed countries (particularly the US) harbour fears that their own stringent GHG control programs will put domestic firms at a severe disadvantage in global markets. This will lead to the "leakage" of production and jobs to firms located in countries that do not adopt equivalent controls. A related concern is that, in the end, domestic action by developed countries will make no difference to climate change if emissions activity simply migrates to other countries and if domestic GHG control policies do not create enough "leverage" to prod China and India and other large but reluctant emitters to take action."[197]

Veel has suggested that it is necessary to press forward with efforts to consider the use of trade measures to address the violation of environmental laws in trade.[198] Hufbauer and Kim then reveal that:

> "To address these concerns, the United States and other countries are contemplating "corrective" provisions in their national GHG control programs, such as the allocation of free allowances, special exemptions from new controls, and border measures. In particular, border measures that penalize imports from countries that do not take comparable action enjoy broad political support. Production subsidies (through free allocations and exemptions), unilateral trade restrictions (through border adjustments), and performance

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[194] See Neumayer "The WTO and the Environment: Its Past Record is Better than Critics Believe, but the Future Outlook is Bleak" 2004 *Global Environmental Politics* 1.
[195] Lester *et al* 856.
[196] Ibid.
[197] Hufbauer and Kim 6-7. See also Environmental Leader "China to Start Cutting CO2 Emissions in 2050" http://www.environmentalleader.com/2009/08/17/china-to-start-cutting-co2-emissions-in2050/ (accessed 25-11-2012).
[198] Veel 749.

> standards (adopted in the name of GHG controls) all promise commercial friction and stand a fair chance of being challenged in the WTO."[199]

Of the measures adopted by the US and other countries in their national GHG control programs, some of them may have trade implications. For instance, product for performance standards such as labeling requirements or energy efficient standards could easily operate as technical barriers to imports.[200] Under the WTO, countries have great flexibility to design environmental regulations that have effects only within their territories.[201] However, the same discretion does not apply to measures that affect exports or imports.[202] An absence of clear guidelines on how to address some of these issues poses challenges to the effectiveness of an environment-trade linkage.[203]

Attempts to link the environment and trade have also resulted in some useful cases being decided by the WTO's Appellate Body which try to address serious questions about the WTO's capacity in addressing non-WTO laws. Sinha has observed that the WTO's Appellate Body reports in the cases of *United States-Measures Affecting the Production and Sale of Clove Cigarettes* [204] and *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*[205] have re-ignited the debate on the WTO's role in balancing the rights of the sovereign to regulate health or environment within its domestic domain, with the need to maintain the sanctity of the multilateral trade order.[206] The significance of the cases and questions raised concerning an environment-trade linkage is that the environment like labour is a non-trade area hence the progress in the negotiations to link it to trade could offer guidelines on how to link trade and labour in multilateral trade agreements.

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[199] Hufbauer and Kim 7.

[200] Ibid.

[201] Ibid. See also Houser, Bradley, Childs, Werksman, Heilmayr "Leveling the Carbon Playing Field" 2008 *Washington: Peterson Institute for International Economics and World Resources Institute* 5.

[202] Ibid. See also Cosbey "Trade and Climate Change: Issues in Perspective" 2008 *Winnipeg: International Institute for Sustainable Development* 7.

[203] Hufbauer, Clyde, Charnovitz, and Kim "Global Warming and the World Trading System" 2009 *DC: Peterson Institute for International Economics* 20.

[204] See the Report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, (Hereinafter referred to as *US-Clove Cigarettes*) WT/DS406/AB/R (4 April 2012). See also, Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R (2 September 2011).

[205] See the Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, (Hereinafter referred to as *US-Tuna Dolphin II*) (WT/DS381/AB/R (16 May 2012).

[206] Sinha "A Review of Kati Kulovesi, the WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation (Kluwer International 2011)" 2012 *Trade, Law and Development* 269.

The *US-Clove Cigarettes* case is one of the most controversial health-related disputes ever to arise in the history of the WTO, yet it is important as it establishes the relationship between trade and environment.[207] In this case, Indonesia challenged a US measure in section 907(a)(1)(A) of the US Federal Food, Drug and Cosmetics Act[208] that prohibits cigarettes and component parts containing a flavor herb or spice (clove) which gives a characterizing flavour to the product except for menthol and tobacco. The US measure bans the production and sale of clove cigarettes, as well as most other flavoured cigarettes in the US. Indonesia is the world's main producer of clove cigarettes and the vast majority of clove cigarettes consumed in the US prior to the ban.[209] It argued that the US ban on clove cigarettes was discriminatory and unnecessary. It also argued that the US acted inconsistently with procedural requirements of the WTO Technical Barriers to Trade (TBT) Agreement.[210]

The WTO Panel found that the US ban was inconsistent with the national treatment obligation in the TBT Agreement because it accords clove cigarettes less favourable treatment than that accorded to menthol-flavored cigarettes.[211] The Panel found that menthol and clove cigarettes were like products in terms of Article 2.1 of the TBT Agreement. The Panel however rejected Indonesia's claim that the ban was unnecessary. The Panel found that Indonesia had failed to demonstrate that the ban was more trade-restrictive than necessary to fulfil a legitimate objective which in this case was reducing youth smoking.[212] The US appealed against the Panel's decision to the WTO Appellate Body.

The Appellate Body upheld the Panel's finding that the US ban was inconsistent with the national treatment principle. However, the Appellate Body disagreed with the Panel that "like products" as referred to in Article 2.1 of the TBT Agreement should be interpreted based on the regulatory purpose of the technical regulation at issue. Instead, the Appellate Body found that the

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[207] See also Voon "The WTO Appellate Body Outlaws Discrimination in US Flavored Cigarette Ban" 2012 *American Society of International Law* 1.

[208] See the US Federal Food, Drug and Cosmetic Act of 1938. It is a set of laws passed by the US Congress giving authority to the US Food and Drug Administration to oversee the safety of food, drugs and cosmetics.

[209] Voon 2.

[210] The Technical Barriers to Trade Agreement (TBT) was renegotiated during the Uruguay round of the General Agreement on Tariffs and Trade with its present form entering into force in 1995. It seeks to ensure that technical regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade. It prohibits technical requirements created in order to limit trade as opposed to technical requirements created for legitimate purposes such as consumer or environmental protection.

[211] See Article 2.1 of the TBT Agreement.

[212] See Article 2.2 of the TBT Agreement.

determination of whether or not products are "like" within the meaning of Article 2.1 of the TBT Agreement should be a determination about the competitive relationship between the products based on an analysis of the traditional likeness criteria.[213] Of significance concerning a trade-environment linkage was the Appellate Body's conclusion that the regulatory concerns underlying a measure such as the health risks associated with a product may be relevant to the determination of "likeness" to the extent that they have an impact on the competitive relationship between the products.

In the *US-Tuna Dolphin II* case the Mexican Government alleged that the US measures under the Dolphin Protection Consumer Information Act[214] which established the conditions for the use of a "dolphin safe" label on tuna products and conditional access to the US Department of Commerce official safe label upon bringing certain documentary evidence that varies depending on the area where tuna contained in the tuna product was harvested and the fishing method by which it is harvested were inconsistent with Articles I.I and III.4 of the GATT and Articles 2.1, 2.2 and 2.4 of the TBT Agreement.[215] As such Mexico argued that the measures were discriminatory and unnecessary. The Panel first determined whether the US safe labeling provisions constituted a technical regulation in terms of Article 2.1 of the TBT Agreement.[216] The Panel rejected Mexico's claim that the US dolphin-safe labeling provisions were discriminatory against Mexican tuna products as the measures did not treat Mexican products less favorably than like US products.[217] However, the Panel also found that the measures were more trade restrictive than necessary and thus contrary to Article 2.2 of the TBT Agreement.

The Appellate Body while agreeing that the measures were a technical regulation reversed the Panel's findings on Articles 2.1 and 2.2.[218] The Appellate Body agreed with the US

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[213] See WTO "Determining 'Likeness' under the GATS" http://www.wto.org/../ersd200608_e.pdf (accessed 11-09-2012). The traditional likeness criteria relates to the physical characteristics, end-uses, consumer tastes and habits as well as tariff classification of a product.

[214] See section 1385 of the US Dolphin Protection Consumer Information Act of 1990. See also Title 16 of the US Code, Title 50 of the US Code of Federal Regulations and section 216.92 of the Dolphin Safe Requirements for Tuna Harvested in the Eastern Tropical Pacific Ocean.

[215] See the WTO "WTO Appellate Body Report: United States Tuna II" http://www.jdsupra.com/legalnews/wto-appel (accessed 14-08-2012).

[216] See the WTO Panel Report *US-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products"* WT/DS381/R 15 September 2011.

[217] Ibid.

that the measures were mandatory and therefore a technical regulation because they formed part of the US law and imposed legally enforceable conditions that had to be met to have access to the dolphin-safe label.[219] However, it concluded that the US had not demonstrated that the measures were even-handed and that the detrimental impact of the US measure on Mexican tuna products stemed exclusively from legitimate regulatory distinction.[220] The Appellate Body thus found that the US labeling scheme provided less favourable treatment to Mexican tuna products, contrary to Article 2.1 of the TBT Agreement.[221]

Again as in the *US-Clove Cigarettes* case environment-related principles were used as a method of determining the legality of specific trade practices. Such an approach in the two leading cases both presided over by the WTO Appellate Body in 2012 indicates the WTO's acceptance of a trade and environment linkage. The basis set by the two cases concerning an environment-trade linkage is very important as it offers a platform to examine the legitimacy of the WTO especially in relation to its reluctance to incorporate non-trade matters which link with trade such as labour standards into its framework.[222] In this connection Sinha noted that:

> "It is important to mention … that the legitimacy of the WTO may not necessarily stand on the shoulders of sovereign actors alone. Indeed, there could be a case to argue that the WTO has the unenviable role of finding legitimacy across its economically and culturally diverse constituencies, prominent among which are environmental and human rights activists, regardless of their national or cultural affiliation or origin. While from a theoretical perspective, it could well be argued that the will of the people is expressed through the will of the sovereign, a realist may well take such a view with a pinch of salt."[223]

Kulovesi has argued that a "state-centred understanding of legitimacy"[224] can "no longer be taken for granted"[225] and also noted that the growing interest in the legitimacy and accountability

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[218] See the US-Tuna Dolphin WTO Appellate Body Report 181. See also Trujillo "The Tuna-Dolphin Encore: WTO Rules on Environmental Labeling, ASIL Insights" http://www.asil.org/insights120307.cfm. (accessed 13-08-2012).

[219] See the US-Tuna Dolphin WTO Appellate Body Report 194.

[220] See the US-Tuna Dolphin WTO Appellate Body Report 231.

[221] Ibid. See also Trujillo "The WTO Appellate Body Knocks Down US 'Dolphin-Safe' Tuna Labels but Leaves a Crack for PPMs" 2012 *American Society of International Law* 1 and Olen "US Loses WTO Appeal in Dolphin-Safe Tuna Case" http://www.economyincrisis.org/content/u-u-los (accessed 14-09-2012).

[222] Kulovesi "The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation" 2011 *Kluwer Law International* 39, 50.

[223] Sinha 269.

[224] Kulovesi 14.

[225] Ibid.

of international organizations "is coupled with re-invigorated interest in democracy at the inter-state level".[226] Kulovesi also emphasized the accountability of a state to its people.[227] Her aim was to show that if states are increasingly accountable to their people, directly or indirectly, then state centred or sovereign legitimacy would translate into the legitimacy of the WTO's policies. This would be an indication that the WTO's policy position concerning non-trade matters is plausible. Kulovesi also noted that:

> "A reference to sustainable development in the WTO Preamble, the establishment of the WTO Committee on Trade and Environment, the conscious jurisprudence of the WTO Appellate Body and the inclusion of environmental issues in the negotiating mandate for the Doha Development, has played a role in alleviating the tension surrounding the trade and environment linkage."[228]

Sinha has argued that, "The WTO's efforts to link environment with trade has further contributed in shaping a sense of legitimate expectation, based upon which the actions of WTO panels or the Appellate Body itself, may be adjudged in the future."[229] It becomes evident that the pressure to ensure that the WTO deals with non-WTO law issues emanates from the realization that its dispute settlement system, though less ideal, is the only international system that can settle disputes emanating from the linkage between trade and non-trade related areas, in this case the environment.[230] It may then be argued that if the WTO is perceived as a solution to dispute resolutions in matters where trade is linked with non-trade matters then it is logical to argue that the WTO must resolve such a dispute.[231]

Dunoff on the other hand has argued that the WTO adjudicating body should simply refuse to decide any disputes which are too political for judicial resolution at the WTO.[232] Jackson has in turn expressed the view that the concepts of sovereignty and subsidiarity are tools through which linkage disputes should be decided.[233] On his part, Petersmann argued in favour of incorporating principles such as human rights into the body of WTO law as "context" for

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[226] Kulovesi 32.
[227] Kulovesi 33.
[228] Kulovesi 57.
[229] Sinha 274.
[230] Kulovesi 59.
[231] Ibid.
[232] Dunoff "The Death of the Trade Regime" 1999 *European Journal of International Law* 733.
[233] Jackson "Afterword: The Linkage Problem-Comments on Five Texts" 2002 *American Journal of International Law* 122.

interpretation of WTO law.[234] However, the WTO Appellate Body in *Mexico-Soft Drinks* made it clear that it will not make any determination as to whether or not a WTO member has violated non-WTO law.[235] In apparent agreement with that position, Howse and Teitel have argued that the limited role of the WTO dispute settlement system is to test violations from the standpoint of WTO law.[236]

It therefore must be questioned whether the WTO panels and the Appellate Body, when interpreting the provisions of WTO laws, should refrain from engaging in an analysis simply because of its political ramifications or because of its linkages with the environment? It must also be questioned whether the legitimacy of the WTO dispute settlement system will be compromised if it is seen to shy away from contentious issues or to apply itself to such contentious issues? Kulovesi's analysis of an environment-trade linkage suggests that neither of the two questions could be easy to address[237] and that the legitimacy dilemma facing the WTO dispute settlement system is much like a "two headed dragon".[238] Kulovesi does not address the questions but concludes that the WTO dispute settlement system alone is ultimately ill-equipped to handle the kind of controversies that could arise from a conflict between organizations such as the WTO and United Nations Framework Convention on Climate Change (UNFCCC).[239]

However, if the questions are not addressed, the issue of the differentiation of international legal principles from the standpoint of whether such principles conflict with WTO law or not might not be clarified. An answer to the questions might be found in the importance of the principle of *lex specialis.*[240] The principle of *lex specialis* may be understood by reference to

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[234] Petersmann "Time for United Nations "Global Compact" for integrating Human Rights into the Law of the World Trade Organization" 2002 *European Journal of International Law* 633.

[235] See the Appellate Body Report, *Mexico-Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (adopted 24 March 2006).

[236] Howse and Teitel "Beyond the Divide: The International Covenant on Economic, Social and Political Rights and the World Trade Organization" in Joseph, Kinley and Waincymer (eds.) *The World Trade Organization and Human Rights: Interdisciplinary* Perspectives (2009) 44.

[237] Kulovesi 69.

[238] Ibid.

[239] See Halvorssen "UNFCCC, the Kyoto Protocol, and the WTO: Brewing Conflicts or are they Mutually Supportive?" 2008 *Denver Journal of International Law and Policy* 372. See also WTO Introductory remarks by Pascal Lamy (Director General of the WTO) "WTO public forum: High-Level Panel on Mutual Supportiveness of Trade, Climate Change and Development Objectives and Policies" http://www.wto.org/english/news_e/news08_e/remarks_lamy_forum08_24sept_e.pdf (accessed 27-08-2012);

[240] See Hampson "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body" 2008 *International Review of the Redcross* 558. Lex specialis, in

the relationship between the law of armed conflict or international humanitarian law (IHL)[241] and human rights law.[242] The International Court of Justice (ICJ) has made three pronouncements on the relationship between the two bodies of rules from which three interrelated propositions emerge.[243] First, human rights law remains applicable even during armed conflict. Second, it is applicable in situations of conflict, subject only to derogation. Third, when both IHL and human rights law are applicable, IHL is the *lex specialis*. It might be thought that these pronouncements resolve the question of the relationship between the two bodies of international law rules. Applied in a trade context, Carmody has noted that:

> "One view of obligations under the WTO Agreement is that they are bilateral, that is, they involve legal obligations between two countries. This is premised on the idea that the object of WTO obligations is 'trade'. According to this view, the WTO Agreement can be considered a 'bundle of bilateral relations' and WTO obligations should be analyzed pursuant to rules concerning bilateral obligations under the Vienna Convention on the Law of Treaties and the Articles on State Responsibility."[244]

The other view according to Carmody argues that:

> "WTO obligations are more appropriately regarded as collective because their principal object is the protection of collective expectations about the trade-related behaviour of governments. These form a common interest over and above the interests of WTO Member States individually. At the same time, while expectations may be the treaty's primary concern, they are not its sole concern. The treaty gives some flexibility to governments to deal with situations actually encountered in the pattern of trade. These two functions, the protection of expectations and the adjustment to realities, combine to produce law in a third mode, something that can be termed a law of interdependence. This is the tendency of the WTO Agreement to promote interaction among producers and consumers in different countries, and thereby to spin an indissoluble web of economic relations that goes beyond the interests of WTO Members individually. For this reason, the WTO Agreement can be thought of as a collective undertaking and WTO obligations are more appropriately

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legal theory and practice, is a doctrine relating to the interpretation of laws, and can apply in both domestic and international law contexts. The doctrine states that where two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*). The situation ordinarily arises with regard to the construction of earlier-enacted specific legislation when more general legislation is later passed. See also Prud'homme, "*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?" 2007 *Israel Law Review* 355.

241 Hampson 558.

242 Ibid.

243 See ICJ "Legality or Threat of Use of Nuclear Weapons" Advisory Opinion 8 July 1996 para 25. See also ICJ "The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" Advisory Opinion 9 July 2004 para106 and ICJ, Case concerning armed activity on the territory of the Congo (*Democratic Republic of the Congo v Uganda*) Judgment of 19 December 2005 paras 216–220.

244 Carmody "WTO Obligations as Collective" 2006 *The European Journal of International Law* 421.

> analyzed under the Vienna Convention on the Law of Treaties and Articles on State Responsibility rules on collective obligations."[245]

An example which comes readily to mind concerning the *lex specialis* is the reference to the Convention on International Trade in Endangered Species (CITES) in *US-Shrimp Turtle*,[246] to highlight the importance attached to the protection of turtles. It was not argued in this case that CITES obligations were in conflict with WTO obligations. The sole purpose of recourse to CITES was to emphasize the magnitude of the dispute that the WTO Panel or the WTO Appellate Body was called upon to address.

