Labour Standards and World Trade Law: Interfacing Legitimate Concerns

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Abstract. This paper examines the linkage of trade and the core labour standards confirmed at the Copenhagen Social Summit and reaffirmed at the 86th International Labour Conference 1998 in Geneva. Currently, there is no consensus to what extent the WTO should be involved in labour issues, nor is there clear conceptual guidance as to how the various core standards may interact with trade regulation. We submit that the WTO labour-related measures should focus on a product-related approach while the implementation of broader policies and efforts should be pursued within the ILO. In including a social clause in the WTO, it should be considered that not all of the selected four core labour standards are suitable for WTO implementation. In particular, the political rights of freedom of association and collective bargaining can hardly operate as product-related approach. We further submit that a fruitful interaction between WTO and ILO could emerge similar to the one in process with WIPO in the field of intellectual property, based upon the TRIPs-Agreement and shared standards and concerns. The existence and structure of the TRIPs-Agreement may provide a legal model for linking labour standards and trade.

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I. Introductory

The symbolism of the Centre William Rappard – the headquaters of the WTO and formerly of the premises of the League of Nations' *International Labour Office* – reminds the visitor of the building that the scourge of 19th Century industrial exploitation of the work force gave raise to the foundation of the first multilateral organisation of economic importance. Long before international trade regulation and monetary issues were addressed after World War II by the Bretton Woods System and the General Agreement on Tariffs and Trade, pressing needs to deal with poor conditions of the workforce were recognised by the Treaty of Versailles. The experience of social unrest and distorted conditions of competition should lead to harmonised standards which bring about peace and prosperity in labour and trade relations.

The wall paintings in the lobby of the building may, reflecting the realism of the times, express the virtues and dignity of work – and the hopes of many for improvement of life and working conditions which were vested in the foundation of the International Labour Organisation (ILO). Today, these paintings accompany the work of the World Trade Organisation (WTO), formerly the GATT.

While the symbols of the building suggest a close linkage of trade regulation and labour standards, such links did not materialise in the history of the General Agreement on Tariffs and Trade. Except for trade restrictions which may be imposed for products manufactured in prison, the GATT does not establish such links; and efforts to bring them about have failed during the last decades. A broad review of the issue in the 1970s between ILO and the GATT did not lead to specific results. The linkage was not on the agenda of the Uruguay Round and renewed efforts by the United States and the European Communities to establish a working group on the subject essentially failed and has been considered to be primarily the business of the United Nations' International Labour Organisation. The stalemate has not removed claims and problems, and the matter is not settled. It is likely to come up again. Eventually, it will be thoroughly discussed in the WTO.

The purpose of this paper is to assist in preparing this debate. To this end, we do not seek to establish the legitimacy and existence of international labour standards. They are firmly established in the tradition of national law and international law. They find expression in human rights instruments, and a great number of international agreements. Recent developments have brought about broad international acceptance of core labour standards which should be implemented as a common denominator around the globe.

There is ample consensus that these standards are required. Yet, there is ample disagreement how they should be implemented and enforced in international law. Labour standards apparently touch upon domestic regulations on labour relations. They are mainly part of internal

affairs. And it can be readily seen that this aspect has disabled powerful implementation and supervision by international instruments, so far.

Setting the stage, the paper briefly explores the history of labour standards in international, regional and national law. We limit our analyses to core labour standards and discuss existing links with the trading system on these levels and the experiences made with the labour trade linkage. We address the main arguments in favour of, and against, linking labour standards with the WTO, and of making them a new trade-related issue. Further analysing the subject, we shall propose to distinguish different levels and regulatory fields and bring them into relationship with trade policy instruments and means of contract law to improve working conditions. The paper then seeks to discuss and develop incentives by which implementation of standards may be improved internationally.

II. The Development of Labour Standards in International Law

A. Motivations

Human endeavours are complex, and driven by different motivations. Labour standards are no exception. They are promoted for a number of reasons, philantrophic, ethical and economic.

Efforts to create international labour standards go back to the 1890s. From a philosophical and ethical point of view, they are today part of the human rights movement which entered the global stage after World War II. They are essential element of the *condition humaine*, primarily defining daily lifes. Working conditions are critical in shaping the realities of human dignity, and therefore deserve protection by standards under this basic umbrella of human rights. From an economic point of view, labour standards are part of regulating one of the principal production factors. Work conditions are critical for the competitive environment and level playing fields. The debate on labour standards has been fueled by these two kinds of motivation. They cannot be clearly distinguished, of course, and they overlap. But the distinction is important, because the scope of standards pursued their implementation and enforcement may differ in terms of goals, strategies and priorities. While human right groups strongly advocate, for example, the protection from child labour as a means to bring about human dignity, labour unions have been pressing for international standards mainly because globalisation and internationalisation tends to erode their impact and domestic bargaining powers.[1] The two motivations may have a different agenda, and one of the main preoccupa-

[1] VAN WETZEL STONE 1995, pp. 987f.

tions for the trading system are unholy alliances of economic protectionism disguised by human right motivations. Linking trade and labour standards therefore needs to develop satisfying answers to this problem. This is a major challenge for the years ahead. Before setting out a brief history of the development of international labour standards, it is useful to recall the motivations leading to efforts to develop and adopt international instruments for protecting the work force.

B. The Evolution of Core Labour Standards in International Organisations: A Survey

1. The ILO and the Copenhagen Summit

The foundation of the tripartite International Labour Organisation (ILO) at the end of World War I in 1919 finds its foundations in the Treaty of Versailles. Part XIII of the Treaty states that Members

> ”will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international Organisation.”[2]

The Preamble of the 1919 ILO Constitution reflects motives such as the improvement of living conditions of human beings and illustrates the growing importance of basic workers’ rights: ”Whereas universal and lasting peace can be established only if it is based upon social justice” and ”And whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; ...” as well as ”whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.” It is human dignity which is defined as the main principle of the ILO.[3]

In 1944, the Constitution was amended by adopting the Declaration of Philadelphia by the General Conference of the International Labour Organisation. It catalogued the promises that had been made in the 1941 Atlantic Charter signed by Winston Churchill and Franklin Delano Roosevelt. That was the time when the universality, legitimacy and even the survival of the ILO were open to serious question.[4]

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[2] Treaty of Versailles, Part XIII ”Labour”.

[3] TSCHUDI 1986, pp. 364.

[4] FRENCH 1994, pp. 19.

Currently, the ILO has 174 Conventions which have come into force and 181 Recommendations. Many of those standards overlap or specify those of the UN Conventions.[5] The voluntary feature of the ILO may explain why most of the Conventions have been ratified only by a limited number of the Member States. Mainly the basic workers' rights Conventions (7 per cent) have ratified by more than half of the membership. There are indeed few, if any ILO Conventions that deserve to be regarded as universally agreed labour standards.[6] This raises the question how beneficial the activities are, especially the setting of standards and moreover the tripartite structure of the ILO.

