# Free Trade and Core Labour Rights: Status Quo of a Discussion[1]

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## 1. Introduction.

Media coverage of the poor working conditions of people producing goods for Multinational Enterprises (MNE) in developing countries in the 80's and 90's generated much debate and re-opened the discussion about a link between labour standards and international trade. The

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issue had come to the fore again at the end of the Uruguay Round, and revealed that significant differences of opinion exist as to whether free trade and labour rights should be linked and if so, how this linkage should be achieved. Labour rights have remained part of the agenda, however, they were not part of the discussions of the Doha Ministerial Conference. The International Labour Organisation (ILO) attempted recently to regain the initiative in this matter.[5] Wherever the discussion is held, the opposing views of developing countries and the industrialised countries seem set to continue the debate. The developed countries perceive the issue as a challenge to the liberal trading system that has emerged in recent decades, sometimes described as a human rights issue. The perceived threat to employment in developed countries has further fuelled the debate. The developing nations on the other hand consider it a threat to their economic welfare, a '*thinly veiled protectionist devise*'[6].

In this article the legal problems associated with the proposals to link free trade and labour rights, will be analysed. The first section is devoted to the delimitation of the subject. The concepts of free trade and labour rights are defined and the link between them is studied. In the second section some mechanisms that have been proposed to protect labour rights in the context of free trade are discussed. Finally, the efficiency and the coherence of these mechanisms are analysed.

## 2. Exploring the Issues.

### 2.1. Delimitation of the subject.

#### 2.1.1. Defining Free Trade.

Recent historic developments have virtually ended the conflict between the capitalist and communist economic approaches. The capitalist approach has become dominant and has inspired the international trading system. Nevertheless, there are different opinions concerning what of the manifold capitalist economic theories should prevail.

The Free Trade theory advances that every nation is capable to gain the greatest benefits regarding its comparative or absolute advantage when it opens its market to foreign traders and can also persuade its trading partners to liberalise their trade policies.[7] The market is perceived as a mechanism through which an important number of individual economic decisions are combined and co-ordinated to utilise resources in the most efficient way to achieve optimal production.[8] Thus, every interference in this autonomous self-regulating mechanism must be considered as a trade barrier, generating a decrease in efficiency and thereby impeding the attainment of the optimal outcome. With time, the concept of free trade has evolved. Initially, free trade proponents were mainly engaged in abolishing trade barriers, such as tariffs and quantitative restrictions. Nowadays, however, most of them stress the positive impact trade liberalisation can have on development through a more efficient allocation of resources and increases in productivity (Sustainability Theory).[9] Sustainability

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[5] *See* X, ILO Leads Discussion on Trade and Labour, 5(24) BRIDGES Weekly Trade News Digest 8 (26 June 2001).

[6] *See* T. Srinivasan, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future*, London, Oxford University Press, 1998, p 157.

[7] M. Trebilcock / R. Howse, *The Regulation of International Trade*, London, Routledge, 1995, pp. 7, 17.

[8] C. Molyneux, ´The Trade Barriers Regulation, The European Union as a Player in the Globalisation Game`, European Law Journal 1999, pp. 375, 377.

[9] D. McGoldrick, ´Sustainable Development and Human Rights: An Integrated Conception`, International and Comparative Law Quarterly 1996, Vol. 45, pp. 796, 799; J. de Castro, *Trade and Labour Standards - Using the*

according to this approach adds new elements to the traditional concept of free trade. It signifies "*a development that meets the need of the present generation without compromising the ability of future generations to meet their own needs*".[10]

### 2.1.2. Free Trade vs. Trade Barriers.

The opposite of free trade is usually identified as protectionism.[11] It was defined as an inward-looking policy that implies erecting internal and external barriers. Access to the national market is subject to quantitative restrictions, the payment of duties or other trade impediments, thereby - intentional or not - shielding domestic industries from competition.[12] However, the creation of trade barriers is a *Janus*-like process. Its opponents argue that the countries' economies will not become stronger behind trade barriers, since protection from competition will be achieved at the expense of consumers.[13] Some trade barriers, however, may be seen as illegitimate (export subsidies, quantitative restrictions) while others may be well founded (e.g. prohibition of drug imports).