This may be distinguished from the situation in the *US-Tuna (Dolphin I)*[247] case and the *US-Shrimp Turtle* case itself, where an *amicus curie* made reference to the obligation on fishing states to protect the marine environment by taking into account the effects on species other than target species.[248] In this instance, government policies that discriminate against countries that engage in bad environmental behaviour were held to violate WTO rules.[249] Complaining governments initially refused to regulate the practices of their nationals who were needlessly killing dolphins and sea turtles.[250] The irony in those disputes was that while the GATT and WTO Panels pointed out the need for more environmentally-friendly fishery policies, the legal rulings were aimed at the US, the country seeking to prevent the avoidable drowning of dolphins and turtles rather than at the countries that were causing the environmental problems.[251] In the *United States-Shrimp* case, the Appellate Body stressed that sovereign nations "should" adopt effective measures to protect endangered species and "should" act together "bilaterally, plurilaterally or multilaterally... to protect the environment."[252] Yet WTO rules do not give any

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[245] Ibid.
[246] See the Appellate Body Report *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998) 185.
[247] The US-Tuna (Dolphin I) case attracts a lot of attention due to its implications for environmental disputes. It was decided under the old GATT dispute settlement procedure. It sought to address whether one country could tell another what its environmental regulations should be. It also sought to establish whether trade rules permit action to be taken against the method used to produce goods? The WTO Panel found that a country, in this case the US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations.
[248] Kulovesi 93.
[249] See the US-Tuna (Dolphin I) case.
[250] Kulovesi 93.
[251] Ibid.
[252] Sinha 277.

authority to the Appellate Body to request governments which violate environmental laws to do so.[253]

A WTO Panel may be more willing to consider non-WTO sources as informing the "ordinary meaning" of WTO treaty terms, and take a more "legal" approach when non-WTO norms are in direct conflict with WTO norms.[254] WTO jurisprudence has previously taken, although in a slightly different context, an extremely narrow view of conflict.[255] Legal agreements such as the Rio Declaration or the Convention on Biological Diversity seem to have been referred to as factual evidence[256] a principle which provides sufficient discretion to incorporate international environmental law as relevant in the WTO dispute settlement system.[257]

In the *EC-Hormones*[258] case, the WTO Appellate Body held that the legal status of the precautionary principle was irrelevant when considering scientific risk assessment and uncertainty under the SPS Agreement.[259] This raises questions as to why the WTO Appellate Body in the *Shrimp Turtle* case noted that the "particular relevance" of Principle 12 of the Rio Declaration[260] in assessing unilateral trade restrictions under the GATT while dismissing its application in the *EC-Hormones* case.[261] Kulovesi argues that, "…what the WTO Appellate Body should have done…is to decide whether the precautionary principle is a norm of customary

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[253] Ibid. Several provisions in the WTO call on governments to carry out non-trade negotiations, but none of them pertain to the environment. See for example the TRIPS Agreement, Article 24.1 and the TBT Agreement, Articles. 2.6, 9.1 and 10.7.

[254] Sinha 277.

[255] See the Appellate Body Report *Guatemala-Antidumping Investigation concerning Portland Cement*, WT/DS60/AB/R (2 November 1998) 65. See also the WTO Panel Report, *Indonesia -Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (2 July 1998) 14.28.

[256] Kulovesi 167.

[257] Ibid.

[258] The *EC-Hormones* case of 1998 was lodged in respect to the measures taken by the European Commission (EC) to ban imports of beef from cows treated with hormones 17B, progesterone and testosterone, trenbolone acetate (TBA), zeranol and melengestrol acetate for growth-promotion purposes. The EC claimed that the ban was necessary for food safety. The US and Canada claimed that there was no evidence of harm to human health. Both the WTO Panel and Appellate Body concurred that the EC standard was beyond the measures required under the circumstances giving rise to the case hence were in violation of Articles 3 and 5. 1 of the SPS Agreement.

[259] The Agreement on the Application of Sanitary and Phytosanitary Measures, also known as the SPS Agreement, was negotiated during the Uruguay round of the GATT and entered into force at the establishment of the WTO in 1995. Under the SPS Agreement, the WTO sets constraints on member states' policies relating to food safety as well as animal and plant health with respect to imported pests and diseases.

[260] Principle 12 of the 12 August 1992 Rio Declaration provides that states should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.

[261] Kulovesi 164.

law and then analyze…how it would affect the interpretation of the SPS Agreement".[262] In the interest of the WTO's legitimacy it was preferable for the WTO to address an issue of fragmentation of laws head on rather than side step it through "legal jugglery".[263]

The *EC-Biotech*[264] decision also provides invaluable insight on the above arguments. In this case insufficient reasons were provided by the WTO Panel to explain why a harmonized reading of international environmental law principles and treaties with WTO laws was not applicable in resolving the dispute.[265] This could be interpreted as a failure of the WTO dispute settlement system to integrate non-WTO law with WTO law. However, it may be argued that if the WTO system itself were to take due note of these concerns and respond to them, the system would be able to evolve into an integrated system. The legitimacy of the WTO system will no doubt be judged by the manner in which the system responds to such concerns in the future.[266]

It is encouraging that cases and formal engagements at the WTO level have already started to explore the possibility of an environment-trade linkage which might lead to the establishment of an appropriate legal framework for such linkage. This position is in stark contrast to the trade-labour linkage which though obvious has been continuously excluded from the WTO legal framework. Carmody stated that:

> "It is therefore possible to conclude that the WTO Agreement as a law of realities is supplementary and assistive to the dominant task of protecting expectations. Reality based rules offer the option of seeking selective release from WTO disciplines, and hence work to reinforce the collectivity of the greater whole. Put differently, the freedom to derogate from this or that WTO rule, and therefore occasionally to disappoint collective expectations, is an integral part of the WTO package. No country would have agreed to it otherwise."[267]

Perhaps it is time efforts similar to those being directed towards the environment-trade linkage should also be directed towards the trade-labour linkage in order to broaden the scope of sustainable development especially for developing countries. It is hoped that the lessons obtained from the trade and environment case, though beset with serious challenges, will inform debates concerning a trade-labour linkage in order to have the latter adopted as one of the WTO's key

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[262] Ibid.
[263] Sinha 278.
[264] Ibid.
[265] Kulovesi 177.
[266] Kulovesi 164.
[267] Carmody 432.

policy objectives towards sustainable development. This could assist in limiting the violations of core labour standards in trade.

8 3 5 Why excluding a social clause could compromise the WTO's legitimacy

The global governance of trade is in a deadlock and the WTO is now suffering from a long standing crisis of legitimacy.[268] This is confirmed by the eventual failure of the Doha Round of multilateral trade negotiations in 2011.[269] Most of today's members of the WTO are involved in regional trade negotiations and agreements that go beyond the scope of WTO agreements in terms of their coverage.[270] The WTO appears reluctant to address the issue of a trade-labour linkage which has now become a key concept in most regional trade agreements.

This calls for a reform of world trade governance, especially of the objectives of the WTO within a renovated world economic order. The WTO stands as a central institution of international law and international economic relations.[271] Of the major international organizations, only the WTO regularly carries out both negotiation and adjudication.[272] Nowhere else in the multilateral system is there a formalized second-level judicial review of state-to-state disputes apart from the WTO.[273] Since mid-2004, WTO members have decided that non-trade matters are off the agenda of the organization as if these issues have no relationship to trade in the present day globalized world.[274] This could possibly be an oversight which sooner or later will call into question the legitimacy of the WTO. Charnovitz has observed that, "The legislative clout of the WTO comes not only through the indirect application of its rules but also in the dynamic way in which the WTO inter-penetrates other regimes."[275]

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[268] Ibid.

[269] See WTO "Think of the Cost of Doha Round Failure, Lamy Urges Members as Deadline Looms" 2011 WTO: News Items 29 March 2011. See also Walker "The WTO has Failed Developing Nations" The Guardian 14 November 2011.

[270] Stoler "Addressing 21ST Century "WTO-Plus" Issues in the Multilateral Trading System" 2012 *International Centre for Trade and Sustainable Development (ICTSD) Programme on Global Economic Policy and Institutions* 42.

[271] See Steger "Improvements and Reforms of the WTO Appellate Body" in Ortino and Petersmann (eds) *The WTO Dispute Settlement System: 1995-2003* (2004) 41.

[272] Ibid.

[273] Ibid.

[274] Ibid.

[275] See Charnovitz "The World Trade Organisation in 2020" http://www.worldtradelaw.net/Articles/charnovitz (accessed 29-08-2012).

The main objective of the WTO is to promote free trade.[276] This mission is more restricted than the one which was assigned to the International Trade Organization (ITO) by the Havana Charter. The ITO not only had the objective of expanding production and trade, but also included a wider objective of "realizing the aims set forth in the Charter of the United Nations, particularly the attainment of higher standards of living, full employment and conditions of economic and social progress and development."[277] The improvement of wages and working conditions, "as productivity may permit", was a central objective of the Havana Charter, which fully acknowledged interaction between trade and labour standards in the name of "fair trade".[278] This implied strong collaboration with the ILO, an objective which has completely disappeared in the WTO partly because of the developing countries who are against the incorporation of a social clause into the WTO framework.

According to Cling, reference in WTO articles to the UN Charter has disappeared.[279] The implication of Cling's observation is that the WTO is born as an international organization out of the UN system.[280] However, even the Bretton Woods Institutions which are largely independent of the UN refer to the UN Charter.[281] Cling concludes that, "This makes the WTO the only major international organization which does not refer to the UN principles. This especially implies that the WTO does neither comply with the Universal Declaration of Human Rights nor with the UN Declaration of Economic and Social Rights."[282] Supiot argues that the WTO's failure to refer to UN principles corresponds to placing the market first before all other general objectives of human development.[283] This regression is particularly obvious concerning the interest in development.

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[276] See Article 1 of the WTO founding Agreement which provides that member countries must consider that "their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services". See also WTO "Agreement Establishing the World Trade Organization" (1994) Geneva: World Trade Organization.

[277] United Nations "United Nations Conference on Trade and Employment held at Havana, Cuba, Final Act and Related Documents" Lake Success: Interim Commission for the International Trade Organization, April 1948.

[278] Cling "The Future of Global Trade and the WTO" 2012 Centre d' economie de l' Universite Paris Nord CNRS UMR 11.

[279] Ibid.

[280] Ibid.

[281] Ibid.

[282] Cling 12.

The Havana Charter was very ambitious in this respect as it was assigned the objective "to foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development".[284] The WTO is, in this respect, much more modest as it only aims to help developing countries "secure a share in the growth in international trade commensurate with the needs of their economic development".[285] This is clearly illustrated in the Marrakech Agreements which appear to be biased against developing countries, a position which is consistent with arguments to the effect that the WTO has no emphasis on development. As such, in order to address the legitimacy crisis of the WTO and reinforce its mandate as the sole institution in charge of international trade, there might be a need to enlarge its scope while including it more narrowly in the UN system.[286] The enlargement of the objectives of the WTO must be promoted together with its full integration into the UN system, a process which could lead to a clear framework for establishing a link between trade and human development.[287] This would translate into reforming trade governance in order to increase the voice of developing countries in the WTO,[288] which may result in the softening of developing countries' stance of resisting the incorporation of a social clause into the WTO framework.

Widening the scope of trade governance is likely to go a long way in repairing the image of the institution in the aftermath of the failure of the Doha Round[289] and in the face of some of the anti-globalization organizations which want it closed down.[290] The reform of the WTO nevertheless must be accompanied with a reform of the world's economic and financial governance.[291] This would mean that the Bretton Woods institutions must also be realigned to the objectives of human and/or sustainable development. It is submitted that the current world economic crisis has deepened the legitimacy crisis of the international institutions in charge of

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[283] Supiot "L'esprit de Philadelphie; La justice Sociale Face Au marché Total" http://www.journaldumauss.net/spip.php%3Fa (accessed 29-08-2012).
[284] Cling 12.
[285] Ibid.
[286] Ibid.
[287] Mattoo and Subramanian "From Doha to the Next Bretton Woods: A New Multilateral Trade Agenda" 2009 *Foreign Affairs* 15.
[288] Ibid.
[289] Deblock "Le déclin Irreversible de la Réciprocité et du Multilatéralisme" 2010 *L'Economie Politique* 35.
[290] Dadush "WTO Reform: The Time to Start Is Now" Policy Brief No. 80 Carnegie Endowment for International Peace Washington D.C. September 2009.
[291] Ibid.

world economic governance and has strengthened arguments for reinforcing the institutions.[292] A "new Bretton Woods"[293] which was talked about at the beginning of the 2008 global economic crisis has not taken place, but the need for it is urgent as ever.[294]

The current challenges being faced by the WTO may not imply that trade liberalization as a process should be interrupted at the international level.[295] Trade liberalization must keep progressing based on regional and bilateral agreements. However, the failure of the Doha Round only means that the multilateral trade liberalization process might be interrupted for a few years with increased regionalism possibly occurring.[296] This leads to the debate of regionalism and its link with multilateralism. Debates about regionalism's contribution to strengthening the multilateral trade system or to weakening it has been going on for years without any clear resolution.[297] It is a recognised fact that the regionalization process has been on the increase. Trade between neighbours keeps increasing. Krugman has noted that, "…the value of the distance co-efficient has doubled in gravity models since 1960. At the same time, trade agreements are signed between these countries to increase trade but also between distant countries (such as North-South regional agreements)."[298] It is in these regional trade agreements that non-trade matters such as labour matters have been addressed by incorporation.[299]

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[292] Ibid.

[293] See Boughton "A New Bretton Woods?" 2009 IMF Finance and Development Magazine volume 46. See also Mattoo and Subramanian 15.

[294] Cling 10. See also World Economic Forum "President Sarkozy calls for a 'New Bretton Woods'" http://www.weforum.org/node/65917 (accessed 25-11-2012). The former president of France in his opening address at the January 2011 World Economic Forum Annual Meeting said, "…it will not be possible to emerge from the global economic crisis and protect against future crises if the economic imbalances that are at the root of the problem are not addressed…Countries with trade surpluses must consume more and improve the living standards and social protection of their citizens…Countries with deficits must make an effort to consume a little less and repay their debts…The prosperity of the post-war era owed a great deal to Bretton Woods, to its rules and its institutions. That is exactly what we need today, we need a new Bretton Woods."

[295] Ibid.

[296] Ibid.

[297] ARTNeT "Fighting Irrelevance: The Role of Regional Trade Agreements in International Production Networks in Asia" 2011 New York: Economic and Social Commission for Asia and the Pacific 2.

[298] Cling 11.

[299] An evaluation of the process of trade liberalization over the past twenty years reveals that most trade liberalization has not been taking place within the WTO. Instead it has been taking place within regional and bilateral trade agreements. The main agreements signed since 1990 include the North American Free Trade Agreement of 1994, the Mercosur of 1995, the European Union-Mexico Free Trade Agreement of 2000 and the ASEAN-China Free Trade Agreement of 2010.

The WTO tries to downplay the impact of the proliferation of intra-regional trade, excluding intra-EU trade, by underlining that it only represents 16% of world trade.[300] However, Cling makes an important observation that intra-regional trade, "…is a growing share and some new regional trade agreements might increase this share further in the medium term. Such would be the case if a transatlantic free trade agreement is signed between the EU and the USA, and potentially also between the EU and Japan."[301] The major change concerning regional trade integration is that regional trade agreements are not so much about trade preferences anymore especially as Most Favoured Nation tariffs have declined substantially,[302] but increasingly about non-tariff barriers and national regulations.[303] As such it may be argued that regional trade agreements are re-shaping the international normative trade framework, which could then influence the multilateral trade framework.

It may also be argued that regional trade agreements benefit mostly developed countries, which are in a position to impose their agenda in bilateral relations.[304] On the other hand, developing countries have the option of accepting regional or bilateral agreements where their bargaining power is limited or being excluded from such agreements and remaining in isolation.[305] Regardless of the developing countries' choices, the signing of regional trade agreements by developed countries could reduce their motivation to reach an agreement for incorporating a social clause in the WTO legal framework.[306] In this regard, an increase in regionalism is both a "stepping stone" and a "stumbling block" in relation to the multilateral trading framework.[307] This development is likely to reduce the WTO's influence, and threaten its existence as a major international organization following the failure of the Doha Round.[308]

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[300] See World Trade Report 2011 "The WTO and Preferential Trade Agreements: From Co-existence to Coherence" Geneva: World Trade Organization.
[301] Cling 9.
[302] Ibid.
[303] Ibid. A good example is shown by the USA-Korea bilateral free trade agreement signed in 2010, which includes mutual validation of technical regulations for cars. More often, the change of regulations provoked by such agreements concerns all trading partners and not just the participants into the regional agreements.
[304] Cling 9.
[305] Cling 10.
[306] Ibid.
[307] Ibid.
[308] Cling 11. See also Hoekman and Kostecki 602. Hoekman and Kostecki argued that: "In the case of trade policy, the pursuit of mercantilist objectives by trade negotiators leads to an outcome that is welfare-improving (unambiguously for small economies that are price takers on world markets). In the case of competition policy this cannot be said-trading commitments on competition policy motivated by market access objectives could

Linking globalization and development might increase the support of the WTO from developing countries which may strengthen its legitimacy. Developing countries have been implementing active trade liberalization policies but there have been diverging patterns between developing and developed countries' growth paths with a few exceptions such as China and a few emerging Asian countries.[309] Special and differential treatment granted within GATT tried to compensate for development levels asymmetries and to reduce this divergence.[310] However the single undertaking principle of the WTO has forced all countries into a "one size fits all" model, whatever their development level, thereby strongly reducing or even abandoning the special and differential treatment.[311] Trade preferences granted to developing countries on a unilateral basis are being eroded by the multilateral liberalization process.[312]

Linking globalization and development could make trade agreements more development friendly.[313] To achieve this objective, an increase in special and differential treatment would be required. Bhagwati and Sutherland have argued that the, "…assumption that a development friendly trade deal must demand less of countries in a way that is proportionate to their state of development permeates the Doha Round and the final package will rightly have to be measured against it".[314] The Doha Round included asymmetric commitments between developed and developing countries concerning the extent of tariff reductions and reductions in agricultural

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have negative implications for the enforcement of competition law more generally. Not surprisingly, it was therefore resisted by…competition authorities…Instead, the focus shifted to support for a more general approach involving strengthening of national competition authorities in developing countries. A problem with this shift was that a major potential for smaller and poorer countries was not on the table." Hoekman and Kostecki's observations were at the centre of the failure of the Doha Round of talks to which Bhagwati argued, ""While trade officials in the US and EU blamed the…developing countries' excessive demands for the failure of earlier negotiations in Cancun in 2003, there is general agreement that this time it was the US whose unwarranted (and unyielding) demands killed the talks…the US managed to impose its own rules on weaker partners in the Preferential Trade Agreements that it helped to proliferate…big emerging economies like India, Brazil, China and South Africa insisted on rejecting such demands when made as part of trade rounds like Doha." See Bhagwati "Doha Round: Failure of Talks Means World Lost Gains that a Successful Treaty would have brought" http://www.economistonline.muogao.com/2008/08/ (accessed 25-11-2012). It could be plausible to argue that the Doha Round failed because it tried to address issues which were not in the best interests of developing countries and were probably not relevant to the contemporary world. Any new trade negotiations must be relevant to the interest of countries in the which. Such an interest must have sustainable development as its key objective.

309 Ibid.

310 Cling 12.

311 Cling 12.

312 Ibid.

313 Ibid.

314 See Baghwati and Sutherland "The Doha Round: Setting a Deadline, Defining a Final Deal" Interim report by High Level Trade Experts Group, January 2011.

subsidies.[315] A practical example of the importance of special and differential treatment for all developing countries, especially Least Developed Countries (LDCs), is seen in the need to remove trade distortions which were caused by European and American agriculture, as they push world prices of agricultural products downward.[316] Addressing this issue would imply that developing countries should still be allowed to use some sort of agricultural subsidies.[317]

LDCs were totally exempted from tariff reductions in the Doha Round.[318] The reasoning behind such exclusion was to compensate for the fact that LDCs are widely considered to be the main losers in the Marrakech Agreements.[319] It could also be argued that LDCs were disadvantaged by the Doha Round as far as tariff reductions were concerned, especially through the erosion of trade preferences.[320] For example, in order to attain a progressive WTO system, it would be reasonable to grant LDCs duty free access to markets such as those of the Organisation for Economic Co-operation and Development.[321] However, this approach might face a stumbling block in the form of increasing differentiation between developing countries.[322] This challenge is made complex by a country like China which has become the world's leading exporter and other fast developing countries such as India and Brazil which have become major players in world trade. It is problematic to address the question as to why such countries should continue to be granted the same preferences and derogations as less developed countries. This is one of the main difficulties that face multilateral trade negotiations as the fast developing countries reject any proposals to differentiate between developing countries since such a development would reduce their trade benefits. This challenge is currently being faced in multilateral negotiations on climate and environment as already alluded to in this chapter.