The ILO is unique in being a tripartite organisation. It brings together the governments with the two important sectors as the trade unions and the employers' organisations to find consensus in basic labour market issues.[7] At the annual International Labour Conference, not only the governments of the Member States have two chairs, but also the employers and the workers unions of the concerned country have to send one representative in each case (2:1:1). The ILO is the only international organisation in which non-governmental organisations can participate in its proceedings on an equal footing with governments. There exist one ILO Convention[8] and one ILO Recommendation (no. 152) which prescribe tripartite consultations to serve the promotion of international labour standards.[9] The tripartite constitution of ILO renders the work of the organisation politically special.[10]

Although tripartism is an important kind of forum for discussion and standard-setting which can help to reduce social and labour market conflicts, it is not without its critics. National level tripartism is politically vulnerable. Its existence is fragile, if trade unions exist at all, and its functioning is uncertain. The relationship between governments, trade unions and employers is burdened by their respective economic and political interests as well as the ideological values. Representation of employers (not business in general) often pursue narrow interests and do not adopt perspectives of global responsibilities. Equally, trade unions are primarly concerned with their positions in domestic constituencies and sometimes fail to adopt a global perspective. This leaves the process locked up in partisan interests. Progress is particularly

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5 International Convenant on Economic, Social and Cultural Rights (Pact I), International Convenant on Civil and Political Rights (Pact II),see SCHLÄPPI 1997, pp. 103.

6 MYRDAL 1994, pp. 342.

7 LANGILLE 1997, pp. 49.

8 ILO Convention of Tripartite Consultation 1976 (no. 144).

9 OSIEKE 1985, pp. 53.

10 VOEGELI 1994.

difficult in recessional periods.[11] Foremost, the ILO lacks efficient enforcement mechanism to assure compliance with adopted standards.[12]

Developing countries, moreover, often face the problem that traditional agreements and new standards are more responsive to needs and constellations in developed, industrialised countries. They doubt whether the instruments produced in the ILO are adequate for their needs, despite the fact that Conventions provide for flexibility for developing countries.

Pressures to bring labour standards into the WTO - following the example of intellectual property - did not remain without an important impact on policies pursued in the ILO. Efforts were made to achieve a stronger focus on essential standards with a view to develop better ways and means to implement them in the Member States. To this effect, an International consensus was reached at the World Social Summit in Copenhagen 1995. The following rights emerged as ”core” labour standards:

- Freedom of association and collective bargaining[13]

- Elimination of exploitative forms of child labour[14]

- Prohibition of forced labour, in form of slavery and compulsory labour[15]

- Non-discrimination in employment[16]

The Declaration of the World Social Summit in Copenhagen 1995 was seen by the developed countries ”as a successful heading-off of further moves towards a social clause”.[17] Commitment 3 of the Declaration expresses the universality of these basic labour standards:

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[11] HÉTHY 1994, pp. 282.

[12] For a detailed description of the ILO enforcement mechanism see OSIEKE 1985.

[13] ILO Convention of Freedom of Association and Protection of the Right to Organise 1948 (no. 87) and ILO Convention of Right to Organise and Collective Bargaining 1949 (no. 98).

[14] There is no ILO Convention which calls for the elimination of exploitative forms of child labour, but the Convention of Forced Labour 1930 (no. 29) is considered to cover exploitative forms of child labour when they constitute forced labour within its definition. The Minimum Age Convention 1973 (no. 138) determines the minimum age for admission to employment. In June 1996 at the International Labour Conference in Geneva they decided to draft a new Convention related to child labour, aimed especially at the most intolerable forms of exploitation of children at work. See also LANGILLE 1997. In addition, the ILO is working on the IPEC (International Programme on the Elimination of Child Labour). It is a technical cooperation programme which lies on a substantial role for NGO’s in project delivery. It also renders technical assistance to various jurisdictions. Finally, article 32 of the UN Convention on the Rights of the Child prohibits the economic exploitation of children. See also OECD REPORT 1996.

[15] ILO Convention of Forced Labour 1930 (no. 29) and ILO Convention of Abolition of Forced Labour 1957 (no. 105), see also GATT article XX(e), general exception.

[16] ILO Convention of Discrimination 1958 (no. 111).

[17] LEE 1997, pp. 5.

”..., at the national level, we will:

i) Pursue the goal of ensuring quality jobs, and safeguard the basic rights and interests of workers and to this end, freely promote respect for relevant International Labour Organisation conventions, including those on the prohibition of forced and child labour, the freedom of association, the right to organise and bargain collectively, and the principle of non-discrimination.”[18]

At the 86th Session of the International Labour Conference in June 1998, the Member States adopted a declaration on labour standards, confirming the four standards and seven Conventions mentioned above to establish a new agenda, linked to regular monitoring on implementation. It was explicitely stated that these standards must not be used for the purpose of trade regulation and diminishment of comparative labour advantages in developing countries.[19]

The core labour standards are recognised as human rights. On the one hand the identification of those fits in with broader international instruments such as the Charter of the United Nations and the Universal Declaration of Human Rights 1948 and the International Convenant on Economic, Social and Cultural Rights (Pact I) as well as the International Convenant on Civil and Political Rights (Pact II). On the other hand, these core labour standards do not entail the controversial discussion of other labour standards such as wages, working hours, vacations. With the latter, it is far more difficult to reach a satisfactory multinational consensus. Freedom of association and collective bargaining, moreover, have ”the advantage of being rights to a process” and not only to a particular substantive result and outcome.[20] While human rights standards have been broadly accepted[21], however, it ought to be mentioned that only 36 countries have ratified all of the relevant seven ILO Conventions.[22]

2. The Havana Charter, GATT 1947 and WTO Singapore Declaration

One of the most important commitment to labour standards was agreed at the United Nations Conference on Trade and Employment in Havana 1948. The Havana Charter provided a far sighted basis for the planned International Trade Organisation (ITO). The Charter itself never entered into force while parts of it resulted in the 1947 GATT. Article 7 of the ITO Charter included the following ”Fair Labour Standards”:

”1. The Members recognise that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations,

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[18] A/conf166/9 Report of the World Summit for Social Development Copenhagen, 1996.

[19] ILO-Erklärung über fundamentale Arbeitsrechte, Neue Zürcher Zeitung, no. 139, p. 25, 19.06.1998.

[20] LANGILLE 1997, pp. 32.

[21] DE WET 1995, pp. 453.

[22] http://www.oecd.org/publications/letter/0509.html

> conventions and agreements. They recognise that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognise that unfair labour conditions, particularly in 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.
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> 2. Members which are also members of the International Labour Organisation shall co-operate with that organisation in giving effect to this undertaking.
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> 3. In all matter relating to labour standards that may be referred to the Organisation in accordance with the provisions of Articles 94 or 95, it shall consult and co-operate with the International Labour Organisation."[23]

Upon failure of the ITO Charter, the trade link remained sporadic. A number of international trade agreements, such as the first International Sugar Agreement (1953), the International Tin Agreement (1954), the International Cocoa Agreement (1975) and the International Rubber Agreement (1979) included provisions pertaining to social standards.

The Multilateral Trading System, however, failed to develop a coherent linkage ever since the GATT 1947 entered into force on January 1, 1948 by means of the provisional protocol of application and successive protocols of accession. The only reference to labour standards can be found in Article XX(e). This general exception preserves the nations' right to take measures against "products of prison labour".