The issue we will be addressing in this article is that some countries perceive certain labour standard requirements as an illegal trade barrier and therefore as embodying a new kind of protectionism. A consensus is far from being reached within the international community. On the one hand, some countries (mostly the developed countries) make the compliance with labour standards a prerequisite for market access[14], arguing that competitive advantage deriving from low labour standards can sometimes be illegitimate (e.g. when labour standards are violated in order to undercut the costs of production). On the other hand, some countries (mostly developing countries) are opposed to the insertion of labour standards in the current trade framework. They refute this as a kind of "*new protectionism*",[15] believing that labour standards and trade sanctions would slow progress towards better living standards in poor countries.[16]

### 2.1.3. Defining Core Labour Rights.

In June 1998 the General Conference of the ILO adopted a Declaration on Fundamental Principles and Rights at Work.[17] It focussed the broad and general discussion about international labour rights to five so called "Core Labour Rights" which are labour rights widely regarded as basic human rights[18], such as the freedom of association (Convention N° 87), the effective recognition of the right to collective bargaining (Convention N° 98), the

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*Wrong Instruments for the Right Cause*, UN Conference on Trade and Development, Discussion Paper N° 5, May 1995, p. 8.

[10] H. Ward, 'Common But Differentiated Debates: Environment, Labour and the WTO', International and Comparative Law Quarterly 1996, Vol. 45, pp. 592, 595.

[11] See: J. Goldsmith, *The Trap*, London, Macmillan, 1994, pp. 35-38.

[12] See: M. Griesgraber / B. Gunter, *World Trade*, London, Pluto Press, 1997, p. XIV.

[13] See: E. Hudgins, *The Fundamental Freedom to Trade*, http://www.freetrade.org/pubs/freetotrade/chap1.html, (last visited July 2000).

[14] J. Bhagwati, *Free Trade, 'Fairness` and the New Protectionism*, London, The Institute for Economic Affairs, 1995, pp. 26-27.

[15] Ibid., pp. 26-32.

[16] D. Griswold, *Protectionism with a Green Face and a Union Bug*, http://www.freetrade.org/pubs/articles/dg-tle.html, (last visited July 2000).

[17] ILO Declaration on Fundamental Principles and Rights at Work, 1998. <http://www.ilo.org/public/english/stamdards/relm/ilc/ilc86/com-dtx.htm>, (last visited 7 June 2000).

[18] M. Trebilcock / R. Howse, *The Regulation in International Trade,* New York, Routledge, 2nd edition, 1999, p. 443.

elimination of all forms of forced or compulsory labour (Conventions N° 29, 105), the effective abolition of exploitive child labour (Convention N°, 182), the elimination of discrimination in respect of employment and occupation (Convention N° 100, N° 111). [19]
In recent proposals and studies, a consensus has emerged that the consideration of labour rights should be based only on these 'core ILO-Conventions, since they are the outcome of several years of considerable discussions and negotiations. [20]
Other intergovernmental organisations such as the OECD as well as the Commission of the European Community also share the international consensus about the core labour rights.[21]
However, despite that widely regarded consensus about the nature of the core labour rights, the linkage issue of these labour rights is fraught with controversy in the WTO, as to whether the organisation should embrace the topic with its activities.[22]

### 2.1.4. Human Rights in the Linkage Debate.

Each of the above named core labour rights is particularly protected by its status as human right. Both issues are inextricably linked to each other, for example, ILO-Conventions N° 29 and 105 to Art. 8 of the International Covenant on Civil and Political Rights (ICCPR) about prohibition of forced and compulsory labour. ILO-Convention N° 100 is linked to Art. 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) about equal treatment of men and women and ILO-Convention N° 138 to Art. 10 ICESCR about protection and assistance of children and young persons.[23] Non –discrimination, freedom of association and the right to organize in the sense of ILO-conventions N°s 111 and 87 are explicitly called for in Articles 26 and 22 sec. 3 ICCPR.
Consequently, there exists a parallel between the UN Covenants on Human Rights and international core labour standards. This parallelism, as well as the fact that these rights are framework conditions for other Labour Standards,[24] seem to be the reason for the existing consensus to be found in various official international document dealing with the issue.[25]