8 4 CONCLUSION

The survival of the WTO lies in its ability to address the challenges being faced in the aftermath of the global economic crisis and the linkage between trade and non-trade issues. This chapter

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[315] Ibid.
[316] Ibid.
[317] Ibid.
[318] Cling 13.
[319] Ibid.
[320] Ibid.
[321] Ibid.
[322] Ibid.

examined the fears that critics against the inclusion of a social clause in the WTO framework have raised. The fears have arguably been shown to be without basis. Solutions to the challenges of incorporating a social clause into the WTO as advanced by academics were analyzed. Proposals for a trade-labour linkage as discussed in this chapter are plausible but lack legitimacy as they do not acknowledge the differences in the levels of development of countries in the world. The proposed solutions to a trade-labour linkage emanate from an assumption that incorporating a social clause into the WTO framework demands equitable compliance with the set obligations by all countries regardless of their levels of development. This may not be possible as such proposals are likely to be resisted by developing countries which are of the view that such an approach would undermine their development agenda and threaten their sovereignty.

By analyzing the progress made in attempts to link environmental protection concerns and trade, the chapter also revealed that it is possible but difficult to create a legal framework which establishes a trade-labour linkage. Reasonable efforts are currently being made in establishing a legal framework for linking trade and environmental laws in the WTO. However, the WTO Appellate Body and Panel have been reluctant to make determinations over cases in which trade law overlaps with non-trade law though it has been made clear that for the WTO to retain its legitimacy, it must deal with trade related matters such as labour and the environment. Its inability to do so could lead to its demise as a multilateral institution in the aftermath of the failure of the Doha round as regional trade agreements are fast incorporating non-trade matters. Such a development may result in developed countries losing confidence in the WTO system with developing countries on the other hand having to be content with subjecting themselves to the policy interests of developed countries through bilateral trade agreements with them. Such an arrangement may not be in the best interests of either side as free trade is a key tool to global economic development.

Developing a legal framework which serves the best interests of both developed and developing countries would be important in addressing debates concerning a linkage between trade and non-trade matters. Such a legal framework should be sensitive to developing countries' agenda of sustainable development yet recognizing developed countries' need to sustain their economies. Such an objective cannot be achieved under the current WTO system. Accordingly, there is an urgent need to reform the current WTO system and establish a new WTO framework

which renders the institution effective in addressing the demands of its Member States in the face of global economic challenges. Perhaps all key stakeholders in international trade such as the WTO member States, the UN Economic Commissions, regional development banks, WTO bodies, institutions such as the ILO, amongst other organisations, should be encouraged to give their inputs on how they could work together with the WTO to achieve sustainable development and economic prosperity.

Such a working party arrangement may be complemented by a work plan that could result in the WTO Committee on Regional Trade Agreements critically exploring how non-trade matters such as labour standards could be linked to trade. This may even assist in establishing how overlaps between WTO laws and non-WTO laws should be addressed by the WTO without infringing upon the mandate of other institutions such as the ILO. It has been pointed out in this chapter that Article 33 of the ILO Constitution could allow for the use of sanctions with respect to members who violate labour standards as was proposed in the case of Burma (now Myanmar). However, it has also been established that even if the ILO would adopt such an approach, which the organisation is reluctant to do, the imposition of sanctions regarding violations of labour standards in trade is likely to infringe GATT Article I. This implies that the WTO and ILO have to work together to limit violations of core labour standards in trade. The reality of the globalization process is that different disciplines are merging hence solutions must be found on how to create a balance between the need to maintain traditional institutional frameworks of the WTO and those of other institutions. This process will not be easy but it is practical and possible as this chapter has attempted to show. Labour standards like environmental matters can form part of the WTO framework. Therefore, the next chapter, amongst others offers recommendations concerning a possible trade-labour linkage framework in the WTO system with emphasis on what the framework must be sensitive to.

CHAPTER NINE

Conclusions and Recommendations

9 1 INTRODUCTION

Labour standards have become a major issue in international trade.[1] Critics of a trade-labour linkage in the multilateral trade system have argued that, "Labour standards have no place in the WTO because it is an organisation that exists primarily to promote mutually beneficial, non-coercive trade through reciprocal and mutually advantageous arrangements aimed at reducing barriers to trade."[2] Such views might not be on the whole plausible as they fail to recognise that the WTO Agreement makes reference to "sustainable development" as one of its objectives which must be balanced against other economic objectives.[3] This study, without undermining the significance of free trade to global economic growth, established that the World Trade Organisation (WTO) has been reluctant to incorporate a social clause in its legal framework.[4] The WTO's reluctance to recognise a trade-labour linkage in its legal framework marks a significant point of departure from the position adopted by the failed International Trade Organisation (ITO) which explicitly embraced development as a key objective of its agenda and

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1 Salem and Rozental "Labour Standards and Trade: A Review of Recent Empirical Evidence" 2012 *Journal of International Commerce and Economics* 1. See also Chartes and Mercurio "A Call for an Agreement on Trade-related Aspects of Labour: Why and How the WTO Should Play a Role in Upholding Core Labour Standards" 2012 *North Carolina Journal of International Law and Commercial Regulation* 665.

2 See Lester, Mercurio and Davies *World Trade Law: Text, Materials and Commentary* (2012) 873.

3 Ibid 873. Lester *et al* point out that critics of a trade-labour linkage ignore that, "The General Agreement on Tariffs and Trade (GATT) and WTO, as well as human rights treaties and organisations were created for the purpose of increasing human welfare, and for the considerable evolution of the aims, objectives and roles of the international trading regime, starting from the establishment of the GATT in 1947." Stressing the importance of linking trade to issues of global welfare is not intended to dismiss those who pursue economic gains in trade over human welfare as myopic. Instead, such an approach seeks to draw the attention of such parties to the need to create a balance between economic gains and development an arrangement which could possibly lead to greater economic returns in the future.

4 See Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 245. Jackson observed that, "Labour standards as a subject for the WTO, or other international treaty cooperation, have been extremely controversial...Some countries have been proposing that some type of attention in the WTO be given to labour standards; however, almost all of the world's developing countries are adamantly opposed because they fear the use of international explicit legal exceptions for labour standards questions will result effectively in trade restrictive measures based on cultural and political considerations within the large industrial countries, to the detriment of developing low-wage countries." it is submitted that the issue is very complicated but can be addressed if a development centred approach which is sensitive to the differences in the levels of development of WTO Member States is adopted. The approach which has been adopted in incorporating social clauses in bilateral and regional trade agreements as discussed in chapter five of this study is a plausible mechanism for the future incorporation of a social clause in the WTO legal framework.

sought to protect workers' rights in trade.[5] This study has demonstrated the WTO's failure to protect values other than that of unrestrained free trade for the benefit of multinational corporations.[6] The general impression created by the WTO's approach is that human rights protection and development are not part of the WTO agenda and any allusion to them in relation to multilateral trade is an afterthought or mere rhetoric. It is therefore plausible to conclude that the WTO, by failing to acknowledge the need to protect non-trade matters such as core labour standards in its framework, has to a certain degree promoted "unfair trade" policies when its envisaged role is to promote "fair trade".[7] Chartes and Mercurio have observed that whilst it might not be possible for the WTO to "...incorporate every area or subject matter which merely may have an effect on trade and traders, it is simply incorrect to state that the WTO has an inherent institutional difficulty imposing obligations that could be viewed as wholly internal."[8]

The WTO's dispute settlement system which undoubtedly is the best mechanism at the multilateral level for dealing with disputes, has been characterized as exceedingly inequitable, non-transparent, and biased based on the view that it is working to exclusively aid business

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[5] See Article 7 of the Havana Charter. The Article titled "Fair Labour Standards" provided that, "Unfair labour conditions, particularly in production for exports, create difficulties in international trade...and each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory."

[6] See International Forum on Globalization "The World Trade Organization Vs. The Environment, Public Health and Human Rights" http://www.ifg.org/EAEF27E2-EB48-4D68-A607-C9733C066A48/FinalDownload/DownloadId-7B437A631401C6102A5C6AF8DB4A1CB6/EAEF27E2-EB48-4D68-A607-C9733C066A48/pdf/cancun/issues-WTOvsEnv.pdf (accessed 23-07-2012).

[7] Ibid. See also Lester *et al* 67. It is important to realise that maintaining that the WTO is exclusively a free trade institution might be a misguided approach to trade practices at the multilateral level. Lester *et al* argue that the WTO system "...does allow tariffs and, in limited circumstances, other forms of protection. More accurately, it is a system of rules dedicated to open, fair and undistorted competition." This plausible argument creates the basis for incorporating a social clause in the WTO legal framework in that the violation of core labour standards in trade will be regarded as being contrary to the aim of supporting fair competition in trade.

[8] Chartes and Mercurio 665. Chartes and Mercurio's views are plausible as they also make a significant observation to the effect that there has to be a criterion to assess the suitability of incorporating non-trade matters into the WTO legal framework. In trying to assess the suitability of incorporating core labour standards into the WTO legal framework, Chartes and Mercurio argued that, "The fact that labour directly affects market share and activity is relatively uncontroversial. Labour is by nature an 'intrinsic part of the production process that culminates in the manufacture of goods and services for trade.' Simply stated, the conditions under which a product is manufactured or produced impact the quantity and cost of the product in the world market. As such, it seems only natural that labour standards should be viewed as an indispensable part of the effective trade in goods." See also Lester *et al* 874. The incorporation of social clauses in bilateral and regional trade agreements by the European Union and the United States is advanced by Lester *et al* as indicative of the fact that one cannot regard trade in the abstract without considering the trade-offs between it and non-trade matters. These views advance proposals to incorporate a social clause in the WTO legal framework and engender efforts to establish an appropriate legal framework to ensure that core labour standards are incorporated into the multilateral trade agreements.

interests at the expense of competing public objectives.[9] This study has argued that for the WTO to maintain its legitimacy it is imperative that it integrates non-trade matters such as core labour standards into its framework. That way, the right to development will become an achievable international human right. However, the study did acknowledge that attempting to establish a trade-labour linkage in the WTO is fraught with challenges. It was therefore the objective of this study to make proposals which could be considered by the WTO and ILO to forge a way forward in trying to protect workers' rights in trade.

It has been strongly argued that the institutional economics perspective regards compliance with core labour rights as being critical for sustainable development.[10] The International Labour Organization (ILO) identified freedom of association,[11] the right to organize and bargain collectively,[12] prohibitions of forced labour,[13] discrimination in employment,[14] and child labour[15] as the core labour standards. However, regardless of the ILO's position, violations of core labour standards in trade have been occurring on a massive scale.[16] Southern Africa has been used in this study as a classical example of how countries are pursuing trade gains at the expense of tangible future development goals. A number of factors have been advanced as the possible reasons why countries still argue for lower levels of compliance with core labour standards as a competitive advantage. Those who violate core labour standards in trade have cited competitive pressures as the basis for their actions.[17] The Bretton Woods Institutions have been fingered in the maintenance of a lowered compliance with labour standards as they regard a flexible approach to the protection of core labour standards as a key sign of the ease of doing business and offer development loans to countries which promote their perspective.[18] On the

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9 Ibid.

10 Sinaga and Schener "Core Labour Rights: Competitive Pressures and Non-Compliance" 2012 International Center for Development and Decent Work (ICDD) Working Paper No. 41 1.

11 ILO Convention 87.

12 ILO Convention 98.

13 ILO Conventions 29 and 105.

14 ILO Conventions 100 and 111.

15 ILO Conventions 138 and 182.

16 International Trade Union Confederation (ITUC) "ITUC Annual Survey: 101 Trade Unionists Murdered in 2009; Pressure on Workers' Rights Grows as Crisis Hits Jobs" http://www.ituc-csi.org/ituc-annual-survey.html. (accessed 27-11-2012).

17 Sinaga and Schener 1.

contrary, several studies have shown that non-compliance with core labour standards does not provide a competitive advantage, thereby denying any economic rationale for non-compliance.[19]

This chapter thus concludes the study of the problems regarding the incorporation of labour standards in the WTO framework and offers tentative recommendations which could improve the protection of core labour standards in trade if implemented. In making recommendations concerning the need to incorporate a social clause in the WTO system, the study takes into consideration the fact that establishing perfect world markets devoid of power relations may not be easily achievable in a short space of time and may require long-term plans. Such an approach could reveal that regardless of the inequalities that exist amongst countries in the world, it remains important to establish a trade-labour linkage in the WTO framework as increased trade is a key component to attaining sustainable development.

Escobar argued that, "…although development promises a kingdom of abundance…the discourse and strategy of development [has] produced its opposite: massive underdevelopment and impoverishment, untold exploitation and oppression, [including] [t]he debt crisis…increasing poverty, malnutrition, and violence."[20] Rahnema has noted, "Nobody…seems to have a clear, and commonly shared, view of poverty. For one reason, almost all the definitions given to the word are woven around the concept of 'lack' or 'deficiency.' This notion reflects only the basic relativity of the concept. What is necessary and to whom? And who is qualified to define all that?" Postrel has observed that, "…these shortcomings include the failure to improve the material lives of the world's poor, to get twelve cent medicines to children to prevent malaria, and to provide four dollar bed nets to poor families despite spending USD 2.3 trillion on foreign aid."[21] Even worse, some critics believe development has continued the destructive processes of colonialism by eviscerating local cultures and by draining least developed countries of their most valuable resources, from oil and gold to the best educated young people and even healthy babies.[22] It is therefore plausible to conclude that without a social clause incorporated

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[18] Bretton Woods Project "IFI Leaders Talk Jobs, but Staff Push Labour Deregulation" http://www.brettonwoodsproject.org/art-570789 (accessed 22-09-2012).

[19] ILO "The Global Jobs Crisis and Beyond" http://www.ilo.org/wcmsp5/groups/public/---dgreports/--dcomm/documents/publication/wcms_118384.pdf (accessed 23-08-2012).

[20] Escobar *Encountering Development: The Making and Unmaking of the Third World* (1995) 21.

[21] Postrel "The Poverty Puzzle" New York Times 19 March 2006 A12.

into it, international economic law of institutions such as the WTO would promote only the objective of maintaining the current neoliberal economic order, grounded in free markets and individual autonomy and not distributive justice. As the analysis on legal theories in chapter four of this study has revealed, distributive justice is an essential concept in a world that has increasingly become unequal. Using the distributive justice theory as a mechanism for advancing a trade-labour linkage proposal could thus be a plausible approach to eradicating the violation of workers' rights in trade.

9 2 SUMMARY

This study has shown that countries in the world, especially developing countries, have been robustly competing for investment by multinational companies with relaxed labour standards emerging as a mechanism to lure investors.[23] This "race to the bottom" phenomenon has raised a serious question as to whether workers should be viewed as mere economic factors or as bearers of fundamental human rights. This issue informed this study which sought to establish whether or not the exclusion of human rights, in particular core labour standards from the WTO framework, impacts negatively on the development of developing countries and their citizens.[24] Attempts to address this question have led to the almost inescapable conclusion that a social clause must be incorporated into the WTO framework.[25] However, every attempt to establish a trade-labour linkage in the WTO has failed due to a lack of consensus driven by a divergence of opinions between developed and developing countries.[26]

An analysis of the differences in opinions concerning the trade-labour linkage debate revealed that developed countries regard the incorporation of a social clause in the WTO framework as a means to avoid the use of cheap labour as a tool for gaining an unfair trade

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[22] Jenson and De Sousa Santos "Case Studies and Common Trends in Globalization: Introduction" in Jenson and De Sousa Santos (eds) *Globalizing Institutions: Case Studies in Regulation and Innovation* (2000) 9. Jenson and De Sousa Santos defined globalisation as, "…the process by which a given local condition or entity succeeds in . . . extending its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local."

[23] Griffin, Nyland and O'Rourke "Trade Unions and the Social Clause: A North-South Divide" http://council.labor.net.au/labor_review/100/update1002.html (accessed 31-08-2011).

[24] Dessing "The Social Clause and Sustainable Development" 2001 *International Centre for Trade and Sustainable Development* Resource 21.

[25] Charnovitz "The Moral Exception in Trade Policy" 1998 *Virginia Journal of International Law* 689.

[26] Tsogas "Labour Standards in International Trade Agreements: An Assessment of the Arguments" 1999 *The International Journal of Human Resource Management* 354.

advantage on trade competitors.[27] However, developing countries consider the use of cheap labour as their competitive advantage and a key mechanism for ensuring that they industrialise.[28] As such, for developing countries, any proposals to incorporate a social clause into the WTO framework amounts to a protectionist move by the developed countries aimed at usurping their competitive advantage and the resultant gains from trade.

An appraisal of the opinions held by both developed and developing countries in this study revealed a number of significant points. First, the study revealed that using cheap labour in trade is not so much of a competitive advantage for developing countries as they regard it to be.[29] While it may lead to quick short-term gains, cheap labour does not in the long-term lead to sustainable development. Evidence has been drawn from the failed Washington Consensus in South America and the developments in Southern Africa in which years of using cheap labour have not translated into industrialisation. Brazil, for example, has realised the importance of a well paid labour force for development and adopted a notable model for achieving a minimum wage in the country which has come to be known as the "Lula miracle".[30] It therefore is not surprising that Brazil's economy has emerged as one of the fastest growing in the world. It is an indicator that workers are a vital component to economic growth whose rights must be protected in the course of promoting business interests.[31] Failure to observe core labour standards in trade is likely to result in negative effects on national and international economic performance both in

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[27] Cottier and Caplazi "Labour Standards and World Trade Law: Interfacing Legitimate Concerns" http://www.humanrights.ch/upload/pdf/00030_caplazi.pdf (accessed 14 August 2012). See also Lumina "Free Trade or Just Trade? The World Trade Organisation, Human Rights and Development (Part 1)" http://ajol.ifo/index.php/ldd/Article/viewFile/52892/41493 (accessed 14 August 2012) and Matsushita "Proliferation of Free Trade Agreements and Development Perspective" http://lawanddevelopment.net/ing/matsushita.pdf (accessed 14 August 2012).

[28] UNCTAD "Investment and Technology Policies for Competitiveness: Review of Successful Country Experiences" 2003 United Nations New York and Geneva.

[29] Globalization 101 "Trade and Globalization" http://www.globalization101.org/uploads/File/Trade/trade112011.pdf (accessed 20 August 2012).

[30] See Tavener "Brazil Minimum Wage May Top R$800 by 2015" The Rio Times 27 September 2011. The current Brazilian minimum wage is R$545, paid thirteen times a year and has been slated to rise fourteen times in 2012. A mechanism based on Gross Domestic Product performance and inflation was also approved in 2011 for indexing the rate of wage increase up to 2015. Brazil's minimum wage is adjusted annually. Such an approach can protect workers from some of the economic challenges posed by globalization.

[31] See Trading Economics "Brazil GDP Growth Rate" http://www.tradingeconomics.com/brazil/gdp-growth (accessed 7 October 2012).

the short-term and long-term.[32] The developments in the mining industry of South Africa, especially the platinum and gold mining industries, have revealed that cheap labour in trade is likely to fuel labour unrest, criminality and lower investor confidence. The same trends were observed in South America after the adoption of the principles of the Washington Consensus as chapter six of this thesis has established. Furthermore, cheap labour in trade has been shown as a means of impoverishing the workers and hampering development in developing countries. As such the developing countries' arguments of cheap labour being a competitive advantage seems misguided.