The United States, in several attempts, took the initiative to include the protection of labour standards in GATT. In 1953, the US State Department proposed for the first time to have an unfair labour clause implemented in the GATT, but no international consensus could be achieved on its definition.[24]

In 1994, the European Parliament proposed to broaden the article XX(e) GATT by including child labour as well as the infringement of the principle of freedom of association and collective bargaining.[25]

In April 1994, at the Conference of Marrakesh, the participants took the opportunity to propose new themes which should be discussed in the newly established WTO. One of the issues was the relationship between the multilateral trade agreements and the international recognised labour standards. The question had already been raised prior to the Conference of Punta

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[23] Final Act and Related Documents, United Nations Conference on Trade and Employment, Cuba, November 21, 1947 to March 24, 1948. UN Doc ICITO/1/4(1948).

[24] CHARNOVITZ 1986, pp. 64.

[25] WAER 1996, pp. 31.

del Este in the year of 1986. Additional proposals were introduced in the 1970s and 1980s and attempts were made to place labour standards on the agenda of the Uruguay Round. They all failed. After the Round, the United States and several European countries, in particular France, urged to give a more direct role to the WTO in commanding respect for core labour standards in its Member countries.[26] They sought to have them discussed at the Ministerial Conference in Singapore 1996.[27] They also requested the establishment of a World Trade Organisation working group to observe the links between international trade and labour standards.[28] But they had to face opposition on behalf of a substantial number of developing countries and the United Kingdom. The former understood it as further protectionist provision. However, the protagonists did claim success in having the core labour standards included in the final Declaration of the Conference:

> ”We renew our commitment to the observance of internationally recognised core labour standards. The International Labour Organisation (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe hat economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.”[29]

To some extent, the declaration can be seen as a breakthrough for the relationship of labour standards and world trade. Being mentioned in the Declaration, it reached the highest political level in the trade community and the recognition of the relevance and importance of the relationship.[30] The issue of labour standards has received support not only by virtue of ILO membership, but also by virtue of WTO membership. The Declaration supports the 1995 Copenhagen declaration. Yet, fierce opposition by developing countries to take up discussions and negotiations in the WTO indicates that no operational work and progress can be expected from the Ministerial Declaration. Neither did the 1998 Ministerial Conference in Geneva bring any progress on the subject. Several high level LDC speakers reiterated funda-

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[26] EGLIN 1997, pp. 101.

[27] The Ministerial Conference is the highest WTO authority. The ministers meet every two years.

[28] WAER 1996, pp. 25.

[29] World Trade Organisation, Singapore Ministerial Declaration, 13 December 1996.

[30] EGLIN 1997, pp. 101.

mental opposition to trade labour linkage in the WTO, and the situation continues to be stalled.[31]

3. The OECD: Guidelines, the 1996 Report and MAI Negotiations

Discussions on the link between trade and labour standards have been a long-standing preoccupation also of the Organisation of Economic Cooperation and Development (OECD). Work focused in the 1970s on the elaboration of non-binding codes of conduct. The lack of data and evidence lead to a major study on the issue which was published in 1996.[32] Current work focusing on the elaboration of a Multilateral Agreement on Investment brings the matter of labour standards and investment to renewed attention.

a) OCED Guidelines for Multinational Enterprise

The OECD Guidelines include, among others, provisions on the issue of labour standards and the obligations of international enterprises in this area. The principle that laws and regulations of the host country have to be respected can be found under chapter "Employment and Industrial Relations". The MNEs are encouraged to respect freedom of association and the right of collective bargaining.[33] These Guidelines lack, however, legal enforcement.

b) The 1996 Report

The aim of the OECD report on Trade, Employment and Labour Standards is to find out whether there is any relationship between core labour standards understood as basic human rights and trade as well as foreign direct investment flows and policies. The report is divided into three parts. The first part identifies the core labour standards which are important from the human rights point of view and discusses them under consideration of the existing ILO Conventions. The second part provides an economic analysis of core labour standards with their impact on economic development, trade and foreign investment patterns and employment. And finally, the third part examines the existing and proposed mechanisms to promote core labour standards and their effectiveness.[34]

c) The MAI Negotiations

Currently, OECD Members are negotiating the Multinational Agreement on Investment (MAI). The purpose of including rules of investment in a multilateral agreement is to give

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[31] see Statement by CARDOSO, F.H., President of Brazil, at the WTO's 2nd Ministerial Conference and 50th Anniversary Commemoration, 18-20 May 1998, Geneva. http://www.wto.org/wto/anniv/cardoso.htm

[32] Trade, Employment and Labour Standards. A Study of Core Workers' Rights and International Trade, OECD REPORT, 1996.

[33] The OECD Guidelines for Multinational Enterprises is one of the four elements in the Declaration on International Investment and Multinational Enterprises, 1976.

[34] OECD REPORT 1996, pp. 22.

them the same importance as to the agreements on trade in goods (GATT) and on the trade in services (GATS) and to enhance multilateral disciplines on investment.[35] It is planned to provide a comprehensive and stable framework for international investment and it is thought to give a fresh impetus to growth, employment and higher living standards. MAI aims at effective investment dispute-settlement procedures between states and between investors and states, and rules will be legally enforceable. The definition of ”investment” will include, in particular, direct investment, portofolio investment, real state investment and rights under contract.[36] Related to labour standards, MAI will leave the implementation of the policies concerning labour standards to the governments. In the draft of MAI (its negotiating text of 14 February 1998) the Preamble points out the recognition of the importance of core labour standards:

> ”Renewing their commitment to the Copenhagen Declaration of the World Summit on Social Development and to observance of internationally recognised core labour standards, i.e. freedom of association, the right to organise and bargain collectively, prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment, and noting that the International Labour Organisation is the competent body to set and deal with core labour standards world-wide.”

This text is not likely to be final. There is no consensus among delegations on the wording reached. Some of them do not accept any reference to labour standards at all, others want to insert a more demanding and precise mention on the core labour standards. Under chapter X ”relationship to other international agreements” the OECD Guidelines for Multinational Enterprises will be included. But the linkage of the Guidelines will not change their non-binding character. [37]

The effort to bring about a multilateral Investment Agreement among OECD countries is likely to end up in WTO negotiations. The fundamental obligation of MFN Treatment in particular in the GATS Agreement renders a multilateral Agreement limited to OECD countries difficult to achieve and implement. Short of regional integration (which OECD clearly is not), mutual privileges in protecting investment would need to be granted to all WTO members

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[35] Investment matters are treated in the WTO in the General Agreement on Trade and Services (GATS), in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), in the Agreement on Trade-Related Investment Measures (TRIMs Agreement) and others. These Agreements are binding and provide a dispute settlement procedure. Notably, these treaties do not refer to the issue of labour standards. Now, with the increasing importance of investment in trade a multilateral framework of rules on investment in the WTO should be negotiated. See OTTEN 1997, p. 1.

[36] http://www. oecd.org./publications/Pol_brief/9702_Pol.htm#1. MAI, The Multilateral Agreement on Investment, OECD Policy Brief, no. 2, 1997.

[37] The Multilateral Agreement on Investment, The MAI Negotiating Text (as of 14 February 1998), Directorate for Financial, Fiscal and Enterprise Affairs.

immediately and unconditionally. LDCs would benefit from protection while not being under an obligation to enhance such protection in their own jurisdiction. It is difficult to see how developing countries would be ready to accept such an unbalanced result.

C. Major Unilateral Efforts

1. The United States

At the same time as the importation of slaves was prohibited, the United States started to ban imports of all foreign goods manufactured by convict labour. In 1930, this legislation called Hawley-Smoot Tariff Act was broadened to forbid imports made by forced labour or indentured labour under penal sanctions.