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[19] ILO Convention concerning Freedom of Association and Protection of the Right to Organize, (1948), <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C87&query0=87.htm>, ILO Convention concerning Right to Organize and Collective Bargaining, (1949), <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C98&queryy0=98.htm>, ILO Convention concerning Forced Labour (1930), <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C29&query0=29.htm>, ILO Convention concerning Abolition of Forced Labour, (1957), <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C105&query0=105.htm>, ILO Convention concerning Equal Remuneration, (1951), <http://www.ilolex.ilo.ch:1567/scripts/convde.pl?query=C100&query0=100.htm>, ILO Convention concerning Discrimination (Employment and Occupation), (1958), <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C111&query=111.htm>, ILO Convention concerning Minimum Age, (1973), <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C138&query0=138.htm>, (all last visited 30 March 2000).
[20] P. Waer, ´Social Clauses in International Trade, The Debate in the European Union`, Journal of World Trade, 1996, Vol. 30, No. 4, pp. 25, 36.
[21] OECD, *International Trade and Core Labour Standards*, OECD Publications, Paris, 2000, p. 17 ss.; Commission of the European Communities, Communication from the Commission to the Council. *The Trading System and Internationally Recognised Labour Standards,* Brussels, 24. 07. 1996, COM (96), 402 final, pp. 9, 12-13.
[22] WTO, *Trade and Labour Standards, Subject of Intense Debate*, http://www.wto.org/wto/mimst1/18lab_e.htm, (last visited July 2000).
[23] N. Valticos, ´International Labour Standards and Human Rights: Approaching the Year 2000`, International Law Review 1998, Vol. 137, No. 2, pp. 138-140.
[24] D. Chin, *A Social Clause for Labour's Cause: Global Trade and Labour Standards – A Challenge for the New Millennium*, London, The Institute of Employment Rights, 1998, pp. 36, 37.
[25] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up 1998; World Social Summit Copenhagen 1995 (refer to commitment N° 3 of the Final Declaration); UNCTAD Discussion Paper N° 99 of

## 2.2. The Intrinsic Relation between Free Trade & Labour Rights.

Free trade and labour rights seem at first glance to follow quite a different logic. But, do both issues really have antagonistic and irreconcilable objectives?
On the one hand free trade is said to help an economy to produce the greatest wealth with a given amount of resources. It has encouraged developed countries to become economically and financially interconnected, it has encouraged developing countries to open their economies much more and benefit from the positive impacts of foreign direct investment (e.g. technology transfer, employment and training)[26] and it finally led to the occurrence of "globalisation" in its widest sense. Economic policies have progressively become more and more interdependent, and so capable of affecting each other.[27]

On the other hand free trade has raised a number of concerns with respect to its social repercussions in both developing countries and the developed countries. In the developed countries, there has been an increasing perception that growing imports of manufactured goods from low-wage countries in the wake of trade liberalisation have caused significant job losses and social dislocations.[28] This anxiety has found a political expression in demands for protectionist policies. Proponents (mainly from developed countries) argue that this will eliminate unfair trade competition based on labour exploitation.[29] They suggest to include labour standards in trade agreements (so for example by a social clause)[30] in order to avoid this effect. Opponents affirm that such an inclusion would be an instrument of disguised protectionism aimed at reducing the international competitiveness of developing countries and thereby limiting their economic growth[31] - an idea that is considered as unfair, given the level of social (and environmental) protection the developed countries had enacted during their own process of industrialisation. Furthermore, they claim that core labour standards are not part of a universal consensus on condemned practices such as slavery; accordingly a consensus on labour standards could not definitively be achieved.[32]

The questions therefore remain: Is the current apprehension and the anxiety over the implications of free trade for labour standards justified?[33] Do imports from low-wage countries cause wage inequality and a fall in demand for unskilled labour?[34] Do low-wage

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May 1995; Final Ministerial Declaration of the WTO Conference in Singapore; OECD, *Trade, Employment and Labour Standards, A study of Core Workers' Rights and International Trade*, Paris, OECD Publications, 1996.