The developed countries' arguments of a social clause becoming a mechanism to prevent unfair trade have not been entirely genuine, as this study has established.[33] Industrialisation in developed countries was characterised by similar if not worse human rights violations and labour abuses in comparison to those which currently prevail in developing countries.[34] As such, depriving developing countries of the opportunity to use cheap labour for the purposes of maximising trade gains might appear to be a legitimate case of protectionism.[35] However, in a global era in which human rights protection is a priority, it is prudent that developing countries desist from adopting the approach employed by developed countries to industrialise. It is proposed that developing countries, possibly with the assistance of developed countries, adopt a balanced approach to business underlined by the principle of a common but differentiated application of labour standards in trade.

The legal basis of such an approach cannot be found in the 1947 General Agreement on Tariffs and Trade and the current WTO founding agreement.[36] It is found in the system of Generalised Trade Preferences (GSP) for developing countries which was first discussed in the

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[32] See Haberli, Jansen and Monteiro "Regional Trade Agreements and Domestic Labour Market Regulation" 2012 *Policy Priorities for International Trade and Jobs* 287.

[33] See Khor "The Proposed New Issues in the WTO and the Interests of Developing Countries" http://twnside.org.sg/title2/tnd14.pdf. (accessed 20-08-2012).

[34] See Miller "Why Economists are Wrong about Sweatshops and the Anti-sweatshop Movement" http://www.fordschool.umich.edu/rsie/acit.../Miller.Challenge.doc (accessed 23-08-2012).

[35] See Bacchetta "Globalisation and Informal Jobs in Developing Countries" http://www.ilo.org/public/english/bureau/inst/download/globalinform.pdf (accessed 25-08-2012). See also Dunkley "Belaboured Playing Fields, Labour Standards, Globalisation and New World Orders" http://www.apec.org.au/docs/citer23.htm (accessed 25-08-2012) and UNCTAD "Opportunities and Challenges for Developing Countries" http://unctad.org/en/Docs/edm2004_en.pdf (accessed 24-08-2012).

[36] See UNCTAD "UNCTAD: A Brief Historical Overview" http://unctad.org/en/Docs/gds20061_en.pdf (accessed 6-09-2012).

1960s by the United Nations Conference on Trade and Development (UNCTAD).[37] It is a system which has already been adopted in bilateral and regional trade agreements to protect labour standards in trade as established in chapter five of this thesis. However, the GSP system, in principle, violates the most favoured nation (MFN) principle.[38] The 1971 Ministerial Meeting of GATT had to provide a clear legal basis for the GSP, which it did in 1971 by adopting a waiver known as the 1971 Waiver that allowed countries to deviate from their MFN obligations, when enacting a GSP, for ten years.[39] However, the text of the 1971 Waiver contained no additional guidance on issues like GSP conditionalities or on the broader meaning of 'mutual acceptability,' but merely recalled the principles and objectives of the GSP that UNCTAD had fixed three years earlier.[40] Eight years later the MFN exception was extended indefinitely by the GATT Member States through the adoption of the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause).[41] Importantly, the objectives of the GSP in the UNCTAD[42] resolution and the 1971 Waiver were converted from "increasing export earnings, promoting industrialization and accelerating economic growth" to a broader mandate.[43] The Enabling Clause provided that:

> "Any differential and more favourable treatment provided under this clause shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries."[44]

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[37] Ibid. The GSP system has also been adopted by the European Union (EU) and aims at promoting development in developing countries. The EU GSP system also recognises the need to protect core labour standards in trade. See European Commission Directorate of Trade "The European Union's Generalised System of Preferences" http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc_116448.pdf (accessed 8-09-2012).

[38] See GATT Article I: 1.

[39] See Waiver, Generalized System of Preferences, Decision of 25 June 1971, BISD 18S/24.

[40] O'Brien and Zandvliet "Defining Development in WTO Law: The Legality and Parameters of Labour Rights Conditionality in the Generalised System of Preferences" http://dx.doi.org/10.2139/ssrn.2091506 (accessed 25 -09-2012). See also Yusuf *Legal Aspects of Trade Preferences for Developing States* (1982) 83.

[41] See the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause), Decision of 28 November 1979 (L/4903).

[42] See the United Nations Conference on Trade and Development (UNCTAD) II, *Proceedings*, Second Session, Volume 1 Report and Annexes, 1968 38.

[43] O'Brien and Zandvliet 8.

[44] See Article 3(c) of the Enabling Clause.

The Enabling Clause was officially extended at the establishment of the WTO in 1994.[45] The legal framework of the GSP thus emerged incrementally, in different stages and within different international organizations.[46] If this approach were adopted with respect to proposals to establish a trade-labour linkage in the WTO framework, the possibility of developing countries buying into proposals of a social clause in multilateral trade agreements could increase as their aspirations to industrialise might become a reality. Such a development could in future allow for the equal application of core labour standards, amongst other standards, at the multilateral level.

At present, even if well intended, any calls for incorporating a social clause into the WTO coupled with expectations of equal compliance by unequal trade partners is for all intents and purposes misguided and could justifiably be regarded as protectionist. Issues of inequality of partners in the international community are not a hidden secret as the September 2012 United Nations Summit revealed.[47] Developing countries are constantly regarded as the lesser parties in international arrangements and/or agreements with their needs not being taken seriously as they do not possess the necessary financial resources to exert influence at the global level. However, if the developing countries' trade potential and the resultant benefits could be measured, their development interests would be seriously considered as critical to the future success of the WTO.[48]

A development-centred social clause which recognises the need to establish a balance between developing countries' needs and the objectives of developed countries to sustain

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[45] O'Brien and Zandvliet 9.

[46] Ibid. See also Bartels and Haberli "Binding Tariff Preferences for Developing Countries under Article II GATT" 2010 *Journal of International Economic Law* 969.

[47] United Nations "At UN Summit, World Leaders Highlight Key Role of Rule of Law in Preventing War" http://www.un.org/apps/news/story.asp?NewsID=42973&Cr=rule+of+law&Cr1= (accessed 29-09-2012). The UN Summit, "...underscored the sovereign equality of all States, the right to self-determination of peoples under colonial dominion and foreign occupation, non-interference in the internal affairs of States, and respect for human rights and fundamental freedoms ...."

[48] The WTO should be moving in line with the objects of the Seoul Development Consensus for Shared Growth. The Seoul Development Consensus for Shared Growth is a set of principles and guidelines adopted to assist the G20 nations and other global actors in working collaboratively with less developed countries in order to boost their economic growth and to achieve the UN's Millennium Development Goals. It was endorsed by the leaders of the G20 nations at the 2010 G-20 Seoul Summit, with a multi year action plan drafted for the delivery of tangible results. The Group of Twenty Finance Ministers and Central Bank Governors (also known as the G-20, G20, and Group of Twenty) is a group of finance ministers and central bank governors from 20 major economies: 19 countries plus the European Union, which is represented by the President of the European Council and by the European Central Bank. The G20 suggests that economic growth is closely linked with low income countries' (LICs) ability to achieve the Millennium Development Goals. They state that measures to promote inclusive, sustainable and resilient growth should take precedence over business as usual.

economic growth might face comparatively less opposition than one which appears to place the interests of developed countries over those of developing countries or vice-versa. Trade has the potential to raise the levels of protection of core labour standards and is a genuine mechanism for ensuring sustainable development for all countries in the world.[49] Accordingly, calls for a trade-labour linkage are unlikely to go away, hence the WTO would do well by making serious efforts, as in the trade and environment case, to address proposals to incorporate a social clause into its legal framework. This study showed that bilateral and regional trade agreements are already incorporating core labour standards, a development which could compromise the multilateral trade system of the WTO in the long-term as countries might lose confidence in it, preferring the former agreements as being more suitable to their developmental agendas.

Article III of the Functions of the WTO in the Agreement Establishing the WTO reads, "With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies." The Article excludes the ILO. It is recommended that the ILO be inserted into this section. Furthermore, in order to establish a formal, more meaningful relationship, a Ministerial Declaration should be adopted acknowledging the high level of cooperation and interconnectedness of the organisations, similar to the Ministerial Declarations regarding the relationship with the IMF and World Bank.[50]

The advantage of the relationship between the WTO and the ILO is that the latter would not be undermined by the former, as it will maintain its authority in regards to labour standards. The mandates of each organisation would be respected, and there would be no recourse to trade sanctions whilst maintaining a degree of basic protection for labour rights.[51] Collaboration between the ILO and WTO should also make use of the joint research facilities available, and a series of reports on labour rights should be created, similar to the ILO and WTO report "Joint Study on Trade and Employment",[52] but with a focus on labour standards. Enforcing core labour

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[49] UNCTAD "Globalization For Development: The International Trade Perspective" http://unctad.org/en/Docs/ditc20071_en.pdf (accessed 7-09-2012).

[50] WTO "Uruguay Round, Relationship of the World Trade Organization with the International Monetary Fund" http://www.wto.org/../34-dimf_e.htm (accessed 19-08-2012).

[51] Wilkinson "Labour and Trade Related Regulation: Beyond the Trade-labour Standards Debate?" 1999 *British Journal of Politics and International Relations* 168.

standards in trade may require that the need to protect core labour standards be emphasized in the Preamble to the WTO founding Agreement.[53] Such an approach has both symbolic and legal value in that whilst it does not place any binding obligations upon states to take immediate action on the labour standards issue, it can be used for the purposes of interpretation. According to the Vienna Convention on the Law of Treaties, "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text... its preamble and annexes".[54] Incorporating core labour standards into the WTO Preamble would also lead to the examination of human rights abuses through existing WTO review mechanisms.[55]

Government policies are reviewed in relation to the "functioning of the multilateral trading system" so as to encourage adherence to commitments under the agreements, and greater transparency.[56] At present, the reviews focus solely on the issue of trade liberalisation, and whether a member's policies support this objective. Although free trade is an important issue, it is not the overall objective of the multilateral trading system. The real objectives of the WTO which are regulating trade practices with the aim of raising standards of living and ensuring full employment[57] are conspicuously ignored. If labour rights were incorporated into the Preamble to the Marrakech Agreement, it would be easier to address labour standards through the trade policy review mechanism.

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[52] WTO "2007 News Items: WTO and Other Organisations" http://www.wto.org/english/news_e/news07_e/ilo_feb07_e.htm (accessed 17-08-2012).

[53] WTO "WTO Analytical Index: Marrakesh Agreement" http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm#pB (accessed 13-08-2012).

[54] See Article 31.2 of the UN Vienna Convention on the Law of Treaties of 1969.

[55] WTO "Understanding the WTO: The Agreements. Trade Policy Reviews: Ensuring Transparency" http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm (accessed 16-09-2012). In 1988 the decision was made to make regular reviews of state's trade policy conducted by the WTO, a key part of the transparency of the organisation. Governments submit information to the WTO Secretariat which gives a report which is then examined by the General Council sitting as the Trade Policy Review Body.

[56] See Annexure 3 para A of the Agreement Establishing the WTO.

[57] See para 1 of the Preamble of the WTO Agreement.

9 3 GENERAL OBSERVATIONS

Making core labour standards conditional for trade is in conformity with WTO law.[58] The protection of core labour standards in trade is arguably a key element to meeting a "developmental need."[59] The WTO Appellate Body in the *EC-Tariffs Preferences*[60] case considered the scope of the term "developmental need" which WTO law is yet to define.[61] The Appellate Body held that:

> "The existence of a 'development, financial or trade need' must be assessed according to an objective standard. Broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard."[62]

The Appellate Body also found that:

> "…a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized...and...the likelihood of alleviating the relevant 'development, financial or trade need'. In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences."[63]

The WTO Appellate Body's ruling in *EC-Tariff Preferences* allows GSP conditionality *per se* but restricts the broad discretion of the GSP grantor in determining when access to its GSP scheme may be linked to non-trade concerns.[64] To uphold GSP labour rights conditionality in a case before the WTO adjudicating bodies, the grantor would thus have to show that in applying the conditionality, they acted in the effective and positive manner suggested, in response to a widely-recognised development need and on the basis of objective entrance and exit criteria.[65]

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58 O'Brien and Zandvliet 8.

59 Bluethner "Trade and Human Rights at Work: Next Round Please...?" http://unglobalcompact.org/docs/news.../Bluethner_21Aug2006.pdf (accessed 28-08-2012).

60 World Trade Organization, Report of the Appellate Body "European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries" WTO Doc No WT/DS246/AB/R (April 7, 2004), (hereinafter: *EC -Tariff Preferences* AB). See also Bartels "The Appellate Body Report in European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries and its Implications for Conditionality in GSP Programmes" in Cottier *et al* (eds) Human Rights and International Trade (2005) 463.

61 Howse "India's WTO Challenge to the Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for 'Political' Conditionality in US Trade Policy" 2003 *Chicago Journal of International Law* 387.

62 *EC- Tariff Preferences* WTO AB 163.

63 *EC- Tariff Preferences* WTO AB 164.

64 *EC- Tariff Preferences* WTO AB 187.

65 *EC- Tariff Preferences* WTO AB 164.

The protection of core labour standards in trade could be classified as a developmental need. For example, in developing countries, the shift of resources from low productivity to high productivity uses is a key driver of economic growth.[66] McMillan and Rodrick have observed that economies that have successfully made the transition from low-income to medium and high-income status have experienced significant changes in their economic structure, as factors moved from lower productivity to higher productivity uses.[67] Since 1990, African countries which like many other developing countries favour a lowered compliance with labour standards as their competitive advantage, have moved from higher to lower productivity employment.[68] Unfortunately, cheap labour as a competitive advantage has been offset by other countries through superior productivity of skilled labour forces, modern infrastructure facilities and political stabilities,[69] with non-compliance to core labour standards leading to labour unrest.[70] Trade can play an important role in creating better jobs, increasing and improving working conditions but it must be appreciated that gains from trade do not accrue automatically[71] as policies which complement trade openness must be implemented to ensure full positive effects on growth and employment.[72]

A social clause in the WTO could emerge as one such important mechanism to ensuring a balance between trade and unemployment. It must be appreciated that in adjusting to technological progress, the process of trade induced growth necessarily entails the continual re-allocation of resources away from less productive activities to more productive ones which can mean that even as average wages and employment conditions improve, some workers may experience unemployment.[73] As such, policies that entrench trade reforms in a context of

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66 Page "Can Africa Industrialise" 2012 *Journal of African Economics* 86.

67 McMillan and Rodrik "Globalisation, Structural Change and Productivity Growth" 2011 *International Food Policy Research Institute: International Growth Centre* 2.

68 Ibid.

69 Hossan, Sarker and Afroze "Recent Unrest in the RMG Sector of Bangladesh: Is this an Outcome of Poor Labour Practices" 2012 *International Journal of Business and Management* 208. See also Abdullah "The Influence of Work Environment and the Job Satisfaction on the Productivity of the RMG Workers in Bangladesh" 2009 *Journal of Management* 43.

70 Clark and Kanter "Violence in Readymade Garments (RMG) Industry in Bangladesh" 2010/2011 *Centre for International and Comparative Studies* 6. See also Haider "Competitiveness of the Bangladesh Ready-made Garment Industry in Major International Markets" 2007 *Asia-Pacific Trade and Investment Review* 1.

71 Newfarmer and Sztajerowska "Trade and Employment in a Fast-Changing World" 2012 *Policy Priorities for International Trade and Jobs* 7.

72 Ibid.

macroeconomic stability and a sound investment climate, protection for workers, maintenance of high-quality working conditions and facilitation of labour transitions can play an important role in realizing potential wage, employment and income gains associated with trade.[74] Trade is indeed a key factor in promoting economic growth.[75] Noquer and Siscart have concluded that a 1 % increase in trade openness was associated with a 1 % increase in per capita incomes.[76] Bruckner and Lederman found that trade openness causes economic growth.[77] They further argued that a 1 percentage point increase in the ratio of trade over gross domestic product is associated with a short-term increase in growth of approximately 0.5 % per year, and with an even larger effect in the long-run, reaching about 0.8 %.[78] O'Brien and Zandvliet examined the legitimacy of labour rights conditionality as a means to advance development needs.[79] In their analysis, they established that, "The fulfilment of labour rights can be both constitutive of and instrumental to development. This makes trade-labour linkage and differentiation between developing countries based on compliance with certain labour standards, in principle, permissible under WTO law".[80]

9 4 RECOMMENDATIONS

For any measures advanced concerning a trade-labour linkage in the WTO to be a success, political will and commitment is required to extend the protection of workers in trade through the enforcement of core labour standards. It would take special measures and a lot of compromise from all parties involved to achieve such an arrangement at the international level.[81] On the one

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[73] Newfarmer and Sztajerowska "Trade and Employment in a Fast Changing World" www.oecd.org/site/tadicite/50286917.pdf (accessed 01-09-2012).

[74] Ibid.

[75] Hallaert "A History of Empirical Literature on the Relationship between Trade and Growth" 2006 *Mondes en Developpement* 1.

[76] Noguer and Siscart "Trade Raises Income: A Precise and Robust Result" 2005 *Journal of International Economics* 447.

[77] Bruckner and Lederman "Trade Causes Growth in Sub-Saharan Africa" 2012 The World Bank Policy Research Working Paper Series No. 6007 2.

[78] Ibid. See also Gorg and Gorlich "Trade and Labour Market Outcomes in Germany" 2012 *Policy Priorities for International Trade and Jobs* 212. See also Brooks and Go "Trade, Employment and Inclusive Growth in Asia" 2012 *Policy Priorities for International Trade and Jobs* 327.

[79] O'Brien and Zandvliet 10.

[80] Ibid.

[81] Varia and Becker "World Report 2012: A Landmark Victory for Domestic Workers" http://www.hrw.org/world-report-2012/world-report-2012-landmark-victory-domestic-workers (accessed 3-09-2012). It took political will and commitment of world governments to consent with trade unions and business to adopt ILO Convention 189

hand, developed countries' governments must be willing to assist developing countries' governments to achieve a sustainable balance between trade gains and the development of their workers.[82] Research has found that there is no clear evidence to suggest that countries can improve their trade performance by maintaining poor labour conditions, contrary to the "race to the bottom" point of view. Bhagwati has argued that:

> "Labour union lobbies and their political friends have decided that the ideal defence against competition from the poor countries is to raise their costs of production by forcing their standards up, claiming that competition with countries with lower standards is "unfair." "Free but fair trade" becomes an exercise in insidious protectionism that few recognise as such."[83]

It is submitted that the objectives of the WTO must be re-defined to include the development agenda as was the objective of the failed International Trade Organisation (ITO). On the other hand, developing countries' governments must not expect developed countries to commit themselves to their cause without them realising that pressing for the retention of low labour standards as a competitive advantage is counter productive.[84] The International Labour Rights Foundation has observed that:

> "As long as poor labour standards exist in one country, workers everywhere will be hurt. Governments that neglect or oppress their labourers make the choice to strip their own citizens of their rights as human beings. Not only this, but they create unfair pressure in the global economy. If one country offers oppressively cheap labour, other countries become compelled to do the same to merely remain competitive. This global 'race to the bottom' creates poor conditions and loss of freedom in the global South, and causes workers in the global North to lose their jobs to cheap outsourced labour."[85]

Concerning Decent Work for Domestic Workers. If global labour standards for domestic workers can be established worldwide, it must be questioned as to why consensus as regards the need to protect workers who contribute to the world's economy is yet to be established. Workers must be regarded as key to world development and must be protected as such.