The American Federation of Labour (AFL), established in 1881 as the Federation of Organised Trades and Labour Unions, asked of full protection for the American industry against imports originated from low-wage countries. This principle was incorporated into the Tariff Act of 1922 and 1930 as the ”cost equalisation” which enables the President to equalise the differences in costs of production for goods produced in the United States and those produced by the principal competing country. In addition, the President was enabled to impose domestically codes of ”fair competition” on industries by the National Industrial Recovery Act of 1933, which, however, did not apply to imports. [38]

In 1983, the United States approved the Carribean Basin Initiative (CBI) which provides duty-free treatment to certain products from the Carribean region. The eligibility of beneficiary countries is based upon 18 criteria, mandatory as well as discretionary ones. The United States is enabled to offer governments some concrete economic benefits if these countries are willing to change attitude towards labour concerns. One year later, the United States incorporated labour standards into the Generalised System of Preferences (GSP). Like the CBI, these standards are now mandatory, too. An eligible country retrains preferences as long as it takes steps to provide internationally recognised workers’ rights. The ILO Conventions are meant with it, although it is not particularly pointed to the freedom of association and collective bargaining, the prohibition against forced labour and the minimum age for child labour.[39]

2. European Communities

In the EC, the discussion on labour standards in an international context began in 1978. The Commission of the European Communities made a proposal to the EC Council of Ministers to provide basic labour standards in the Lomé II Convention which concedes trade prefer-

[38] CHARNOVITZ 1987, pp. 569.

[39] CHARNOVITZ 1986, pp. 61.

ences to African, Carribean and Pacific countries. There was opposition on behalf of these beneficiary countries because EC trade preferences were not applied to South African trade. Therefore, labour standards were not incorporated in the Lomé II Convention.[40]

The White Paper on European social policy of 1994 also examines the link between social policy and international trade. It suggests to have the fundamental social rights, such as collective bargaining and freedom of association, forced labour and the exploitation of children discussed in the WTO. But the debate is divided not only among the Member States of the European Union but also among the different bodies of the EC. The European Parliament advocates discussion of the social dimension in the WTO, while the Commission is going to find an official new position.[41]

Outside the GATT/WTO framework, EC law contains provisions referring to social matters in its industrial Generalised Scheme of Preferences (GSP). The example of GSP in the United States has shown that conditioning eligibility for GSP benefits on the respect of core labour standards brought about a positive change in the behaviour of some countries.[42] The EC program should have entered into force on 1 January 1997, but some Member States, in particular Germany, did not seem satisfied with these provisions and managed to postpone the application until 1 January 1998. Meanwhile, the Commission has initiated one proceeding for the possible suspension to Mynmar (Burma) as well as to Pakistan based on alleged forced labour practices.

Besides the European GSP, the EC has included human rights clauses in recent trade agreements, in particular in those with Eastern European countries such as Bulgaria, Romania, the Czech Republic and the Slovak Republic. The human rights clause enables the Community to discuss human rights with the country concerned without provoking a charge of intrusion in domestic affairs. In case of violations they may have the possibility to suspend the treaty according to article 60 of the Vienna Convention on the Law of Treaties 1969. Furthermore, respect to human rights is also taken into account in case of deciding the grant of EU financial support of investment projects in developing countries. [43]

3. Switzerland

In the field of trade relations, Switzerland has not established trade-labour links. This is particularly true for GSP, introduced in 1972. Substantial privileges for LDC's were introduced

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[40] CHARNOVITZ 1986, pp. 65.

[41] Commission Communication to the Council, COM (96)402 final, 24.07.1996, The Trading System and Internationally Recognized Labour Standards.

[42] OECD REPORT 1996, pp. 17.

[43] WAER 1996, pp. 28.

in the area of agricultural (tropical products) and industrialised products. But Switzerland does not provide for provisions which would allow to withdraw GSP treatment in cases of violation of core labour standards. The government has been of the view that social clauses is not the right instrument to change attitudes towards labour standards and that states have to decide autonomously on social issues. The policy does not exclude a possible introduction of incentives or sanctions at a later stage in accordance with EC GSP schemes.[44]

III. Linking WTO and Core Labour Standards

A. The State of the Debate

Before addressing underlying constitutional issues, we summarise the main arguments in favour of and against a linkage with the WTO system found in publications.

1. Advantages of the Trade link

Arguments in favour of the trade link generally focus on the following arguments:

- The increased international competition leads to ”a destructive downward spiral in the conditions of work and life of working people all over the world”.[45] This ”race to the bottom” would not take place in case of the implementation of core labour standards on multilateral level, because everybody would take part in international trade under the same conditions. It would ensure a ”level playing field” in international trade.[46] The social clause has to be recognised as the necessary regulating measure.
- Labour standards are an international public policy issue.
- Core labour standards support good governance (rule of law, transparency, social security).
- Core labour standards applied multilaterally put governments under pressure to adapt and upgrade national legislation.
- While the argument that economic growth will be a powerful indirect means of raising labour standards might be right, growth in countries without a democratic system and which are hostile to labour issues will not lead to any improvement on working condi-

[44] Verordnung vom 29. Januar 1997 über die Präferenz-Zollansätze zugunsten der Entwicklungsländer, AS 632.911.

[45] VON LIEMT 1989, pp. 435.

[46] LEE 1997, pp. 6.

tions. The same seems to be true for countries with high inequality in the distribution of wealth and income.[47]

- Trade link would avoid any uni- or bilateralism with its increased protectionism. Collaboration between industrialised countries could take place in order to exploit human resources in the developing countries.
- Low developed countries should consider the protection of core standards as a means and tool to defend their interests against aggressive investment policies. Competition for investment tends to increase the race to the bottom. Choices for investment leave governments with little to respond to claims. Harmonised labour standards will assist governments in enforcing minimal standards. A close analysis reveals that labour standards are not directed against domestic government, but a discipline on domestic and foreign employers.
- If all Members produce under the same working standards, especially developing countries would not have to fear that foreign investment firms/multinational enterprises threaten to transfer production to a more favourable country.
- Social dumping would be reduced.
- Increasing interests of the consumers and their not to be neglected influence on international trade put pressure on the WTO. If the WTO does not consider their interests the WTO and the liberalisation of trade will lose support and appreciation.[48]
- The WTO dispute settlement procedure makes it possible to sanction governments which are not likely to apply the core labour standards. Together with the environment issue, the implementation of the labour standards will be indispensable for a sustainable development in the north and the south.[49]

2. Disadvantages and Shortcomings of the Tradelink

The arguments of the opponents essentially are the following:

- Protectionism; it will limit or cancel the comparative advantages of developing countries; it will weaken the competitiveness of low-wage countries; the opponents, mainly developing countries, face a potential misuse of the supremacy of the industrialised countries.
- The use of trade sanctions does not improve working conditions, but worsen them in the sector concerned

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[47] LEE 1997, pp. 12.

[48] LEARY 1997, pp. 21.

[49] EGGER 1996, pp. 251.