[26] For a similar conclusion refer to Art. 1 of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (as amended at the 279th Session of the Governing Body, November 2000); Preface of the OECD Guidelines for Multinational Enterprises (as adopted at the OECD annual Council Meeting in Paris on June 27th, 2000).

[27] G. Burtless / R. Lawrence / R. Litan / R. Shapiro, *Globaphobia*, Washington, The Brookings Institution et al, 1998, pp. 89-90.

[28] E. Lee, ´Globalisation and Labour Standards: A Review of Issues`, International Labour Review 1997, Vol. 136, No. 2, pp. 175-176.

[29] Ibid., p. 177.

[30] A social clause can be defined as a provision in bi- or multilateral trade agreements, that permits the withdrawal of some or all trade preferences if labour rights (as defined in the agreement) are disrespected.

[31] J. Bhagwati, *Free Trade, 'Fairness' and the New Protectionism*, London, The Institue for Economic Affairs, 1995, pp. 28-31.

[32] Ibid., pp. 27-28.

[33] E. Lee, ´Globalisation and Employment: Is Anxiety Justified`, International Labour Review 1996, Vol. 135, No. 5, pp. 486-487.

[34] J. Wood, ´Does Trade Reduce Wage Inequalities in Developing Countries`, 1995, 58 quoted in G. Burtless et al., *Globaphobia*, Washington, The Brookings Institution et al, 1998, pp. 89, 92.

economies attract increasing outflows of foreign direct investment so indirectly destroying jobs?[35] Does a link exist between free trade and labour rights?

### 2.3. Learning From Economics.

There is little available empirical evidence that changes in the pattern of international trade and relatively decreasing foreign investment flows have played an important role in the social problems of the developed countries.[36] Other factors also have been definitively determined this development such as deregulation (removal controls, economic reforms such as liberalisation), de-unionisation of the labour market and lower economic growth.[37] Freeman estimates that one fifth of the rise in US wage inequality is due to the decline in unionisation. This deduction is based on a comparison to Western Europe, where unions have remained much stronger than in the USA and wages of the less skilled have not collapsed.[38]
Likewise, manufactured imports from low-wage economies represented only around 4% of the GDP of the OECD nations in the 1990's and the FDI flows remain no more than 0,5 % of the GDP in the industrialised countries.[39] Moreover, the major part of manufacturing products in the industrialised nations is to be found in skill and innovation-intensive industries, which are not under direct threat of relocation to low-wage economies since most multinational enterprises are still primarily home centred.[40]
Many authors recognise that protectionist ideas often miss the mark. *D. Rodrik* stresses that '*much of the differences in labour costs is typically due to lower levels of labour productivity in the exporting countries'*. Low-wage competition does not really disadvantage workers in developed countries since the labour productivity of the former is also much lower than in the latter.[41] The OECD shares such opinions. In a study of 1996, it is underlined that the economic effects of core labour rights in particular are likely to be small and that there is no evidence that low-standard countries enjoy a better trade performance than high-standard countries.[42] Maybe in some situations low labour standards may have played a role in the location decision of OECD investors in favour of non-OECD destination, but these have not been determinants in the majority of the cases.[43]

While a significant number of authors and international organisations emphasise the minor negative impact of core labour rights on free trade, others argue that core labour rights even positively influence free trade.[44] They see harmonisation of labour rights as a dynamic process. Labour standards are perceived as an input into economic development. Efficient regulation of labour standards limit the "latent subsidy" that low pay offers to companies