[82] United Nations (UN) "'Fully Fledged War' needed to Eradicate Poverty" http://www.un.org/News/Press/docs//2012/gaef3338.doc.htm (accessed 04-09-2012). See also UN "The Future we Want-Zero Draft of the Outcome Document" http://www.uncsd2012.org/futurewewant.html (accessed 2-09-2012).

[83] Bhagwati "Obama and Trade: An Alarm Sounds" Financial Times 9 January 2009.

[84] ILO "Changing Patterns in the World of Work" http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-i-c.pdf (accessed 01-09-2012).

[85] International Labour Rights Foundation "Changing Global Trade Rules" http://www.laborrights.org/creating-a-sweatfree-world/changing-global-trade-rules (accessed 27-08-2012).

It must be appreciated that a race to the bottom will not lead to development.[86] Instead a lowered compliance with core labour standards diminishes economic growth,[87] threatens investor confidence[88] and leads to labour unrest.[89] At the time of concluding this study, the South African mining industry was becoming almost ungovernable with illegal strike actions and mass dismissals increasingly becoming prominent features of the country's labour market. Productivity had fallen with the country's currency and economy facing noticeable declines.

Fast developing countries' governments must also appreciate that they cannot expect to be treated in the same vein as least developed countries. For a social clause to work, it must acknowledge the differences in the levels of development of Member States to the WTO as was held by the WTO Appellate Body in the *EC-Tariff Preferences* case. The positions of countries such as India and China who themselves have high incidences of labour standards violations must be reviewed. They must accept that they have achieved significant growth in their economies such that they cannot be equated to least developed countries. However, it is also submitted that they cannot be treated in the same breath as developed countries. Should a consensus be established concerning the levels of compliance of developed and developing countries, a frame work and/or mechanism to manage a practical trade-labour linkage in the WTO can easily be achieved.

It may be possible to establish a social clause in the WTO whose objective is not so much to punish or exclude countries with a low level of compliance with core labour standards from trade but to ensure that the punitive measures to be applied, where necessary, are aimed at correcting the violations in the offending country whilst trade continues.[90] Practices in bilateral and regional trade agreements have shown that sanctions aimed at ensuring that any monetary penalty imposed on a state party that violates core labour standards will not be opposed to as

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[86] Black "Eduardo Porter's 'Folly'- Why we must end the 'Race to the Bottom'" 2012 *New Economic Perspectives* 1.

[87] ILO "The Benefits of International Labour Standards" http://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm (accessed 01-08-2012).

[88] ILO "Global Employment Trends 2012: Preventing a Deeper Jobs Crisis" http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_171571.pdf (accessed 3-09-2012).

[89] Ahmed "Could a Tripartite Wage Commission Remove Labour Unrest in the Bangladesh Ready-made Garment Sector?" 2007 *Middle-East Journal of Business* 1.

[90] Bhagwati "The WTO's Agenda: Environment and Labour Standards, Competition Policy and the Question of Regionalism" Columbia University Discussion Paper Series No. 725 19.

long as such a fine is used to improve labour standards compliance in the offending country.[91] This means that the social clause must be pro-development and must avoid measures which are likely to damage the underlying value of trade. In other words, the social clause must be attractive to the governments so much so that they may be willing to exercise the necessary political will and commitment needed to arrive at a trade-labour linkage framework in the WTO.[92] Research has shown that agreements, when reinforced by factors such as enforcement mechanisms, positive incentives, and market forces, may improve compliance with labour standards, bringing about better labour market conditions.[93]

9 4 1 Short-term measure

Social clauses have become a regular feature of bilateral and regional trade agreements.[94] These trade agreements have been entered into by developed and developing countries with special preferences being given to the latter in instances where they are compliant with labour standards incorporated into the respective agreements. Parties to bilateral or regional agreements are mostly members of the WTO.[95] It is accepted that notifications of entry into bilateral and regional trade agreements are made to the WTO.[96] Therefore, it is proposed that to establish a short-term and easily adaptable legal mechanism for a trade-labour linkage in the WTO, an agreement which recognises the incorporation of labour standards in bilateral and regional trade agreements as part of the WTO agenda to promote fair trade and development must be negotiated and adopted.

A side agreement on a trade-labour linkage in the WTO which mirrors the NAALC and the environment-related example of the CANCUN agreements[97] should form the basis upon which countries can negotiate or continue to enter into bilateral or regional trade agreements

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91 See Canada-Chile FTA which came into effect on 5 July 1997.

92 Chan “”Racing to the Bottom: International Trade without a Social Clause” 2003 *Third World Quarterly* 1011.

93 Salem and Rozental 2.

94 Witte “Realizing Core Labour Standards: The Potential and Limits of Voluntary Codes and Social Clauses” http://www.gppi.net/fileadmin/gppi/Studie-CLS-endfassung.pdf (accessed 10-09-2012).

95 WTO “Rules: Regional Agreements Building Blocks or Stumbling Blocks” http://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief09_e.htm (accessed 10-09-2012).

96 WTO “Regional Trade Agreements” http://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 10-9-2012).

97 See UNFCC “The CANCUN Agreements” http://cancun.unfccc.int/ (accessed 20-09-2012). The agreements, reached on December 11 in Cancun, Mexico, at the 2010 United Nations Climate Change Conference represent key steps forward in capturing plans to reduce greenhouse gas emissions and to help developing nations protect themselves from climate impacts and build their own sustainable futures.

which recognise a trade-labour linkage. The agreement should place emphasis on the need to acknowledge the differences that exist amongst countries in the world on a short-term basis using trade as a tool to building up countries' capacity, especially in developing countries, to meet the overall challenge of protecting core labour standards in trade and establishing effective institutions and systems that will ensure the successful incorporation of a social clause in the WTO in the long-term. Parties to the bilateral and regional trade agreements will be permitted to use legal mechanisms available in their bilateral or regional trade agreements to resolve issues of non-compliance with labour standards in trade.

However, since the overall objective is not simply to establish a trade-labour linkage in multilateral trade that is not universally enforceable, minimum requirements which will serve as a guideline to countries on how to attain best practices in protecting labour standards in trade must be adopted. The Joint WTO and ILO Secretariat must be involved in drafting such a code of good practice on the trade-labour linkage.[98] It should not be difficult to achieve such an arrangement as a Joint WTO and ILO Secretariat which looks into matters concerning synergies between trade and labour already exists. This code could ensure avoidance of conflicts between the two organisations in the event of potential overlaps in their mandates. The code could also create a foundation for establishing a stronger WTO and ILO relationship to address the challenges posed by globalisation. Such an approach is cost effective given that a joint WTO and ILO secretariat which works towards establishing areas of co-operation between the organisations is already in place.[99] The secretariat can also be used as an advisory and informal but non-binding dispute settlement body which, through dialogue, tries to assist countries in dispute over labour violations in trade to reach amicable resolution. Where disputes are not resolved through the dispute resolution procedures provided in the bilateral or regional trade agreements, the joint WTO and ILO secretariat must recommend what it considers as the ideal course of action in addressing the dispute at hand.

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[98] The USA-Cambodia Textile Agreement of 1999 contain provisions within this agreement which offer a good example of a programme for implementing and promoting improved working conditions between the two countries. It has the Better Factories Programme which was started in 2001 and includes positive incentives for compliance with employees' rights as well as a monitoring function for the ILO.

[99] WTO "Work with Other International Organizations: The WTO and International Labour Organization" http://www.wto.org/english/thewto_e/coher_e/wto_ilo_e.htm (accessed 10-10-2012).

The recommendations of the joint WTO and ILO secretariat whilst relying on the expert knowledge of qualified personnel already appointed to the secretariat shall not *per se* be binding but will serve as tentative guidelines on how best to settle the dispute in issue. Should the disputing countries be unwilling to rely on the recommendations of the joint WTO and ILO secretariat, the matter would be concluded as unresolved and the ultimate decision on whether or not to continue with the agreement left to the Parties to the specific bilateral or regional trade agreement in issue. This approach is unlikely to cause tensions amongst WTO member states because it retains the existing arrangements of the countries as provided for in their trade agreements, a feature which is not likely to infringe upon the sovereignty and political preferences of the countries. It is an approach which also recognises the differences in the levels of development of countries as bilateral and regional trade agreements are in most instances sensitive to the specific demands of State Parties. Since this proposal is a short-term measure, the joint WTO and ILO secretariat must be in a position to monitor each trade agreement with a view to establishing a record of the problematic areas in on going attempts to recognise a trade-labour linkage through bilateral and/or regional trade agreements. These areas should then be reviewed by the joint WTO and ILO governing bodies with a view to establishing the ideal approach to incorporating a social clause in the WTO on a long-term basis. However, it must be appreciated that whilst this measure might not lead to political tensions, it might not be an ideal long-term measure as it does not provide for any enforcement and or punitive measures against state parties which violate labour standards in trade. Therefore a long-term measure which seeks to establish a balance between the need to recognise the sovereignty and/or political independence of countries in the world and the need to respect human rights in trade must be adopted.

9 4 2 Long-term measure

A long term measure to incorporate a social clause in the WTO can be achieved by reforming the WTO.[100] The WTO must adopt a more flexible approach to trade negotiations, tailored to the needs of individual countries and groups.[101] The institution should move beyond multilateral, all-

[100] Cottier "Preparing for Structural Reform in the WTO" 2006 World Trade Institute 1.

or-nothing negotiations that are bearing little fruit and find ways to leverage opportunities where liberalization is taking place.[102] There have been calls for reforming the WTO with some of the central issues in the proposals being related to the organisation's inability to recognise its linkage to non-trade related matters.[103] It is submitted that in its current state, the WTO agreement which lacks a comprehensive development agenda does not have room for a social clause. It lacks the development agenda which was purposefully embraced in the failed ITO. The apparent failure of the Doha Round may be an indication that the WTO is fast outliving its relevance to contemporary global challenges. For it to remain legitimate, it is proposed that a new WTO agreement which mirrors the objectives of the failed ITO be adopted. The new agreement must recognise the need to link non-trade matters such as labour standards to trade. The wording of GATT article XX and the MFN clause make it almost impossible to incorporate a social clause which takes into consideration the levels of development of unequal trade partners. As such there is need to draft new provisions in a new international trade agreement which establishes a common but differentiated application of core labour standards in trade without evoking disputes relating to the MFN principle.

The growing prominence of developing countries in global politics has contributed to a conciliatory approach among developed countries towards those demands perceived as legitimate, of which the development imperative of poor countries is clearly one that is now accepted as an imperative for the multilateral trade regulatory systems.[104] The Stockholm Declaration of 1972 reflected this compromise.[105] In deference to the desire of developed

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[101] Dadush "Crisis, Protectionism, and Doha- What Future for the WTO?" http://carnegieendowment.org/2009/09/15/wto-reform-time-to-start-is-now/pfp (accessed 01-10-2012).

[102] Ibid.

[103] See WTO "Plurilaterals and Bilaterals: Guardians or Gravediggers of the WTO?" http://www.wto.org/english/news_e/news12_e/pfor_24sep12_e.htm (accessed 01-10-2012). See also WTO "Amid Global Economic Problems, WTO Reforms Urged" http://www.wto.org/english/news_e/news12_e/pfor_25sep12_e.htm (accessed 01-10-2010) and Bacchus "A Way Forward for the WTO" in ICSTD *The Future and the WTO: Confronting the Challenges - A Collection of Short Essays* (2012) 6.

[104] Rajamani "The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law" 2012 *International Affairs* 3. Steffek "The Legitimation of International Governance: A Discourse Approach" 2003 European *Journal of International Relations* 249.

[105] The Stockholm Declaration is the first document to explicitly recognise the right to a healthy environment. The Declaration laid down the fundamental principles and main objectives of environmental policy, including a policy on the marine environment.

countries to create a common environmental ethic, the Preamble recognized that environmental protection was 'a major issue' and that it was the "urgent desire of the peoples of the whole world and the duty of all Governments".[106] Principle 24 of the Stockholm Declaration crystallized this sentiment, stating that the "environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing".[107] The recognition of a common protection imperative, however, was qualified by several principles that recognized the special needs of developing countries, including in particular their development imperative.[108]

The trade-environment linkage experience brings about an important development to the principle of common but differentiated application of standards. The balance of power amongst countries in the world has changed since the UN Framework Convention on Climate Change (UNFCCC)[109] was negotiated. Emerging economic powers like China, India, Brazil and South Africa no longer merit the extent of differential treatment to which they are entitled under the regime.[110] As such they can no longer be treated in the same vein as other developing countries. Accordingly, the US has sought to differentiate between developing countries that are major economies and those that are not.[111] The European Union has also argued that differences between developing countries must be taken into account, and that the economically advanced developing countries must make 'fair and effective contributions' to the climate effort.[112] Japan has suggested categorizing developing countries on the basis of their stage of economic development, and encouraging mitigation actions tailored to their common but differentiated

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[106] See Stockholm Declaration, 1972, Preamble.
[107] See Stockholm Declaration, 1972, principle 24.
[108] See Stockholm Declaration, 1972, principles 9, 10, 11 and 12.
[109] The United Nations Framework Convention on Climate Change (UNFCCC) was opened for signature on the 9th of May 1992 after an Inter-governmental Negotiating Committee produced the text of the framework convention as a report following its meeting in New York from 30 April to 9 May 1992. It entered into force on 21 March 1994. The UNFCCC has 194 parties. The main UNFCCC treaty is the Kyoto Protocol, which has become much better known than the UNFCCC itself. The treaty itself sets no binding limits on greenhouse gas emissions for individual countries and contains no enforcement mechanisms. In that sense, the treaty is considered legally non-binding. Instead, the treaty provides a framework for negotiating specific international treaties called "protocols" that may set binding limits on emission of greenhouse gases.
[110] Rajamani 10.
[111] Ibid.
[112] See "Climate Change: Bali Conference must Launch Negotiations and Fix 'Roadmap' for New UN Agreement' IP/07/1773 Brussels 27 November 2007. See also submission by France on behalf of the European Community and its member states FCCC/AWGLCA/2008/MISC.2 14 August 2008 5-6.

responsibilities.[113] Australia has argued that if the Gross Domestic Product per capita of UNFCCC parties is taken into account, there are 'more developing countries that are advanced economies than existing developed countries'.[114]

Australia recommended therefore that there should be an objective basis for graduation of developing countries with a view to all advanced economies adopting a comparable effort towards the mitigation of greenhouse gas emissions.[115] These proposals have proved controversial. Many developing countries are opposed to efforts to differentiate between them, as they perceive such differentiation as threatening their identity and leveraging power.[116] In their view the differentiation sanctioned by the UNFCCC and Kyoto Protocol stems not from differences in material conditions but from differences in historical and moral responsibility for causing climate change.[117] They argue that any erosion of differentiation would blur the lines of responsibility, shift a disproportionate burden of mitigation onto developing countries, and thereby limit their development prospects.[118] However, compromises have to be made and fast developing countries must realise that with development comes greater obligations and responsibilities on a multilateral level. It is thus proposed that for purposes of achieving a practical arrangement for a potentially successful social clause in the WTO, all developing countries for leveraging purposes be grouped together regardless of their economic performance but their responsibilities should be marginally different based on their economic performance. In that regard, it is proposed that a clause relating to the trade-labour linkage be incorporated into a new WTO Agreement as follows:

"For purposes of protecting core labour standards in trade, developing country parties shall not be discriminated against by developed country parties, through the latter resorting to any forms of unilateral measures including countervailing border measures, against goods and services originating from developing countries on grounds of non-compliance with labour standards. Such unilateral measures would violate the principles

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[113] See submission by Japan FCCC/AWGLCA/2008/MISC.1/Add.1, 12 March 2008 4, 11.
[114] See submissions by Australia FCCC/KP/AWG/2008/MISC.1/Add.2, 20 March 2008 5, 8 and 73.
[115] See the Submission by Australia FCCC/KP/AWG/2008/MISC.1/Add.2, 5.
[116] See submission by Philippines on behalf of the G77/China, FCCC/AWGLCA/2008/MISC.5/Add.2 (Part II) 10 December 2008 48.
[117] Ibid.
[118] Ibid.

and provisions of the WTO related to the principle of common but differentiated responsibilities. For the purposes of the operation of this clause, the common but differentiated responsibilities shall take into account differences in the levels of development of developed, fast developing and least-developed countries. This clause shall only be deemed applicable if labour standards and/or practices prevailing in fast developing and least-developed countries, in trade related matters, are held to be a true reflection of their best practices in efforts to attain a trade-labour linkage by a joint WTO and ILO Panel appointed in terms of this agreement."

To ensure compliance with core labour standards in trade, sanctions are proposed. However, the sanctions can only be used as a last resort. Bilateral and regional trade agreements have shown that such an approach is plausible. However, it is submitted that distinguishing between developing countries might pose a challenge when it comes to the enforcement of sanctions against countries which violate core labour standards in their trade practices. It is therefore proposed that any differences in sanctions between fast developing countries and least-developed countries must be marginal so as to avoid the former resisting the incorporation of a social clause into the WTO system. Proposed social clause provisions which capture this understanding are illustrated below. It is acknowledged that provisions such as a Preamble,[119] definitions clauses,[120]

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[119] See the Preamble of the European Union (EU)-South Korea Free Trade Agreement (FTA) which came into force on 1 July 2011. See also the preamble of the EU-Cariforum Free Trade Agreement of 30 October 2012. In general the EU-Developing country FTAs include preambles which encourage parties to give effect to the 2002 Johannesburg Declaration and Plan of Implementation on Sustainable Development, the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, the UN Convention on Economic, Social and Cultural Rights, and the 2008 ILO Declaration on Social Justice for a Fair Globalisation. Parties to the agreements are in essence encouraged in the preambles to recognise that economic development and social development are interdependent and mutually reinforcing components of sustainable development, and they reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations. In particular the preambles draw Parties' attention to the benefits of considering trade related labour issues as part of a global approach to trade and sustainable development. Parties are urged in the preambles to promote dialogue and cooperation between or amongst themselves with a view to developing and improving their trade and economic relations in a manner supportive of labour standards; enhance compliance with, and enforcement of, labour laws; make full use of instruments for better regulation of trade and labour issues, such as impact assessment and stakeholder consultations, and encourage businesses, civil society organisations and citizens to develop and implement practices that contribute to the achievement of sustainable development goals and promote public consultation and participation in the discussion of sustainable development issues arising under this Agreement and in the development of relevant domestic laws and policies. See also Cooper, Jurenas, Platzer and Manyin "The EU-South Korea Free Trade Agreement and its Implications for the United States" 2011 *Congressional Research Service* 19.

multilateral labour standards,[121] levels of protection,[122] governmental enforcement of labour standards in trade,[123] cooperation and consultation with other state parties on programmes to improve labour standards[124] and the establishment of the Joint WTO and ILO Panel,[125] the Joint WTO and ILO Secretariat[126] and the Joint WTO and ILO Appellate Body[127] are necessary for a WTO framework designed to allow effective recognition of labour standards in trade. In addition to the provisions and bodies proposed below, the study proposes legal provisions required to establish an effective social clause in the WTO system. These legal provisions relate to how the protection of labour standards in the WTO system can be achieved without violating the interests of member states of the WTO.

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[120] See the Canada-EU FTA of 14 July 2010. The Canada-EU FTA's definition clause provides that the term 'labour' must be construed as including all issues relevant to the strategic objectives of the ILO.

[121] The EU-South Korea FTA provides that the Parties to the agreement must recognise the value of international co-operation and agreements on employment and labour affairs as a response of the international community to economic, employment and social challenges and opportunities resulting from globalisation. It also provides that Parties must commit to consulting and co-operating as appropriate on trade-related labour and employment issues of mutual interest.