- Trade sanctions will have side-effects. That is the reason why they do not have a successful record. An import ban can be seen as an ”unfriendly act”. Therefore, governments do not lodge complaints against another one. They avoid to be involved in trade sanctions. In certain countries, mainly smaller ones, which depend strongly on export opportunities, or countries which have acute balance-of-payment problems, would suffer if they participated in sanctions for moral reasons. A further question is how the WTO should treat governments not applying core labour standards, but producing goods or having raw material which are hard to obtain at any place in the world. Furthermore, countries of a small economy do not have any chance complaining against countries of a more powerful economy when it comes to procedures.[50]
- Suppression of core standards is not an effective social subsidy; there is little evidence that core standards influence trade patterns in practice”.[51]
- The applicability of labour standards will be illusory because in the end their implementation will depend on political will and is therefore likely to fail.
- The stage of development will differ from country to country. This makes it difficult to adopt general norms; neither will it be easy to meet the specific regional realities and the common concerns on a multilateral level.
- The imposition of labour standards amounts to a loss of national sovereignity.
- The social clause will mainly be applicable to the exporting sector and does not address problems in internal markets and the informal sector.[52]
- The WTO is not based on value judgements about domestic or foreign policy choice. The introduction of value judgements would change the legal nature of the WTO.[53]

B. The Constitutional Function of the WTO

It would seem that the arguments against linking trade and social standards have prevailed so far. Developing countries have been blocking discussions, considering a trade link to impair the comparative advantage of cheap labour and production and thus encouraging protectionist policies by industrialised countries. We return to this argument shortly. More profoundly, however, it is felt in many quarters that labour standards are not the business of an agreement promoting freer trade. From the economists point of view, trade liberalisation and enhanced market access amounts to more efficient allocation of resources and thus welfare gains. How-

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[50] VON LIEMT 1989, pp. 443.

[51] OECD REPORT 1996, pp. 171.

[52] EGGER 1996, pp. 251.

[53] EGLIN 1997, pp. 103.

ever, trade liberalisation is not in a position to bring about distribution of income and welfare except for general participation in the growth brought about. Indeed, the GATT has not been concerned with promotion of income distribution, as little as it was concerned with promoting other policies, such as sustainable development. This does not mean that other policies are less important. Yet, from a classical point of view, labour standards therefore would need to be promoted by other policies and policy fora than trade regulation. We are faced with the issue about whether the classical, functional reading of GATT and WTO is still sufficient. It is submitted that it no longer is.

While the GATT was an agreement, the purpose of which was almost exclusively the reduction of trade barriers, the WTO increasingly assumes constitutional functions in a globalising economy.[54] It moves centre stage to shape global economic policies. The goal of dismantling trade barriers is increasingly accompanied by the inclusion of additional, trade-related issues. The environment has been one of them. Intellectual property is another. Competition (anti-trust) is a future one which is likely to address private behaviour of companies. The system becomes multifunctional. It increasingly has to deal with a number of partly competing, but equally legitimate policies and concerns. It becomes a matter of balancing interests. This, in essence, is a constitutional function, and it evolves mainly for the following reasons:

Trade policy and regulation emerge as the prime instruments of foreign policy. They take centre stage. Enforcement of foreign policy goals essentially operates with economic incentives of which market access assumes a key role. Traditional means, such as territorial control or military operations, are no longer suitable and available, being limited to emergencies.

Therefore, it is not a coincidence that GATT, and now the WTO, has been attracting regulatory needs in what are called trade-related aspects of other policy areas. The attraction is due to the key role of trade regulation in enforcing foreign policy and to the successful track record of GATT. It creates new tasks and problems alike.

Due to the central role of trade regulation in foreign policy, the WTO Dispute Settlement emerged as by far the most efficient legal and political instrument to settle international disputes.[55] It contains the first international appeal process and stands for the rule of law. The dispute settlement system not only has to cope with the juridification of trade disputes. It also has to cope with the trade-related issues allocated by Members to the WTO.

Enlarged responsibilities of the WTO in the international economic system explain why a classical focus on trade liberalisation, irrespective of its effect, no longer is in a position to confirm and reinforce the legitimacy of the system. Whether or not the WTO system will suc-

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[54] JACKSON 1998, pp. 1.

[55] PETERSMANN 1998, pp.175.

ceed or fail in the future depends on broad and public support. The system needs to be able to balance liberalisation with other legitimate policy goals. This is true for the environment. But it is equally true for labour standards in an age of globalisation with millions of citizens fearing a race to the bottom and for their personal position on the labour market. It is therefore submitted that the WTO, in order to build legitimacy, support and confidence in world public at large, can no longer afford to stay away from central issues such as labour standards. In our view that matter is no longer a matter of principle, but of degree and of finding optimal levels of intervention by the international system in cooperation with the International Labour Organisation. It becomes a matter of asking as to how the WTO system could best assist Members in bringing about and enforcing core labour standards.

C. The Precedent of the TRIPs Agreement

The GATT and the WTO are by and large instruments of what is commonly called negative integration. Principles and rules define the possible scope for national or regional law. In defining such boundaries, for example by means of the principles of MFN, National Treatment and related exceptions, or by imposing minimal standards of transparency and legal protection, market access rights for goods and services originating in Member States are sought to be secured. Unlike the tradition of negative integration, positive integration seeks to bring about level playing fields by harmonising the relevant rules, or by adopting principles of mutual recognition. Positive integration, of course, amounts to a higher level of co-ordination. While both approaches are paramount in regional integration, in particular the EC, positive integration is only in its beginning in the global trading system. Up to the Uruguay Round of multilateral trade negotiations, it may be observed in the field of anti-dumping and countervailing duty law (subsidies) which gradually evolved to set common standards and which eventually were implemented in national or regional legislation. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), however, brought about a big leap into positive integration[56]. While it was carefully avoided to speak about harmonisation, the TRIPs Agreement essentially establishes minimal standards binding on Member States both in terms of levels of protection and in terms of procedural rights of private right holders. The standards relating to all the forms of intellectual property rights are set forth in great detail and provide ample guidance to national legislators and courts alike. Moreover, the Agreement incorporates existing standards set forth in previously existing multilateral agreements, in particular the Paris and the Berne Conventions which are being administrated by the U.N. World Organisation for Intellectual Property (WIPO). Altogether, old and new rules are sub-

[56] For an introduction and further information see.: BLAKENEY 1996, COTTIER 1996, COTTIER 1992, STAEHELIN 1997, KRETSCHMER 1997.

ject to WTO dispute settlement and enforcement machinery[57]. Given the long and difficult history of improving international IPR standards in WIPO, the TRIPs Agreement is a most remarkable achievement. There are a number of reasons explaining the success. Perhaps the most important one relates to the fact that intellectual property was negotiated with a background of basic trade-offs in other areas of particular importance to developing countries, in particular in the field of trade in agriculture and textiles. This is an option not available to specialised organisations, and it explains why break-throughs in core areas did not materialise in WIPO. The prospects of improving market access in these core areas explains best why strong resistance of LDCs to place IPRs on the agenda eventually changed into active participation in negotiating the Agreement.

It is evident that the existence and structure of the TRIPs Agreement may provide a legal model for linking labour standards and trade. With this agreement in place, it is difficult to argue that the establishment of positive rules of conduct, of enforcement, and the incorporation of existing agreements administrated by the ILO is legally barred in international law. The relationship of ILO and WTO may develop in comparable way as relations between WIPO and WTO are developing: after fierce resistance and attempts to prevent the TRIPs Agreement from happening, the TRIPs Agreement worked out to improve the importance of both organisations alike, and a complementary working relationship is evolving. Much of the difficulties were attributable to bureaucratic considerations and prestige, and being of little relevance to the IP community at large. It should be recalled that the removal of the long and previously existing impasse in further developing the Berne and Paris Conventions equally serves WIPO and its work. Moreover, the scope of activities in WIPO remains by far larger than in WTO, and the area of overlap is limited to, albeit crucial, areas of IP law.