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[35] J. Arthuis, Délocalisation et l' emploi: mieux comprendre les mécanismes des délocalisations industrielles et des services, Paris, PUF, 1993, pp. 33 ss.
[36] OECD, *International Trade and Core Labour Standards*, OECD Publications, Paris, 2000, pp. 37, 38.
[37] E. Lee, 'Globalisation and employment: Is anxiety justified?', International Labour Review 1996, Vol. 135, N° 5, p. 487.
[38] R. Freeman, ´When Earnings diverge, Causes, Consequences and Cure for the New Inequality in the US`, in D. Rodrik, *Has Globalisation gone too far?*, Washington DC, Institute for International Economics, 1997, p. 25.
[39] E. Lee, 'Globalisation and employment: Is anxiety justified?', International Labour Review 1996, Vol. 135, N° 5, pp. 487, 488.
[40] Ibid., pp. 487, 488, 493.
[41] D. Rodrik, *Has Globalisation gone too far?*, Washington DC, Institute for International Economics, 1997, p. 76.
[42] OECD, *Trade, Employment and Labour Standards, A Study of Core Workers' Rights and International Trade*, Paris, OECD Publications, 1996, pp. 88-92.
[43] Ibid., pp. 122-123.
[44] C. Scherrer, 'The Economic and political Arguments For and Against Social Clauses', Intereconomics 1996, Vol. 31, N° 1, pp. 9, 11-13.

which cannot compete on the basis of innovation.[45] If employees notice they are more socially protected, they will subsequently become more productive and competitive. Accordingly, there is no reason for considering the impact of labour standards on free trade sceptically.
However, the question remains whether the economic approach can be appropriate to deal with the repercussions of labour standards on free trade. The alternative explanation based on human rights may be more adequate, since core labour rights are human issues.

### 2.4. Explaining Labour Rights through the Human Rights Discourse.

According to the human rights approach, core labour rights are unconditional rights. They cannot be made conditional on a country's level of development.[46] Discussions on core labour rights certainly interfere with and influence economy and trade issues but they are founded elsewhere.[47] Core labour rights cannot be rejected only because a nation would economically be better off if it did so. Maybe, societies would be more efficient and competitive if some citizens were enslaved, but this cannot be considered as a seriously debatable means.[48]
Core labour rights are not efficient in economic terms; they cannot only be discussed in terms of economic welfare and efficiency. Core labour rights are fundamental and not contingent. The issue of free trade and core labour rights is, therefore, a matter of human rights and not a matter of economics.[49]
Finally, since core labour rights are those human rights that are the most directly affected by free trade, the link between the protection of labour rights and free trade is established. Any argumentation aiming at blurring this connection must be rejected.

Now that we have defined labour rights and free trade and analysed the link existing between them, we must focus on the mechanisms that have been invoked to protect labour rights in the context of free trade.

## 3. Exploring the Mechanisms

### 3.1. The Unilateral Approach.

Unilateralism in the context of free trade and labour rights refers to every measure taken by a single state aimed at suspending trade advantages with (or at rejecting any further trade advantages to) another state in case of violations of labour standards Many countries have adopted numerous pieces of trade and international economic legislation that link trade and other economic benefits to a foreign country's labour law and practice. Particularly in the USA and the European Union, legislation making trade conditional upon government observance of workers´ rights has been attached to a number of trade programmes and provisions.

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[45] S. Deakin / F. Wilkinson, ´Rights v. Efficiency? The Economic Case for Transnational Labour Standards`, International Law Journal 1994, Vol. 23, No. 4, pp. 307-309.
[46] L. Compa, ´Labour Rights and Labour Standards in International Trade`, Law and Policy in International Business 1993, pp. 201-204.
[47] J. de Castro, *Trade and Labour Standards - Using the wrong instruments for the right cause*, UNCTAD Discussion Paper N° 5, May 1995, pp. 2-3.
[48] B. Langille, ´Eight Ways to think about International Labour Standards`, Journal of World Trade 1997, Vol. 31, No. 4, pp. 34-35.
[49] P. Waer, 'Social Clauses in International Trade, The Debate in the European Union', Journal of World Trade 1996, Vol. 30, N° 4, pp. 25, 39; R. Howse / M. Trebilcock, ´The Fair Trade-Free Trade Debate: Trade, Labour and the Environment`, International Review of Law and Economy 1996, Vol. 16, No. 1, pp. 61, 64.