[122] The EU-South Korea FTA provides that, "Parties must recognise that it is inappropriate to encourage trade or foreign direct investment by lowering the levels of protection embodied in domestic labour laws and standards. A Party shall not weaken or reduce the labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws and regulations or standards in a manner affecting trade or investment between the Parties. A Party shall not fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties or foreign direct investment."

[123] The Canada-EU FTA and the Canada-Chile FTA which came into effect on 5 July 1997 provide that each Party shall promote compliance with and effectively enforce its labour laws through appropriate government action such as labour inspections, monitoring and investigation of suspected labour violations in trade and the keeping of records of such violations amongst other things.

[124] The US-Cambodia Textile Agreement provides that the, "Parties in recognising the importance of co-operating on trade-related aspects of social policies in order to achieve the objectives of the agreement must commit to initiating co-operative activities. Parties shall conduct at least two consultations during each Agreement Year to discuss labour standards, specific benchmarks, and the implementation of this program."

[125] See WTO "The Panel Process" http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm (accessed 4-10-2012). Whilst a Joint WTO and ILO Panel has never existed, it is proposed that one which follows the structure and procedures of the WTO Panel be adopted to address disputes concerning trade-labour linkages in the multilateral trade system.

[126] See Article 6 of the WTO Agreement. The Joint WTO and ILO Dispute Settlement Body could mirror the role currently played by the WTO Dispute Settlement Body in the process of dispute settlement. Reliance upon this body can only be done if the dispute settlement approach of the ILO which is based on consultations has failed to achieve positive outcomes. Such an approach might create a balance in the power struggles which may arise concerning which institution's mechanisms are being heavily relied upon.

[127] See WTO "Understanding on Rules and Procedures Governing the Settlement of Disputes" http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#17 (accessed 4-1-2012). The joint WTO and ILO Appellate Body would mirror the role played by the WTO Appellate Body established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

9 4 2 1 A joint WTO and ILO approach

With the advent of globalisation, governments are no longer the major players in the policy-making process given that socio-economic and even political problems that are usually multifaceted in nature now demand a holistic approach for their resolution.[128] It is in light of this realisation that many governments are engaging labour and business in discussions that go beyond the traditional labour matters. Together Government, labour and business are called the social partners and the three parties are then involved in a process called social dialogue. The term social dialogue does not have a clear cut definition but broadly defined, it involves the interface and interchange of ideas between and within nations. Professor Tayo Fashoyin has argued that:

> "Cooperation between labour and management is one of the outstanding features of industrial relations. Joint effort aimed at promoting workers' welfare and enterprise productivity is a manifestation of the resolve of the two sides of industry to work together on issues of mutual interest, such as enterprise performance and sustainability. Thus, labour-management cooperation can be seen as a step towards a social partnership by which work, productivity, reward and industrial peace are sought and achieved. Bipartite relation of this kind can promote or reinforce the tripartite process, which involves labour, employers and government, usually at the national level...This conception of social dialogue as an institutional configuration designed to facilitate consensus building, represents a broader perspective on the role of employment relations in organizing the world of work at both the enterprise and national levels."[129]

The ILO defines social dialogue as: "Negotiation, consultation and information sharing either among the bipartite parties in the workplace or the tripartite partners at the national level on the functioning of the labour market and broad issues of economic and social policy."[130] Consultations are important in that:

> "Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution... Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and

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[128] Bertuci and Alberti "Globalization and the Role of the State: Challenges and Perspectives" http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006225.pdf (accessed 5-10- 2012).

[129] Fashoyin "The Imperative of Social Partnership and Social Dialogue for Socio-Economic Development" 2010 http://www.heathrose.co.nz/files/Tayo%20Fashoyin-%20Social%20Partnership(1).pdf. (accessed 29-09-2012).

[130] See the proceedings of the 276th Session of the ILO Governing Body, November 1999.

responding parties as well as to third parties and to the dispute settlement system as a whole."[131]

WTO consultations, like the ILO social dialogue process, allow for a diplomatic approach enabling parties to a dispute to mutually resolve their differences. This could promote greater transparency and corporation in protecting workers' rights in trade in the countries of the parties in dispute should they be in a position to resolve their disputes without reliance on tribunals. The assumption in this case is that countries would be sensitive to each other's economic policies to the extent that future trade arrangements between such parties would be done based on an understanding of the development needs of each party. From the nature of the current consultation process in the WTO legal framework, the Dispute Settlement Understanding provides few rules on the conduct of consultations.[132] A dispute settlement provision[133] designed for the implementation of the social clause in a new WTO agreement could be structured as follows:

The proposed Joint WTO and ILO Dispute Settlement system would see the Joint WTO and ILO Secretariat operating as the equivalent of the current WTO Dispute Settlement Body.[134]

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[131] Van Den Bossche *Law and Policy of the WTO: Cases, Texts and Materials* (2008) 269. Consultations are significant to the proposed Joint WTO and ILO dispute settlement system in that they are what Van Den Bossche terms "a political-diplomatic process" which most member states of the WTO would appreciate as they do not mirror the formalism brought by a rigid legal mechanism. See Van Den Bossche 270.

[132] See Article 4.6 of the WTO Dispute Settlement Understanding.

[133] See the US-Jordan FTA of 17 December 2001. The proposed dispute settlement provision in the proposed WTO side Agreement on Labour follows the model adopted in the US-Jordan FTA which has been able to embrace consultations and or dialogue as the first crucial step to resolving disputes at the multilateral level. See also Washington Times "Jordan Shutting Abusive Factories" http://www.washingtontimes.com/news/2006/jun/16/20060616-105349-6847r/?page=all (accessed 5 October 2012). The consultation process appears to be useful as the large numbers of sweatshops in Jordan have significantly decreased due to ongoing dialogue between the country and the US. See also Bessma "A Middle East Free Trade Area: Economic Interdependence and Peace Considered" 2007 *The World Economy* 1682. Bessma observes that the agreement has not only been successful from a consultative perspective but has also seen a significant growth in Jordan's economy.

[134] See Article 2.1 of the WTO Dispute Settlement Understanding (DSU) which establishes the WTO Dispute Settlement Body (DSB). The DSB administers the DSU's rules and procedures. Like the DSB, the Joint WTO and ILO Secretariat must be given an elevated status to assume the authority to establish dispute settlement panels, adopt the Joint WTO and ILO Panel and Appellate Body reports, maintain surveillance of implementation rulings and if necessary authorise WTO Members to suspend concessions and other obligations to trade agreements where a WTO Member violates labour standards in trade. See also Lester *et al* 153.

Hierarchy of the proposed Joint WTO and ILO Dispute Settlement System

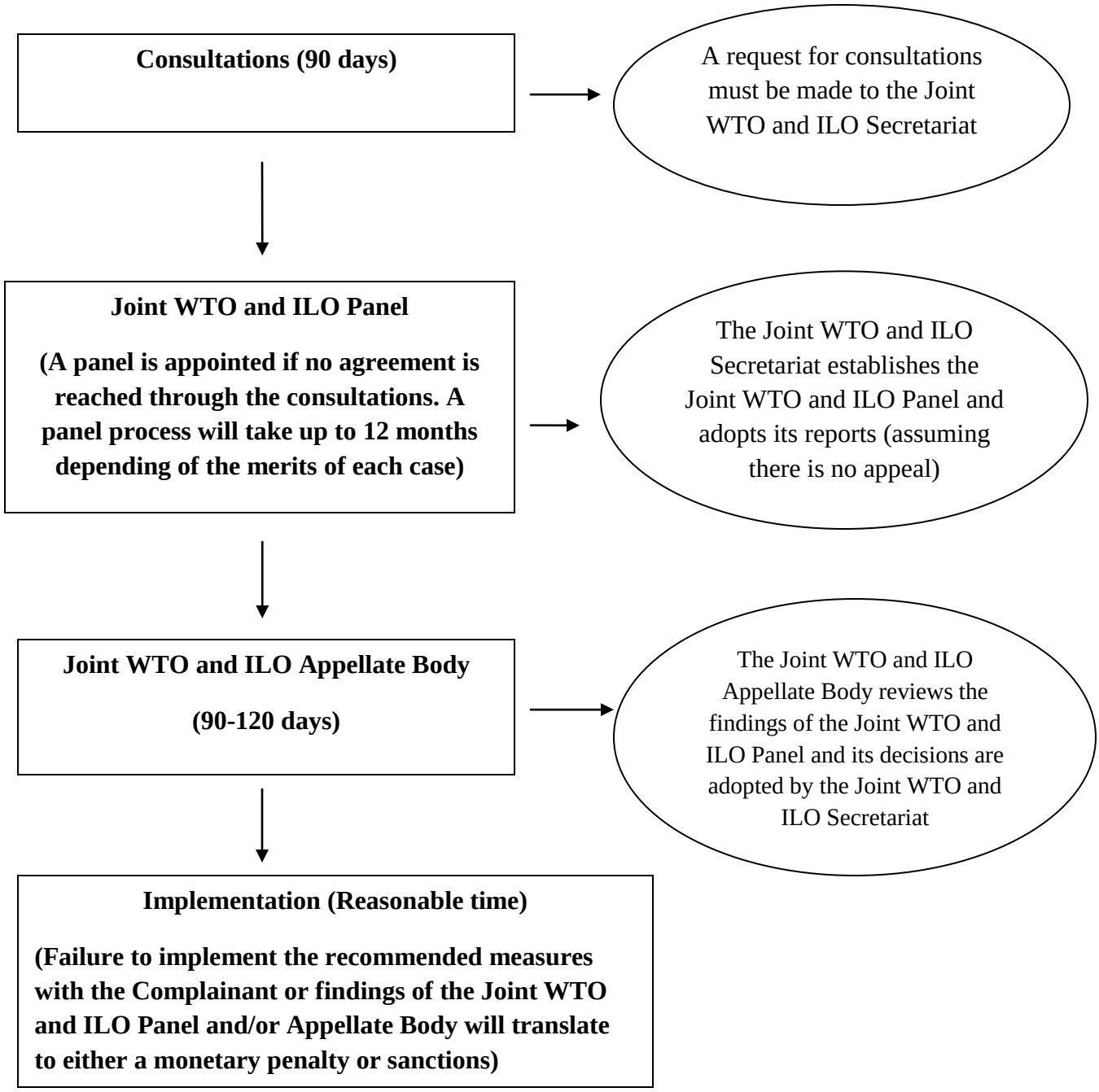


Figure 1 above shows the hierarchy of the proposed Joint WTO and ILO dispute settlement system.

The Joint WTO and ILO Secretariat will receive requests for consultations and only facilitates the consultation process. If the dispute cannot be resolved at the consultation stage, the Joint WTO and ILO Secretariat would establish a Joint WTO and ILO Panel to adjudicate over the dispute. If the Joint WTO and ILO Panel issues its findings and no appeal is lodged against such findings, the Joint WTO and ILO Secretariat would then adopt the report. If an appeal is lodged against the findings of the Joint WTO and ILO Panel, the Joint WTO and ILO Appellate Body would then adjudicate over the appeal which would then be adopted by the Joint WTO and ILO Secretariat. For interpretation purposes, all time frames proposed in this social clause Agreement shall be regarded as working days with the exclusion of public holidays.

It is proposed that the following provisions be adopted to establish the Joint WTO and ILO Dispute Settlement Process:

"1. Member States of the WTO being Parties to any trade agreement shall through consultations make every attempt to arrive at a mutually agreeable resolution whenever a Party considers that the other Party has failed to carry out its obligations in protecting core labour standards in trade or if a Party considers that measures taken by the other Party significantly distort the balance and resultant benefits of a trade-labour linkage or substantially undermine the fundamental objectives of a trade-labour-linkage in the WTO.

2. The consultations shall be confidential between the parties to the dispute. There shall be no intervention by the Joint WTO and ILO Secretariat or its officials. The consultations shall be pursued without prejudice to the rights of any Member in further legal proceedings.

3. A Party seeking consultations in terms of subparagraph 1 above shall submit a request for consultations to the Joint WTO and ILO Secretariat and notify the respondents within 10 days of the circulation of such request thereof. The request as submitted to the Joint WTO and ILO Secretariat shall deal exclusively with matters of a substantial trade and labour linkage.

4. Should an agreement be reached by the disputing Parties, the Joint WTO and ILO Secretariat must be informed about such agreement within 7 days from the date of reaching such an agreement.

5. If the disputing Parties fail to resolve their dispute within 90 days of the submission of the request to consult, notification of the subsisting dispute shall be made in writing by either Party to the Joint WTO and ILO Secretariat requesting the establishment of a Joint WTO and ILO Panel to adjudicate over the dispute. The request must indicate whether or not consultations were held, identify the specific measures at issue and give a brief summary of the legal basis or claims in dispute (For the purposes of the WTO Dispute Resolution process, measures shall be interpreted as referring to any acts or omissions in the form of laws, regulations, administrative instructions, specific application of laws through tariffs, quotas, anti-dumping duties or safeguards taken to diminish the competitive advantage of one Party over another regarding the trade-labour linkage issue). The rationale for precision in the request is to:

a) **Define the measures and claims with respect to the dispute at hand which give the Parties to the dispute and third Parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case.**
b) **Establish the jurisdiction of the Joint WTO and ILO Panel by defining the precise claims at issue in the dispute.**

6. The Joint WTO and ILO Secretariat shall establish a Joint WTO and ILO Panel with the objective of resolving the dispute.

7. The Joint WTO and ILO Panel as established by the Joint WTO and ILO Secretariat shall be an ad hoc Panel appointed on a case by case basis. It shall be composed of 6 panellists (3 trade specialists and 3 labour specialists).

8. The panellists shall be appointed subject to proposed nominations suggested to the Parties by the Joint WTO and ILO Secretariat. The Parties reserve the right to oppose the nominations. If a disagreement subsists concerning any nominations for appointment to the Joint WTO and ILO Panel, the Panel shall be composed of 3 nominations of trade specialists and 3 nominations of labour specialists proposed jointly by the Director General of the WTO and the Director General of the ILO subject to a request by the complainants.

9. Subject to the establishing of the terms of reference and composition of the Joint WTO and ILO Panel, the Panel's proceedings shall take up to 12 months, depending on the nature of each case, and the stages are outlined as follows:

a) **Parties' file their first written submission(s);**
b) **Lodging of Third party submission(s);**
c) **First substantive meeting with the Parties and Third Parties;**
d) **Submission of written rebuttals of the Parties;**
e) **Second substantive meeting with the Parties;**
f) **Release and circulation of the descriptive parts of the panel report(s);**
g) **Request for the Parties' responses on the descriptive parts of the panel report(s);**
h) **Conduct of interim review of the report;**
i) **Issue of the final report to the Parties; and**
j) **Circulation of the final report to the Parties and all WTO Members.**

10. If a matter referred to the Joint WTO and ILO Panel has not been resolved to the satisfaction of the Complainant after a period of 12 months from the date when the dispute was referred to it, or within such other period as the Joint WTO and ILO Panel has agreed to in consultation with the Parties to the dispute, the Complainant may appeal to the Joint WTO and ILO Secretariat to convene the Joint WTO and ILO Appellate Body to review the findings of the Joint WTO and ILO Panel.

11. The Joint WTO and ILO Appellate Body shall be a standing body composed of 6 members. The members shall hold office on a part-time basis for a five year term which is renewable only once. The members shall be appointed by the Joint WTO and ILO Secretariat on consensus based on nominations by WTO Members who are also expected to be members of the ILO. Appointment as a member of the Joint WTO and ILO Appellate Body shall be subject to the following requirements:

a) **Authority and expertise in international trade law or labour law or both;**
b) **Non-affiliation with any government; and**
c) **Impartiality and broad representativeness.**

12. Appeals shall be limited to issues of law related to a trade-labour linkage covered in the Joint WTO and ILO Panel report and legal interpretations on the trade-labour linkage developed by the Joint WTO and ILO Panel.

13. The Joint WTO and ILO Appellate Body shall, within 120 days of its convening, present to the Parties a report containing findings of fact and its determination as to whether:

a) **the Respondent has failed to carry out its obligations under this agreement; or**
b) **Whether a measure or measures taken by the Respondent severely distorts the trade-labour linkage provisions and the resultant benefits accorded by the social clause in this agreement.**

13(1) A further inquiry must be made to establish whether or not any such violations of core labour standards in trade as referred to in Articles 13(a) and (b) substantially undermine the fundamental objectives of a social clause in the WTO founding Agreement. Where the Joint WTO and ILO Appellate Body finds that the Respondent has failed to carry out its obligations under this agreement, it may, at the request of the Parties, make recommendations for resolution of the dispute.

14. If, in its report, the Joint WTO and ILO Appellate Body determines that there has been a persistent pattern of failure by the Respondent to effectively enforce its labour standards, the Parties may agree on an implementation/action plan, which shall conform to the determinations and recommendations of the Joint WTO and ILO Appellate Body.

15. If the Parties have not agreed on an implementation/action plan under Article 14 within 90 days of the date of the Joint WTO and ILO Appellate Body report, or the Parties cannot agree on whether the Respondent is fully implementing an implementation/action plan agreed to under Article 14, the Complainant may request that the Joint WTO and ILO Secretariat to invoke the monetary penalties or sanctions against the Respondent subject to compliance with the findings of the Joint WTO and ILO Panel or Joint WTO and ILO Appellate Body (in the case of an appeal).

16. Where a Joint WTO and ILO Panel has been reconvened under Article 15, it:

a. shall adjudicate whether any action plan proposed by the Respondent is sufficient to remedy the pattern of non-enforcement and

(i) if so, shall approve the plan, or

(ii) if not, shall adjudicate such a plan inconsistent with the law of the Respondent, and

c) may, where warranted, impose a monetary penalty in accordance with this agreement.

17. If the Joint WTO and ILO Appellate Body under the WTO founding Agreement to which both Parties are Party has been invoked by either Party with respect to any matter, the mechanism invoked shall have exclusive jurisdiction over that matter.