Given this experience, and after going through similar motions, it is likely that a comparable working relationship may evolve between ILO and WTO. Currently existing resistance of ILO to linking labour may be explained in similar terms as those in WIPO, at the time. It may wither away as the waves calm, and future benefits may be similarly of mutual interest to both Organisations – and mankind at large. It may work out to the benefit of all: the respect and impact of labour standards, and the legitimacy of two organisations alike. Given the expertise in ILO and the potential of dispute settlement and enhanced enforcement in WTO, the potential of fruitful synergies should be developed. The scope and focus of the ILO will by all means remain much larger than of the WTO in respect of labour rights. But it can be done from a legal point of view, the linkage of labour standards and trade no longer is a problem. It is a matter of expediency, political judgement and will.

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[57] For further references see: CAMERON/CAMPBELL (1998), COTTIER (1998), COTTIER (1997), PESCATORE/DAVEY/LOWENFELD (1995), PETERSMANN (1997a), PETERSMANN (1997b).

It is interesting to observe that 86.6% of international non-governmental labour organisations in developing countries support the idea of introducing labour standards in international economic relations.[58] However, non of them would want to have this exclusively done by the WTO. There is a legacy of mistrust stemming from the fact that the GATT has been traditionally perceived as a rich man's club. However, 49% of all the organisations interviewed are supportive to the idea to establish standards jointly by ILO and the WTO, mainly with a view to make good use of the enforcement system of the WTO. 25% of all interviewed prefer to localise standards in ILO alone. Strong resistance to labour standards by the executive branch of developing countries therefore does not reflect shared attitudes in society and needs to be assessed with this qualification.

D. Traditional Trade Policy Instruments in WTO

The most important effect of linking core standards to the WTO consists in preventive effects of WTO dispute settlement and of potential trade sanctions. The prospect of loosing market access in products directly or indirectly related to violations of core standards as well as the political costs of exposure and dispute settlement amount to the prime incentive for compliance in the first place.

Measures and policies allegedly contrary to obligations are subject to WTO dispute settlement procedures. Failing informal consultations, a Member may request formal consultations which result in most cases in the establishment of a dispute settlement panel. Following quasi-judicial procedures, including extensive hearings and submissions of the parties, the panel legally assesses the case. In case of violation, it recommends that the law is brought into compliance and, possibly, that the measure is removed. The findings of the panel are regularly appealed by the losing party and reviewed, in questions of law, by the Appellate Body. Unlike the panels findings, the recommendation of the Appellate Body are final and binding, unless all Members of the Dispute Settlement Body (the Council) agree to refute the adoption of the report. Upon adoption, the Member is obliged to implement the findings within a reasonable time frame defined by the Body or by arbitration. In case of difficulties, the Member is entitled to offer compensation which, however, is of a temporary nature. It does not replace compliance. In case such compliance fails to materialise, the Member impaired is entitled to withdraw concession and thus reduce market access rights. Such rights primarily need to address the product and sector concerned but may eventually reach other products and sectors with a view to exert effective pressure on the failing Member to bring about the implementation of the decision. In practice, the very prospects of imposing such measures frequently suffices to bring about changes in attitudes of domestic constituencies, allowing the government

[58] EGGER 1996, pp. 253.

and parliament to proceed. It is a trademark of WTO dispute settlement that it operates under tight time frames and schedules. From consultations to implementation, the process should not take longer than 15 month. In practice, complex cases tend to take a somewhat longer time, falling short of what courts, national and international, normally take.

There is no doubt that the dispute settlement system could be used to assess violation of core labour standards. It provides the necessary procedural means to investigate and assess the facts of the case. There are, however, doubts whether governments are likely to use the instrument for the purpose of enforcing labour standards. First, such violations tend to be politically sensitive, exposing weaknesses of a government concerned and thus having destabilising potentials. Second, governments are not likely to take up cases of minor economic impact. They are driven by economic problems caused to the industry. Financial and political costs will not be incurred for the sake of defending labour standards abroad short of a significant economic impact. Third, even in such cases, governments may be reluctant to bring cases due to the fact that they themselves may not be in a position to demonstrate full compliance with core standards. The experience in subsidies shows that governments tend to collude and refrain from incurring limitations as to their spending power by multilateral dispute settlement procedures.

Much will depend on the impact of organised labour in lobbying the government to bring cases against a particular Member of the WTO. Since governments control foreign trade relations under the present system, it is difficult to answer how responsive they will be to such claims. The situation may change if standing would be introduced for private sectors, in particular watch dog organisations. This, however, is a general and controversial issue and can hardly be focused on labour standards alone. While standing might be introduced for particular subjects (such as subsidies or state trading), it is an issue of general systemic interest which cannot be dealt with separately in context of labour standards.

It is a mainstay of WTO rules that except where explicitly provided for, such as safeguard measures and countervailing duties, a Member is not entitled to take unilateral action without proceeding through WTO dispute settlement. While this is controversial under U.S. law, this is particularly true for the European Communities. The Trade Barriers Regulation clearly requires that sanctions may be imposed only upon assessment by the WTO dispute settlement system. This may be considered both a disadvantage and an advantage. Governments proactive in defence of core standards are barred from quick action. The matter no longer is open to retaliatory powers under general international law. This very situation, however, is of a protective advantage to potential target countries. Members of the WTO are entitled to insist on WTO procedures and defend themselves from politically motivated unilateral actions by trading partners. Measures allowed are limited and may not include unrelated actions, such as withdrawal of concessionary aid or the imposition of other disadvantages. This is an impor-

tant aspect which developing countries in particular may carefully consider. It is submitted that they are better protected under WTO core standards than under a legal regime where countries may unilaterally impose their own standards, taking recourse to doctrines of extra-territorial application of domestic law.

Given these constraints, failure to comply with core labour standards may lead to following measures or threat thereof in accordance with WTO rules:

- Imposition of unilateral countervailing duties (tariff increase, surcharge) unilaterally imposed on goods produced in violation of core standards, and subject to dispute settlement review upon complaint by the infringed Member
- Unilateral Elimination of products from GSP privileges within the bounds of tariff bindings (tariff increases)
- Withdrawal of tariff concessions and increase tariff rates beyond bindings upon the goods concerned.
- Imposition of quantitative restrictions up to total ban for imports of goods produced in violation of core standards.
- Imposition of similar sanctions relating to other goods, unrelated to core standards.
- Imposition of restrictions of market access to services, unrelated to the violation of core standards.
- Measures in the field of intellectual property rights.

The tools of enforcement of WTO are most beneficial as a threat to impose sanctions. Such threats may be effective to bring about the necessary changes in attitudes of domestic constituencies. If the threat fail, measures imposed are likely to affect negatively the work force to the extent that they affect the sector in which labour standards should be improved. Lay-offs possibly further deteriorate the situation. Things may be different if sanctions are imposed in other sectors (cross sanctions). Generally speaking, restrictions of trade inherent to sanctions, however, are not beneficial to enhance labour standards.