### 3.1.1. Short Case-Studies.

#### 3.1.1.1. The United States of America.

The USA included labour standards provisions in a significant number of preferential trade agreements for developing countries. In 1983, the Caribbean Basin Economic Recovery Act[50] was signed, providing for additional trade preferences, which can be denied or revoked by the USA governments when certain labour rights, such as respect of workplace safety standards and violation of the right to organise and bargain collectively are disrespected.[51] In 1984, the General System of Preferences (GSP) was extended.[52] It includes a review and an enforcement process in case of non-respect of labour rights and was often used by the USA in order to force countries to respect labour rights. The 1984 GSP gives the USA the right to deny or refuse to renew special trade advantages to the "violating" countries.[53] Section 301 of the 1988 Trade and Competitiveness Act allows as well for withdrawal and suspension of trade benefits in case of non-respect of labour rights by trade partners.[54]

#### 3.1.1.2. The European Community

In 1994 the European Union has begun to link trade agreements with labour standards.[55] Since 1998 the modulated GSP arrangements[56] of the European Community provide for the withdrawal of some or all trade preferences in case of slavery or forced labour. On the basis of a "*special incentive scheme*" further trade concessions for the respect of further core labour rights are offered, the aim of which is to '*help beneficiary countries improve the quality of their development by adopting more advanced social…policies*'.[57]

### 3.1.2. Evaluation

Unilateralism raises many questions. There is no consensus on whether this approach is suited to the issue of improving working conditions in developing countries. Its proponents claim that it allows a better enforceability in case of violation of labour standards. Indeed, if trade partners do not respect labour rights, they will temporarily or permanently lose their trade preferences or advantages. Unilateralism is, then, perceived as the most efficient and rapid way of reacting on violations of labour standards. On the other hand, its opponents denounce that unilateral sanctions are more likely to succeed in changing behaviour if the policy changes are quite modest and above all if the sanction-imposing country is larger and economically more powerful than the targeted country. This sanction by "middle powers" is likely to stay ineffective or ignored.[58] Furthermore, the more the targeted countries are hostile

[50] Public Law 98-67, tit. II, subtit. A, Sec. 201-18, 97 Stat. 384 (1983); U.S.C 2701 – 2706 (1988).
[51] Sec. 212 (c) (8); confer also to S. Charnovitz, 'Caribbean Basin Initiative: Setting Labour Standards', 107 Monthly Labour Review 1984, N° 11, p. 54; J. M. Griesgraber / B. G. Gunter, op. cit. No. 5, p. 45.
[52] Trade Act of 1974, as amended in 1984, tit. V, Sec. 501 – 505, 88 Stat 2066 (1975); U.S.C. 2461 – 2465 (1988).
[53] J. de Castro, *Trade and Labour Standards - Using the wrong instruments for the right cause*, UNCTAD Discussion Paper N° 5, May 1995, p. 7.
[54] X, ´The WTO and the Social Clause`, International Labour Review 1994, Vol. 133, No. 3, pp. 407, 409.
[55] Council Regulation N° 3281/94, OJ L 348.
[56] Confer to Council Regulation (EC) N° 2820/98 of 21 December 1998 applying a multi-annual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001, OJ L 357 of December 1998, pp. 1 – 112.
[57] Commission of the European Communities, Communication from the Commission to the Council, *The Trading System and Internationally Recognized Labour Standards*, Brussels, 24.07.1996, COM (96) 402 final, p. 14.
[58] R. Howse / M. Trebilcock, ´The Fair Trade-Free Trade Debate: Trade, Labour and the Environment`, International Review of Law and Economy 1996, Vol. 16, No. 1, pp. 61, 70-71.