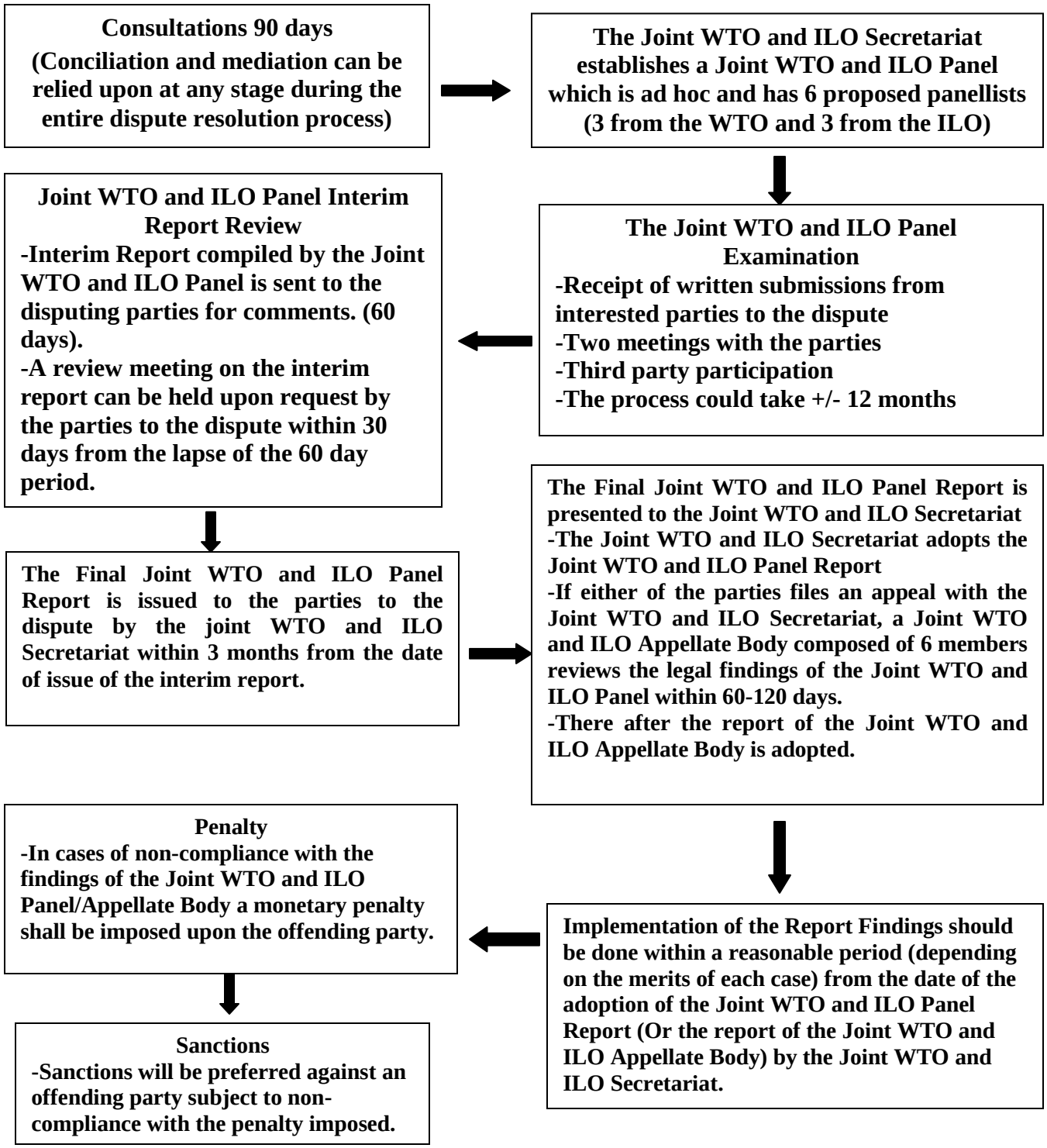
18. If the mechanism fails for procedural or jurisdictional reasons to make findings of law or fact, as necessary, on a claim included in a matter with respect to which a Party has invoked such mechanism, Article 17 shall not be construed to prevent the Party from invoking another mechanism with respect to such claim.

19. The WTO Member States, shall within 180 days after the entry into force of this agreement, enter into discussions with a view to developing rules for the selection and conduct of members of Joint WTO and ILO Panels, Appellate Body and Secretariat contemplated in this Agreement.

20. Third Parties who were participants at the Joint WTO and ILO Panel Stage shall have the right to file submissions and participate in the oral hearing before the Joint WTO and ILO Appellate Body. However, Third Parties will not have the *locus standi* to appeal.

21. The adoption of the Joint WTO and ILO Panel or Appellate Body Reports must be done within 60 to 120 days from the circulation of their reports."

Figure2: The proposed Joint WTO and ILO Dispute Resolution Process



Note that longer time frames have been proposed for each stage due to anticipated complexities in jointly dealing with disputes concerning a trade-labour linkage.

Figure 3: The proposed Joint WTO and ILO Panel Process

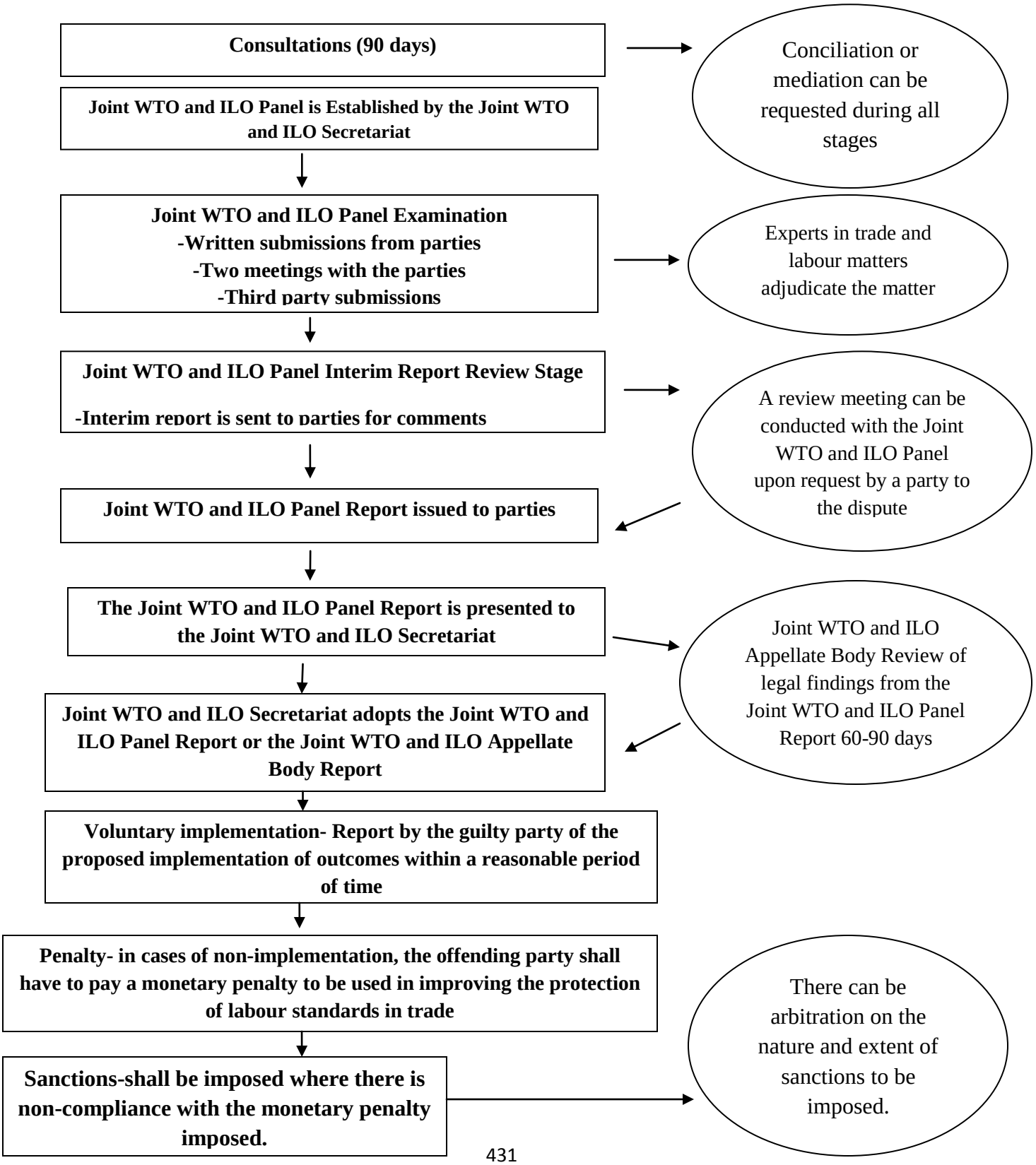


Figure 4: Proposed Joint WTO and ILO Appellate Body Process time table

Nature of process sought by the appellant	**General Appeals**	**Appeals against sanctions**
	Days	**Days**
Notice of Appeal	0	0
Appellant's submission	0	0
Notice of other appeal	10	5
Other appellant's submission(s)	10	5
Respondent(s) submission(s)	20	10
Third Participant(s) submission(s)	25	15
Oral Hearing	30-45	15-20
Circulation of Joint WTO and ILO Appellate Body Report	60-90	30-60
Joint WTO and ILO Secretariat meeting for the adoption of the Joint WTO and ILO Appellate Body Report	90-120	60-90

The adoption of a joint WTO and ILO dispute settlement system could be a plausible approach to addressing disputes regarding a trade-labour linkage. Trebilcock has observed that:

> "...where trade sanctions have been invoked against imports from foreign countries for failure to observe core labour standards or other universal human rights, and these sanctions have been challenged before the WTO Dispute Settlement Body by exporting countries, it would

> seem appropriate that the WTO Dispute Settlement Body seek opinions from other international organisations whose mandates squarely embrace these issues about whether systematic violations of core labour standards or universal human rights have occurred or are occurring, leaving the WTO dispute-settlement system to address the proportionality of the proposed sanctions relative to the severity and persistence of the abuses in question and to screen out arbitrary or unjustifiable forms of discrimination or disguised restrictions on trade under the conditions in the chapeau of Article XX."[135]

From the proposed dispute settlement provision outlined above, it must be noted that reasonably lengthy time frames have been set aside for the consultation process with a view to avoiding quick and direct reliance upon sanctions as a means of punishing a party to trade that has failed to protect core labour standards in trade or has failed to take the necessary measures to redress any such violations to the detriment of trade partners due to such country gaining unfair trade advantage through a lowered compliance with labour standards. However, it must be appreciated that consultations alone may not achieve the intended objectives of incorporating a social clause in the WTO system. As such, the social dialogue approach of the ILO must be reinforced with the sanctions model of the WTO as sanctions could be an efficient tool to secure the compliance of offending state parties to their international obligations.[136] The sanctions model of the WTO is undoubtedly the best legal mechanism at the multilateral level which is able to ensure compliance with international standards by offending parties.[137] It is therefore recommended that a provision allowing for the use of sanctions in the aftermath of failed consultations be included

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[135] Trebilcock Understanding *Trade Law* (2011) 177. Trebilcock posits that, "...rationales of a proposed trade-labour linkage in the multilateral trade system which focus on social welfare in importing countries rather than on social welfare in exporting countries where low labour standards prevail is problematic in that such an approach could carry a serious risk of depriving developing countries of their major source of comparative advantage, that is, low labour costs." He however observes that, "[a] rationale for a trade policy-labour standards linkage that focuses squarely on social welfare considerations in exporting countries, rather than importing countries, and seems an entirely cogent basis for global action to ensure that core labour standards in all countries, conceived of as universal human rights, and other international human rights are respected." See also Trebilcock 172.

[136] Guzman "The Design of International Agreements" 2005 *European Journal of International Law* 579. See also the UN Security Council Resolution SC/1079 of 19 September 2012. The Resolution adopted the use of targeted sanctions as a means of punishing parties that violate the rights of children in armed conflict. Whilst the Resolution might have nothing to do with trade and labour matters, it underlines the significant role played by sanctions in international law in trying to address the continued violations of human rights.

[137] WTO "Settling Disputes: The Priority is to Settle Disputes, not to Pass Judgement" http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf (accessed 5-10-2012). The WTO itself has observes that: "Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case."

in the proposed WTO Agreement in order to give effect to the social clause. The sanctions provision[138] should be based initially on monetary fines which must be used to improve the levels of protection of core labour standards in the offending country. The wording of the clause should be as follows:

"1. The preference of and/or imposition of monetary penalties and sanctions for the purposes of the operation of a social clause in the WTO founding Agreement and any bilateral and regional trade agreements shall be regarded as an option of last resort and will only be deemed permissible if all other reasonable measures have been taken in terms of the joint WTO and ILO Dispute Settlement System. Parties must endeavour to resolve their disputes mutually without reliance on the punitive provisions of the social clause.

2. Where a mutual resolution of the dispute fails, monetary penalties for the purposes of penalising a violation of labour standards in trade no greater than USD 20 million for developed countries, USD 12 million for fast developing countries and USD 9 million for least developed countries or its equivalent in the currency of the Respondent shall be imposed.

3. In determining the amount of the monetary penalty, the Joint WTO and ILO Panel or Appellate Body, subject to the adoption of the Joint WTO and ILO Secretariat, shall take into account:

a. the frequency and duration of the Respondent's pattern of failure to effectively enforce its labour standards;

b. the level of enforcement that could reasonably be expected given the level of development and/or economic performance of the Respondent;

c. the reasons, if any, provided by the Respondent for not fully implementing an action plan;

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[138] The proposed monetary fines model is based on the Canada-Chile and Canada-EU models. However, it differs from the two agreements in that it proposes the acknowledgement of the differences in the levels of development which exist between fast developing countries and least developing countries. It therefore sets differences in the monetary fines to be imposed on fast and least developing countries. However it makes the difference fairly marginal to avoid resistance from fast developing countries who have argued that any significant differences in treatment between themselves and least developing countries, as observed in the environment case, would limit their potential to maximise their gains from trade and would amount to an act of discriminating against them in favour of least developed countries.

d. efforts made by the Respondent to begin remedying the pattern of non-enforcement after the final report adopted by the Joint WTO and ILO Secretariat; and
e. any other relevant factors deemed relevant by the Joint WTO and ILO Secretariat.
4. All monetary penalties shall be paid in the currency of the Respondent into a fund established by the Joint WTO and ILO Secretariat and shall be spent on improving or enhancing the protection of core labour standards in trade in the Respondent State, consistent with its law."

It is submitted that no system is without its flaws. Therefore, should a country fail to pay its monetary penalty as imposed by the Joint WTO and ILO Secretariat, it is proposed that the last stage in this sanctions-based model be activated. This stage allows the suspension of the trade benefits of an offending country.[139] It is therefore proposed that such a suspension provision be incorporated in the proposed WTO agreement as follows:

"1. Where the Respondent fails to pay a monetary penalty assessment within 180 days after it is imposed by a Joint WTO and ILO Panel or Appellate Body and adopted by the Joint WTO and ILO Secretariat:
a. any Complainant may suspend the granting of benefits to the Respondent in an amount no greater than that equivalent to the monetary penalty.
2. Where a Complainant has suspended trade benefits, the Joint WTO and ILO Secretariat shall, on the delivery of a written request by the Respondent, reconvene the Joint WTO and ILO Panel or the Joint WTO and ILO Appellate Body (where an appeal was filed) to determine whether the monetary penalty has been paid or collected. The Joint WTO and ILO Panel or Appellate Body shall submit a report within 30 days after it has reconvened to the Joint WTO and ILO Secretariat indicating whether or not the monetary penalty has been paid or collected. Should the report indicate payment or collection of the monetary

[139] The suspension provision is based on the North American Agreement on Labour Cooperation (NAALC) which was signed on September 14, 1993, by the Presidents of Mexico and the United States, and the Prime Minister of Canada, as one of the supplementary accords to the North America Free Trade Agreement (NAFTA). It entered into force on January 1, 1994.

penalty to be used in improving the protection of labour standards in trade, in the Respondent State, the suspension of benefits shall be terminated forthwith.

3. On a written request of the Respondent delivered to the Complainant and the Joint WTO and ILO Secretariat, the Joint WTO and ILO Appellate Body or the Joint WTO and ILO Panel (as the case may demand)[140] shall reconvene to determine whether the suspension of benefits by the Complainant is manifestly excessive. Within 30 days of the request, the Joint WTO and ILO Panel or Appellate Body shall present a report to the Joint WTO and ILO Secretariat which after adopting the report would circulate it to the disputing Parties to appraise them of the determination by the Joint WTO and ILO Panel or Appellate Body.

4. Where there is substantial evidence of non-compliance with the monetary penalty, a Complainant in considering what tariff or other benefits to suspend shall:

a. first seek to suspend benefits in the same sector or sectors as that in respect of which there has been a persistent pattern of failure by the Respondent to effectively enforce its labour laws; and

b. where it is impracticable or ineffective to suspend benefits in the same sector or sectors, the Complainant may suspend benefits in other sectors."

The proposed provisions designed to give effect to a social clause in the WTO are similar to provisions that have been successfully implemented in bilateral or regional trade agreements which include a social clause. It is hoped that the continuing application of these similar frameworks at the bilateral and regional levels could be the basis for adopting of an appropriate framework for the in inclusion of a social clause at the multilateral level.

It is also plausible to propose that as an interim measure to address the need for a trade-labour linkage at the multilateral level, the WTO amends its founding WTO Agreement to recognise the need to invite specialists in non-trade related matters such as labour economics to sit as specialist advisors to members of the WTO Panel or the WTO Appellate Body when they

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[140] The written request could indicate that Respondent State due to its level of development or any other extenuating circumstances as may be influencing its economic performance, can not in whole or in part comply with the monetary penalty preferred against it. Proof of such inability to comply with the monetary penalty shall be upon the Respondent State with detailed financial reports of its financial status being plausible instruments to plead poverty or insolvency or any other legally recognised defence.

are adjudicating over disputes in terms of the present WTO Dispute Settlement System.[141] The proposal of inviting ILO specialists to sit in panel and appeal processes of the WTO as advisors to the panellists is consistent with Trebilcock's views to the effect that "These issues of institutional competence and legitimacy would appear to require creative forms of horizontal coordination or linkage between the WTO and other international organisations, particularly in the WTO's dispute settlement role."[142] Chapter five of this study has established that in some bilateral and regional trade agreements, the ILO has been invited to offer guidance on specific issues in relation to disputes regarding the trade-labour linkage. This could be indicative of the fact that the WTO and ILO can in essence cooperate to curb the violation of labour standards in trade. Such an approach could provide another platform upon which a comprehensive WTO legal framework on the trade-labour linkage could be adopted in future. This study has established that there could in fact be novel and practical approaches to establishing a trade-labour linkage within the WTO framework. However, the study has indicated that there are challenges as regards WTO Members' consensus on recognising a trade-labour linkage in the WTO founding Agreement.[143] Perhaps innovative measures such as the ones proposed in this chapter which place emphasis on

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[141] See Trebilcock 176.

[142] Ibid. Take note that the advice of the ILO specialists would not be binding but would be regarded as opinions which could be persuasive to the panellists and members of the appellate body. It would thus be the duty of the panellists and members of the appellate body to rationalise the opinions advanced by the ILO specialists subject to WTO laws and procedures in order to determine the appropriate measure to adopt against an offending party. See also Trebilcock 177. Such an approach is likely to allay fears surrounding the usurping of powers of ILO by the WTO or vice-versa as there are clearly defined boundaries within which officials from either institution would operate.