Moreover, there is the problem of temporary compensation. A party violating WTO rules is entitled to offer compensation as long as it is not in a position to remedy the violation. Apparently, this remedy is without much help, even if temporary, in the context of labour standards. It may be used to postpone or even circumvent implementation of core labour standards.

The TPM (Trade Policy Review Mechanism) will be an instrument to regularly assess compliance with core labour standards. The examination of trade policy of Members, however, tends to be rather general. It is not followed by particular measures. It primarily is of use for an assessment by the Member itself and a source of information, but does not bring about the

settlement of outstanding and difficult issues. Partners may complain about non-compliance with labour standards in this form. The government concerned, however, will not be obliged to take action and report back to the WTO.

E. Product-Related Measures or General Sanctions?

Trade measures imposed in the wake of insufficient compliance with core labour standards may be a response to the violations with regard to the production of particular products (goods and services) or they may be used as a response to insufficient compliance with standards in general. It is not clear in the current debate which of the two options is addressed. There seems to be a certain amount of confusion.

Product-related trade measures are specific responses to the importation of products which were manufactured or provided in a manner inconsistent with core labour standards. Core labour standards, from this point of view, amount to production and process methods (PPMs). Products are required to be produced by a certain manner, even if such manner does not show in the quality and substance of the product as such. Goods manufactured by exploited child labour and forced labour or under conditions of social dumping, or in violation with principles of non-discrimination may be banned from import, or restricted by the imposition of additional charges. The rationale of product-related measures essentially is an argument of level playing field. Disregard of certain standards is conceived as a distortion of competition which may be remedied at importation by measures at the border.

General sanctions are different from product-related measures. In this case, disregard for core labour standards by employers and by the government may give raise to action by governments of importing countries or the international community. Products and sectors are being targeted with a view to bring about changes in labour relations. Measures do not depend respect of specific product-related requirements. They are imposed to those areas which are likely to bring about such changes most efficiently. Thus, it is possible to target exports in order to bring about improvements in the production of domestically consumed and marketed goods alike.

It is important to distinguish the two constellations. The first one is a narrow one. It essentially builds upon the tradition of product qualifications which we find in the field of environmental and technical standards, sanitary and phytosanitary measures. It is still controversial whether under current WTO law, a Member may impose respect of production and process methods. Yet, it is conceivable to develop a trade link which would allow to do so in explicit terms and make this the scope of a labour standard negotiations. As a consequence, these measures will only apply to exported products. They do not touch upon domestically consumed goods.

The second approach, on the other hand, is much broader. Trade relations and trade policy is being used to bring about compliance with core labour standards. Here, it is not necessary to demonstrate that a particular product has been produced in violation of core standards.

It is evident that the latter approach may be used to enforce all of the core standards, while the first one requires a specific relationship to a particular product. It is hardly of any help in bringing about compliance with the principles of freedom of association and collective bargaining and the principle of non-discrimination. On the other hand, it is supportive of the prohibition of exploitative forms of child labour and the prohibition of forced labour (including social dumping) to the extent that they affect exports.

We submit that the WTO labour-related measures should focus on a product-related approach while the implementation of broader policies and efforts should be persued within the ILO. It builds upon the tradition of the multilateral trading system. It limits the risk of using core standards for broad protectionist purposes. It is better equipped to bring about a proper balance between, and interface, the goals of trade liberalisation, market access and social policy concerns. It will be necessary for a complaining party to demonstrate that production occurred under conditions contrary to the adopted minimal standard. Moreover, it needs to be discussed whether additional criteria should be used, in particular a fair price on the export market or whether wages alone should be considered. At any rate, such an approach would seem more suitable for the process of adjudicative dispute settlement in WTO than the possibility of imposing broad sanctions with a view to improve the general situation of labour relations in a Member.

We submit that a product-related approach does alleviate a number of concerns voiced by LDCs, in particular fears that labour standards would be generally used to promote protectionist import restrictions by developed countries with a hidden agenda. Closer analysis reveals that LDCs should in fact be interested in having globally uniform core standards relating to the production of goods and services. It would give their governments and unions a better bargaining position in negotiating conditions for investment, both foreign and domestic. Common global standards assist in countering a race to the bottom as it assists in avoiding the dilemma that the imposition of standards encourages investment to go elsewhere. It would assist in rendering voluntary Codes of Conduct for MNEs more effective.

IV. Proposals of Policy : Towards Incentives

A limitation to product-related standards and the inherent shortcomings of the dispute settlement system in terms of standing and effects of sanctions suggests to look for additional incentives to bring about compliance with core labour standards. This is in particular necessary with regard to the procedural and political rights of freedom of association and collective bar-

gaining and general non-discrimination, which, as it was seen, are hardly suitable for enforcement in the context of WTO, unless broad trade sanctions could and would be used to that effect. Ways and means need to be found which by themselves operate as promoters of compliance within the multilateral trading system. Main and promising areas are within the bounds of private law and contracts between private trading partners. The question then is, how, in the long run, WTO law could support ILO work to bring about effective implementation of these policies.

A. Private Law Level

1. Codes of Conduct

Some countries like Bangladesh, Dominican Republic, Malaysia, Jamaica, India, Sri Lanka and others apply lower labour standards in Export Processing Zones (EPZ)[59] in order to attract foreign investment. They restrict or often cancel fundamental human rights as freedom of association and collective bargaining or governments do not sanction adequately cases not observing the labour law. The investors in such EPZ are mainly multinational enterprises (MNEs)[60] originating in industrialised countries which actually cannot dare to ignore world-wide recognised human rights without being exposed to international attention and criticism. Voluntary codes of conducts encourage MNEs to comply more closely with core labour standards in its host country and make them aware of their responsibilities in social policy. [61] These purposes are reflected in the OECD Guidelines for Multinational Enterprises included in the Declaration on International Investment and Multinational Enterprises adopted in 1976, in the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted in 1977 and the Code of Conduct for Transnational Corporations of the United Nations.[62]

The MNEs should be encouraged to observe the core labour standards confirmed at the World Social Summit in Copenhagen 1995. We cannot ask less developed countries to observe fundamental human rights, and take their political problems or lack of a democratic system as an

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[59] In comparison with other types of commercial zones, in these areas the goods entering receive different, more favourable custom treatment than goods entering other parts of the same country. These zones can spread over two or more countries. Estimately, there are over 500 zones world-wide, located in 73 countries. OECD loc. cit.

[60] According to the OECD Report MNEs employed about 4 million people in 200 EPZs, compared with the total of employment in foreign subsidiaries in developing countries of about 12 million in 1992 (UNCTAD datas).

[61] TORRES 1996, pp. 10.

[62] CHAMBOVEY 1996, pp. 214.

opportunity to ignore our historically developed ethics related to working conditions and exploit its human resources.

What could actually be the impact of MNEs practising the core labour standards? First of all, the direct beneficiaries are the employees of such firms. They could enjoy working conditions which are superior to the one guaranteed by the legislation of the host countries. If the MNEs require their suppliers to apply the same standards, those employees would benefit too. Maintaining good trade relations with domestic companies would change behaviour of the latter positively. Secondly, from a political point of view most MNEs are in an influential position as far as the growth of the domestic economy concerns. Therefore they could put pressure on governments to change labour legislation. They could threaten to withdraw production or transfer it to another country where labour standards at the minimum level being observed. Today's situation, it goes to the contrary. Firms threaten to transfer production to countries where, of course, labour standards requested are not observed. All this threatening could be avoided if the minimal standards received the required importance in international trade and had to be followed by all Member states.[63] Governments and MNEs should be aware that repression of basic labour rights leads to misallocation of resources and will be an obstacle to long-term economic growth.[64]

2. Labelling

Might product labelling serve as an additional or new implementation mechanism? Labels mark products which are produced or dealt under "fair" circumstances. The principle is to provide consumers with information that enables them to choose products according to ethical criteria or which meet certain standards deemed to be socially desirable. There exist several social labelling programmes such as the Rugmark campaign relating to the production of hand-made carpets mainly produced by children, and the union label which indicates that the product is produced by members who belongs to a labour union membership.[65] The Max Havelaar Foundation, as a further example, confers labels to distinguish products from developing countries which perform minimal standards with regard to social and ecological issues. But the term "fair trade" is not protected by law or even monopolised.[66]

Social labelling programmes will mainly work for products which will be exported and are not sold in the developing country alone. In case of raw material it is possible to declare the product as socially desirable if the producer of the finished product requires suppliers to re-

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[63] BRASSEL 1995, pp. 24.

[64] OECD REPORT 1996, pp. 112.

[65] OECD REPORT 1996, pp. 120.

[66] SCHMUTZ CATTANEO 1996, pp. 265.

spect the core labour standards in their production of inputs. That would be a further opportunity to contribute to the implementation of core labour standards world-wide.[67]

Comprehensive social labelling can be an instrument for consumers to show their preferences and thereby contribute to get ahead with the international negotiations.[68] But this scheme could easily become subject to marking requirements GATT 1994. Countries could use it as a means of forbidding imports causing unequal accessibility for those.[69] Therefore, the criteria of attribution has to be defined carefully and must be properly monitored under criteria of Art. IXX GATT. The central point is transparency. Moreover, the labelling scheme could develop into a substitute for unilateral trade action what would be the contrary to what the discussion about international labour standard is aiming at. At this stage, the number of label products is still limited and does not really distort market order[70], but this may change with expanding labeling policies.

3. Social Clauses in Production and Subcontracting

The multinational company Levi Strauss is a good example in point of private law social clauses.[71] At the beginning of the 90ties it faced public criticism because it had been made known that one of their suppliers violated human rights in letting the employees work under slavery-like conditions. Subsequently, Levis issued guidelines for suppliers, including provisions on wages according to national law. But if wages should be higher in the main industrial sectors, those would be matched. Yet, more important are the provisions on working hours and the guarantee of freedom of association, prohibition of forced labour, non-discrimination as well as security and health. The guidelines provide the minimal age of 14 years for work. Children who still have to go to school are not allowed to put to work. For children to whom work is necessary, Levis provides educational opportunities. Control and supervisory mechanisms were included in the guidelines. Moreover, they laid down criterias for the choice of countries where they would source their suppliers from. These countries have to assure that violation of human rights do not take place.

B. Support Measures in Public Law

We suggest to look further into ways and means as to how the incentives in private law contracts, thus voluntary compliance with core labour standards, could be supported and hon-

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[67] OECD REPORT 1996, pp. 120.

[68] SENTI 1997.

[69] OECD REPORT, pp. 120 ; see also LEARY 1997, pp. 20.

[70] OECD REPORT 1996, pp. 120.

[71] BRASSEL 1995, pp. 90.

oured by the rules of the WTO. It would seem important that these measures, unlike sanctions, imply some sort of burden sharing with countries undertaking efforts to bring about improvement of core labour standards. This could provide an answer to the persistent argument that capital formation of developed countries benefited from cheap labour at the time and that even core standards impair comparative advantages of cheap labour countries today. In some form or another, developed countries making claims to improve labour standards abroad need to contribute to this effort. What are possible mechanism available? How could ILO and WTO law support these efforts?

1. Monitoring and Controlling and Labelling Practices

Monitoring labelling programs could be an important role of ILO activities. Experience and work gained in ecological labelling should be made available to labour relations. In the WTO, labelling requirements need to be studied primarily in the context of Article IX GATT (marking). This is a field of possible broad cooperation between the two organisations. The purpose of common efforts would consist of assuring that consumers are correctly informed, that labels are being used properly, and that marking requirements do not amount to disguised barriers of trade.

2. Tax breaks

Compliance with labour standards may cause adjustment processes. Production is likely to become more expensive and less competitive on the market. It would be interesting to study the potential of temporary tax reliefs during that stage. Governments could grant such reliefs to local businesses, as much as foreign investment. Lasting tax breaks could be considered for compliance with voluntary standards exceeding core standards. It would be necessary to study the implications of WTO law to such schemes. While exemptions would be necessary for indirect taxation since tax reliefs amount to restrictions of national treatment and MFN, direct taxation has not been part of the rules, at least in the fields of goods. Matters are more complex in the field of services. Negotiations on core standards would need to look into these aspects.

3. Tariff Incentives (other than GSP)

Importing countries could support the promotion of core labour standards by granting tariff incentives for products observing labour standards. Additional costs of production could be levelled by granting lower or even zero tariffs for such products. While current unilateral GSP schemes allow for withdrawing of special rates if labour standards are violated, it could be envisaged to grant special tariff incentives upon positive demonstration of respect of labour standards for products not covered by GSP schemes, and make them available to all products. In the field of services, corresponding instruments would need to bring about improved mar-

ket access by means of special conditioning of national treatment in schedules of commitment. In all cases, the general idea consist of compensating for increased costs by making an indirect contribution (subsidy) on the part of developed, and possibly developing importing countries. Such subsidy consists in the granting of lower or zero tariffs and thereby in renouncing of possible fiscal income as a contribution to the development and implementation of labour standards abroad. Unlike GSP, such ideas could be worked out as multilateral commitments within an agreement on core labour standards. The implementation of the schemes should be a joint operation of ILO and WTO. While the former is responsible for monitoring the standards, the latter would assume the role of administrating multilateral tariff regulations.

V. Conclusions

The preliminary exploration of linking labour standards, WTO rules and enforcement reveals potentials and limitations alike. Close cooperation between the ILO and the WTO could contribute to better implementation of core labour standards around the globe. Assuming that LDCs begin to perceive core standards as an instrument to improve relations with foreign and domestic investors and to reduce a race to the bottom, trade links can be developed in a fruitful manner. Given the structure and the tradition of WTO rights and obligations, we suggest that WTO dispute settlement, implementation and trade measures should be limited to product-related standards. WTO may serve as a tool to implement bans on exploitative forms of labour. It should not allow for general trade sanctions by which compliance with labour standards can be sought across the board. The WTO, in other words, offers limited possibilities to enforce general rights of association and bargaining, and of non-discrimination. These goals require broader policies. They need to be further studied in the context of investment policies and additional incentives which WTO may support, in particular in the field of tax regulation and tariffs.

Possible trade links of labour standards, however, also reveal that implementation and realisation will depend, and to a larger extent, on voluntary compliance at home. Trade policies can hardly reach domestic markets, and interests to pursue dispute settlement will be limited to exports. By no means may a trade link replace efforts to convince governments and employers around the world that respect for labour standards, education for children and fair wages are a precondition to development, prosperity, stability, competitiveness in a global economy, and social peace. Not all of the proposed core labour standards are fit for WTO implementation.

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