[143] See Lester *et al* 872. Lester *et al* observe that, there is a general feeling driven by the views of developing countries to the effect that labour issues, except prison labour, fall generally outside of the WTO, lying instead with the ILO. The primary basis of such an argument is that developing countries benefit from labour policies that do not comply with international standards. However, Chartes and Mercurio (as quoted by Lester *et al* 873) in criticising Bhagwati over his argument that labour standards have no place in the WTO because it is an organization that exists primarily to promote mutually beneficial, non-coercive trade through reciprocal and mutually advantageous arrangements aimed at reducing barriers to trade, observed that, "Bhagwati's view that the WTO's role is limited to regulating 'pure' trade issues for the purposes of trade ignores that the GATT and WTO, as well as human rights treaties and organizations were created for the purpose of increasing human welfare..." The argument for a trade-labour linkage must not be construed as implying that the WTO replaces the ILO as the organisation that deals with labour matters. It must be viewed as a cooperative approach of international organisations to complement each other in advancing their aims, objectives and roles in a world in which countries are struggling to reach development goals in the face of challenges created by globalisation.

the need to mutually resolve trade-labour disputes before any penalties or sanctions could be implemented as an option of last resort could find support in the international community.[144]

9 5 CONCLUSION

There is a significant need to establish a trade-labour linkage in the WTO in order to address challenges related to development and the complex issues that have emerged in labour markets due to globalisation.[145] This study was aimed at examining the calls to incorporate a social clause

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[144] See Article XXII of the GATT 1947. See also Van Den Bossche 269. Van Den Bossche underscores the significance of consultations to dispute resolution as they have few rules to conducting them. It would thus be plausible to assert that establishing a practicable social clause in the multilateral trade agreement must place emphasis on consultations before penalties and sanctions could be imposed on offending parties. WTO Members would be encouraged to resolve their disputes mutually in a flexible manner which suites their socio-economic demands without having to directly rely upon and be subjected to the prescriptive and punitive measures which are usually associated with hard law, often building resistance against the adoption of such laws. Consultations could even strengthen free trade as WTO Members will be in a position to trust and understand each other without any suspicions being held regarding the intentions of one party over the measures advocated by another concerning a trade-labour linkage. See also Trebilcock and Howse *The Regulation of International Trade* (2005) 112. Trebilcock and Howse observed that, "...the 1947 GATT made no provision for formal, juridical dispute settlement, nor was there any explicit provision for recourse to the International Court of Justice in resolving disputes. The emphasis was on diplomatic methods of consultation and consensus." Trebilcock and Howse's observations are plausible in their analysis of the 1947 GATT. If all disputes could be resolved at the consultative level, then there would be no need for penalties and sanctions. However, managing relations between state parties at international level does not always lead to disputes being resolved through consultations. Therefore penalties and sanctions could be used as a last resort with primary emphasis being placed upon consultations. See also Trebilcock and Howse 566. Trebilcock and Howse are against the use of hard law instruments in the scope of trade-labour linkage. They argued that, "Surely genocide, torture, detention without trial...warrant at least a serious concern from the international community than core international labour standards." However it is questionable whether it is prudent to downgrade core labour standards as human rights in preference of another set of human rights where action can be taken to improve the protection of both sets of rights. The case of the DRC has shown that torture be used as a tool to violating core labour standards in trade. As such a case for a trade-labour linkage could also be a future case for eliminating torture in trade related matters. If the torture, genocide and detention are not trade related, then the United Nations must be seen to develop the necessary instruments to hold accountable parties perpetrating such violations.

[145] See Chartes and Mercurio 665. Chartes and Mercurio have argued that, "The incorporation of Intellectual Property Rights into the WTO framework indicates that governments are willing to allow for the regulation of internal activity if such regulation has the net effect of expanding the volume of trade and, in so doing, increasing the security and predictability of markets. Yet, developing country governments, industry associations, certain economists, and some developing country Non-Governmental Organisations often argue that the inclusion of core labour standards into the WTO would not expand trade volumes, but rather operate as disguised protectionism to undermine developing countries' comparative in cheap labour vis-a-vis developed countries. Thus it is claimed that allowing WTO Members to impose restrictive measures on products manufactured in contravention of core labour standards would have the net effect of reducing world trade...a result that is irreconcilable with the WTO's objective to further promote trade-liberalization and the expansion of trade." Basing on Chartes and Mercurio' views it would be plausible to argue that adopting a balanced approach between the views of those advocate for a trade-labour linkage and those who are against a trade-labour linkage could address the misconceptions concerning this issue as this study established. It is not in question that free trade is vital to economic growth as much as it is conceivable that the observance of core labour standards would

into the WTO framework as a mechanism to promote sustainable development in the countries of the world, especially developing countries. The study's analysis of how incorporating a social clause in trade agreements has positively contributed to the growth of Mexico has been juxtaposed with the effects of a lowered compliance with labour standards amongst Southern African countries. The developments currently taking place in South Africa were used as a case study of how poor compliance with labour standards should no longer be regarded as a comparative advantage in a world that seeks to prioritise the protection of human rights.

The study also analysed the advantages and challenges regarding proposals to incorporate a social clause in the multilateral trading system. The main challenges, such as national sovereignty,[146] lack of consensus and co-operation,[147] as well as macro-economic imbalances and tensions within countries, were identified. The establishment of bilateral and regional trade agreements which have the potential to undermine the development of an international consensus that would strengthen multilateralism was also discussed. The study has established that the incorporation of social clauses in bilateral and regional trade agreements constitutes an

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strengthen the long-term economic performance of all countries regardless of their level of development. As such regarding one argument over the other would be misguided. Perhaps a balanced approach could be useful.

[146] See Jackson *The Jurisprudence of GATT & the WTO* (2000) 404. Jackson argued that, "There have been some allegations made that the WTO Charter is an important intrusion into 'national sovereignty.' Apart from the general problems of how to define 'sovereignty' in a world that is increasingly interdependent ... [t]he protections for national sovereignty built into the WTO Charter rules on decision making are substantially enhanced." This view could imply that the inclusion of a social clause in the WTO would not infringe the doctrine of national sovereignty as the WTO already has mechanisms in place to ensure that a trade-labour linkage does not threaten the ability of a country to self-regulate in the interest of its citizens and pursuit economic goals.

[147] There have been strong arguments advanced against a trade-labour linkage in the face of strong arguments for a trade-labour linkage. See Hoekman and Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* (2009) 625-626. Hoekman and Kostecki argued that, "Populist calls to reduce differences in labour costs are not at the core of the issue in the WTO context. Labour costs reflect the income and productivity of a country. Insisting that liberalization of trade be made conditional upon convergence in labour costs makes absolutely no sense, and would constitute blatant protectionism. The gains from trade result precisely from differences in costs, which are due to differences in endowments, technological capacities and output per worker...Trade policy is an inefficient tool to enforce labour standards, assuming agreement could be reached on what the relevant standards should be." Hoekman and Kostecki further opined that using the WTO system to enforce core labour standards would actually be harmful to those it is intended to protect. These issues have been dealt with in detail in this study. However, Hoekman and Kostecki's views can be disputed on the basis of Chartes and Mercurio's argument to the effect that, "...the imposition of fundamental worker rights can be pursued without necessarily injuring a nation's capacity to effectively export and trade with the world system...evidence suggests that many developing countries have (in taking a myopic view of the issue) completely ignored the benefits that acceptance of universal labour standards could bring and the correlative role that acceptance could play in the expansion of the world market." The arguments clearly indicate that no argument concerning a trade-labour linkage stands exclusively above that other. This calls for a balanced approach to the debate which points to the adoption of a trade-labour linkage legal framework in the WTO which recognises a balance between free trade and the protection of core labour standards.

alternative to the multilateral negotiations in the WTO that were undermined by the slowness of the negotiations in the Doha Round and the negotiations' resultant failure.[148] These agreements have proven to be a success with countries like Mexico benefiting immensely from the NAFTA agreement.[149] As a result, the WTO could be forced to rethink its approach to non-trade matters and consider proposals such as those advanced in this study to recognise a trade-labour linkage

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[148] See Hoekman and Kostecki 602. The Doha Round failed primarily as a result of the inability of WTO Member States to establish consensus regarding the relationship between trade and competition policies. This issue falls at the centre of the trade-labour linkage debate as was established in this study. Hoekman and Kostecki observed that, "In the case of trade policy, the pursuit of mercantilist objectives by trade negotiators leads to an outcome that is welfare-improving (unambiguously for small economies that are price takers on world markets). In the case of competition policy–trading commitments on competition policy motivated by market access objectives could have negative effects for the enforcement of competition law more generally." This approach was rejected by competition authorities who derailed the objective of establishing common competition principles which could have been in the interest of developing countries. The Walmart/Massmart merger discussed in this study illustrates this problem. It could thus be argued that a failure to negotiate and establish a legal framework for a trade-labour linkage in the WTO could also lead to the failure of the WTO as some Members lose confidence in its ability to adopt pro-development policies. See also Hoekman and Kostecki 666.

[149] See Compa *Justice for All: The Struggle for Worker Rights in Mexico* (2003) 41. Compa appears to paint a pessimistic picture about the effectiveness of the North America Agreement on Labour Cooperation (NAALC) which is a side agreement to the NAALC. He argued that, "The NAALC has failed to achieve its high purpose. Apparently more eager to maintain diplomatic niceties rather than tackle and solve worker rights violations, the three governments have demonstrated a lack of will to hold one another to their NAALC commitments. Some investigations and reports have led to significant findings and recommendations, but they have not produced change. Ministerial consultations resulted only in research projects and trinational conferences. Although these are informative, they have not directly addressed or resolved worker rights violations documented and proven in NAALC proceedings." However Compa's views concerning the impact of the NAALC might be questioned as they seem to ignore that arrangements such the NAALC must prioritise consultations over confrontational tendencies especially in agreements involving countries with different levels of development. The NAALC does have a dispute settlement mechanism which could allow an aggrieved party to prefer sanctions against the offender. However, since the objective is to build cooperation, one would not expect reliance on punitive measures at the spare of a moment. That the countries have come up with such an arrangement is commendable as the fruits of such efforts are now being realised. See also NAFTA "Myths vs. Reality" http://www.naftanow.org/myths/default_en.asp (accessed 01 September 2012). Here, the notion that the protection of core labour standards in trade is likely to promote future development is realised. After arguments were advanced to the effect that the NAFTA would result in job losses and hurt workers by eroding labour standards and lowering wages, statistical evidence after the adoption of the NAALC shows that the opposite has happened. Since NAFTA came into effect, the overall job growth in all three countries has been strong with an estimated total employment growth of 40 million from 1993 to 2012. Higher wages have been realised for workers. In Mexico for example, export firms employ one in five workers; these workers are paid 40% more on average than those in non-export jobs. Firms with foreign direct investment employ nearly 20% of the labour force and pay 26% more than the domestic average manufacturing wage. Should such growth patterns continue to be realized, it would not be surprising to realise a future improved protection of labour standards in trade. The NAFTA case could be an illustration that free trade can lead to an improved protection of labour standards with time.

in its regulatory system.[150] Several years ago, Jackson criticised the treaty structure of the WTO and its Charter rules which make amendments difficult to effect.[151] Jackson was particularly concerned with the fact that the WTO's new treaty structure and Charter were designed to make amendments difficult.[152]

This study also acknowledged that developed countries are gradually withdrawing from multilateralism and engaging in bilateral trade deals where they can gain more concessions from individual developing countries. This is the reason why developing countries must prefer the multilateral approach where the rules should apply equally regarding the incorporation of a social clause in trade. Multilateralism has to deal with issues other than cross-border trade, such as labour matters.

This study underscored the importance of ensuring that world governments, especially developing countries' governments improve in the enforcement of labour rights protection and legislation and support the proposals to incorporate a social clause in the WTO.[153] It then proposed mechanisms for incorporating a social clause in the WTO both on a short-term and long-term basis. It is evident that businesses and governments the world over now need to have a

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[150] See Trebilcock 191. Whilst not making allusion to labour matters, Trebilcock in commenting on the future challenges for the world trading system concluded that, "...it seems imperative that the WTO move to some form of delegated decision-making by a broadly representative executive body charged with formulating issues for negotiation and managing initial negotiations, with recommendations subject to a trade-weighted special majority vote for all members." Failure to take such an approach would lead to the organisation likely becoming, "increasingly marginalized in international trade matters without an ability to move in a more decisive and timely fashion on current trade issues." Trebilcock's views appear to confirm the incorporation of a social clause in bilateral and regional trade agreements with fears being held to the effect that developed countries might leave the multilateral trade system and focus on regional and bilateral trade agreements where their interests will be best served. See also Hoekman and Kostecki 670. Hoekman and Kostecki argued that there might not be a problem at all with the development currently emerging in the world trading system which renders the WTO's bargaining more complex due to the emergence of countries such as China, India and Brazil as major trade actors and the rise of developing country coalitions. They contend that the basic aspects of the WTO still remain relevant and could even increase. What is however evident is that the approach adopted by the organisation in dealing with emerging issues concerning trade will determine its fate. This could include the incorporation of core labour standards in its founding Agreement.

[151] Jackson 342.

[152] Jackson 343. That the WTO Charter makes amendments difficult to effect may translate to the fact that the WTO would find it difficult to adapt and evolve to meet the rapidly changing circumstances of international economic relations. It has already been argued that incorporating a social clause in the WTO founding Agreement in its current state would be almost impossible if not impossible. If one holds Jackson's views as plausible, it could thus be commendable to propose that the WTO system be reformed to allow it to adjust to the changes that have become synonymous with globalisation. This could allow for amendments to incorporate a social clause in the WTO founding agreement in its current state without coming into conflict with principles such as the MFN as alluded to in chapter eight of this study.

[153] See Chartes and Mercurio 672. See also Lester *et al* 877.

dialogue concerning a culture of rule of law and employees' protection. Workers the world over should be treated as a critical component of an effective trade regime. The Bretton Woods Institutions' proposal that the ease of doing business is enhanced by flexible labour market conditions often characterised by low compliance with labour standards might need to be balanced with the conceptualization of trade as a key element for improving global welfare. Failure to do so could lead to social upheavals as currently taking place in South Africa, a development which threatens investor confidence and lowers productivity. An analysis of developments in some Southern African countries has established that focusing on quick economic gains on the basis of a lowered compliance with labour standards in trade, which does not lead to sustainable development, might be a misguided approach. Governments of countries in the world which are members of the WTO have the responsibility to promote a human rights approach to trade as does the WTO itself.[154] And countries generally have the responsibility of legal compliance with human rights and labour standards.[155]

Lastly, the study recommended that for the long-term, hard law provisions should be incorporated into the WTO system making it more regulatory rather than voluntary.[156] There is a need to enlarge the capacity of developing countries in managing issues of labour and human rights protection.[157] The study also made a detailed analysis of the attempts to link environmental

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[154] See Petersmann "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration" 2002 European Journal of International Law 621. See also Lester *et al* 882. See also Trebilcock and Howse 583. Trebilcock and Howse observed that, "...beyond the labour context (in whole or in part), international human rights law is relevant to the interpretation and evolution of international trade norms, focusing on the WTO."

[155] See Lester *et al* 880.

[156] See Trebilcock and Howse 566. Trebilcock and Howse are of the opinion that, "...trade or other economic sanctions should not be confined to core labour standards, but should extend to at least some subset of universally accepted rights more generally, and that such sanctions should not be limited to goods directly produced by the offending practices. This in fact suggests a very broad domain for linking trade and other economic sanctions with universal human rights. However, it also suggests some significant constraints on their invocation. In particular, both the substantive rules governing their invocation and the procedures by which they may be invoked should be consistent with the human rights rationale for intervention and should exclude the unfair competition and race-to-the-bottom rationales for intervention. " In their assertion, Trebilcock and Howse do not object to the inclusion of a social clause in the WTO but the rationale by which they have to be incorporated. This view could appear to pave the way for the formulation of possible legal frameworks for incorporation a social clause in the WTO based on a human rights approach which is what this study argued for amongst other issues.

[157] See Petersmann 621. Petersmann argued that, "...human rights law offers WTO rules moral, constitutional and democratic legitimacy that may be more important for the parliamentary ratification of future WTO agreements than traditional economic and utilitarian justifications." His view is consistent with the one advanced by Trebilcock and Howse to the effect that a human rights approach would be a plausible approach for advocating

regulatory practices to trade with a view to showing that it is possible to achieve the same outcomes with core labour standards.[158] In the short-term the study proposed that establishing a side agreement to the founding WTO agreement which recognises international investment agreements as part of the WTO system could be the route for developing a platform for labour issues to be eventually incorporated into the WTO's framework in the long-term. The study proposed that in the long term, the WTO may have to be reformed with a social clause being incorporated into a new multilateral trade agreement. The social clause in the new WTO agreement could place emphasis on the need to resolve disputes regarding the violation of labour

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for the inclusion of a social clause in the WTO legal framework. See Trebilcock and Howse 566. However the human rights approach is not without its critics. Alston argued that the proposed human rights-trade linkage was a radical approach which would have far reaching consequences for the existing human rights regime. His contention was that individuals would end up being objects rather than the holders of human rights as human rights would be deemed as an instrumental means for achieving economic policy objectives. See Alston "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann" 2002 *European Journal of International Law* 815. However, it might not be plausible to assume radical position concerning the need to link the WTO to non-trade matters. It might be productive to pursue intellectual debates over the appropriate relationships that should subsist between trade and matters such as labour law. This study sought to establish one such link between trade and labour from a human rights and developmental perspective. Perhaps a systematic and intellectually open way of acknowledging the opposing debates on the debate and establishing a common ground could lead to future productive working relations between the WTO and ILO as well as other institution which preside over non-trade matters which are linked to trade.

[158] See Trebilcock 161. Just like the debate on the need to recognise a trade-labour linkage in the WTO legal framework, the trade policy-environment linkage has emerged as one of the controversial issues in the trade policy agenda. However attempts to ensure a differential application of standards in efforts to adopt multilateral rules on environmental practices as revealed in chapter 8 of this study, could provide the basis for a future agreement on trade and environment. The development in the trade and environment debate have been used in this thesis to ascertain whether or not there are any lessons which could be learnt to inform the trade-labour linkage debate. It is evident from the trade-environment debate that the uniform application of standards will not lead to any success in establishing a relationship between trade and non-trade areas. A differential application of standards could be a positive approach to achieving a uniform yet development specific application of standards. Such an approach could draw support from WTO Members if properly implemented. See also Steinberg "Power and Cooperation in International Environment Law" in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 520. Guzman and Sykes observed that, "Trade-environment rules are less well developed and less environment friendly in the GATT/WTO than in some other trade organizations, such as the NAFTA and European Union." The observations of Guzman and Sykes suggest that establishing a trade-environment linkage (as would a trade-labour linkage) at a multilateral level could be complicated than it would be at regional level. However, if Member States of the WTO are the same parties adopting such an approach at bilateral or regional level and advocating for a similar approach at multilateral level, it poses the question whether or not it would be prudent for the WTO to continuously exclude a linkage with non-trade matters. It is submitted that such an approach could inadvertently weaken the organisation with time as its own Member States rely on bilateral or regional trade agreements to achieve linkages between trade and non-trade matters. This could be an unfortunate development in a world that is increasingly moving away from autonomous states to a global approach to governance and business operations. A global approach to governance and business operations should translate to an increased significance of the multilateral trade arrangement in establishing a balance with the bilateral or regional approach to conducting trade (as bilateral and regional trade agreements incorporate non-trade matters). This suggests a need to strengthen the capacity of the WTO in dealing with non-trade related matters rather than weaken it by continuously excluding such issues from its framework.

standards in trade mutually with monetary penalties and sanctions being used as a last resort in instances where reasonable and adequate measures would have been taken to resolve the dispute in question. The approach of regarding low labour standards as a comparative advantage by developing countries might also need to be reviewed with emphasis being placed on technological development and training of skilled workers to produce quality goods for trade.[159] The WTO must revisit the principles of trade and its impact on global welfare as envisaged by the failed ITO. Samuelson in his famous dictum observed that:

> "There is essentially only one argument for free trade or freer trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labour, greatly enhances the potential real national product for all nations and makes possible higher standards of living all over the globe."[160]

Samuelson's dictum could offer much guidance going forward for strengthening the WTO's capacity to promote sustainable development. Whilst the organisation's commitment to free trade cannot be questioned, its commitment to development and human rights protection still raises key questions which could compromise its legitimacy going forward. It is thus recommended that trade be linked to non-trade matters such as labour as this could go a long way in sustaining the legitimacy of the WTO.

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[159] See Lowenfeld International Economic Law (2007) 7. Lowenfeld observed that, "...the theory of comparative advantage has never been wholly satisfying. One major shortcoming, even when expanded beyond the two-country, two-product, two-factor model, is that it would lead to the expectation that countries with similar levels of economic development would trade little with each other, apart from goods directly linked to geography, such as the products of agriculture or mining. In fact, industrial countries trade in great volume with one another, often in the same sector products." This argument suggests that apart from merely relying on low labour standards as a comparative advantage, greater effort must be put in adjusting to appropriate trade policies which could offer an enhancement of the welfare of developing countries' citizens or even contribute to the general global welfare through sustainable and productive economic activities.

[160] See Samuelson *Economics* (1980) 651.

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