and intransigent, the less probable is a friendly settlement or a settlement at all. Moreover, there is no empirical evidence that unilateralism influences the situation of core labour rights, positively , however it results in negative consequences, such as reinforcing trade barriers[59] and making consumers´ life more expensive.[60] Finally, opponents argue that unilateral trade sanctions are illegal under the GATT/WTO system since no provisions are included in it concerning possible trade sanctions in case of labour rights´ violations.[61]

### 3.2. Labelling

Other conceivable approaches are to take recourse to private party initiatives, such as codes of conduct or labelling. As many of the advantages and disadvantages of the two mechanisms are similar, we will focus exemplarily on labelling .[62]

Labelling is organised either through private parties or public institutions. Thus, products made in a manner that meets a given set of labour rights could be entitled to bear a distinctive logo or statement that inform consumers of this fact.[63] The movement to label goods to indicate conformity with selected labour rights has been increasingly spreading in the USA and Europe. So, campaigns have been supported by European labour unions and a significant number of NGOs, in order to make public opinion aware of the violation of labour rights and to introduce quality labels.[64] In West-European countries, campaigns were successfully initiated for the use of the carpet label "Rugmark". It is the proof that children have not produced the carpets.[65] Consumers buying labelled goods influence directly the promotion of core labour rights inside their own country and abroad. Labelling on the other hand influences consumers in their consumption decisions since it bases their behaviour on moral principles, relating to the conditions of production of the product purchased.[66]

The recourse to these ´private boycotts` is considered by some authors as an effective instrument capable of creating a consensus in favour of moral positions[67] and of enabling consumers to avoid the "taint" of consuming "socially incorrect" products.

However, other authors stress that behaviour of individual consumers is not easy to anticipate. The individual consumer needs to feel not be the only one who will boycott a product. Thus, if the consumer considers most other consumers will not act as he does, he will not consider it rational and efficient not to buy the product.[68] Furthermore, consumers may well be manipulated by campaigns that misuse moral principles to disguise their protectionist

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[59] S. Anderson, *Unclean Hands: America's Protectionist Policies,* http://www.freetrade.org/freetotrade/chap6.html, (last visited July 2000).

[60] J. Powell, *Protectionist Paradise*, http://www.freetrade.org/pubs/freetrade/chap7.html, (last visited July 2000).

[61] Cf. to Kevin McDonalds, ´Warum die USA Section 301 Trade Act nicht aufheben müssen`, Recht der Internationalen Wirtschaft 1999, p. 356 for s. 301 US Trade Act; s. 307 US Tariff Act on the other hand would not be illegal because the clause is grandfathered in relation to the GATT; for an in-depth analysis confer to H. – V. Lempp, *Die Vereinbarkeit einseitiger Maßnahmen gegen das sogenannte Sozialdumping mit dem „GATT 1994" und dem Völkergewohneitsrecht*, Diss. Würzburg, 1995.

[62] Confer also to R. Liubicic, ´Corporate codes of conduct and private labelling schemes: The limits and possibilities of promoting international labor rights through private initiatives`, Law and Policy in International Business 1998, Vol. 30, N° 1, p. 111.

[63] R. Howse / M. Trebilcock, ´The Fair Trade-Free Trade Debate: Trade, Labour and the Environment`, International Review of Law and Economy 1996, Vol. 16, No. 1, pp. 71-72.

[64] P. Waer, ´Social Clauses in International Trade, The Debate in the European Union`, Journal of World Trade, 1996, Vol. 30, No. 4, pp. 25, 34-35.

[65] Ibid.

[66] OECD, Trade*, Employment and Labour Standards, A Study of Core Workers' Rights and International Trade*, OECD Publications, Paris, 1996, p. 199.

[67] J. Bhagwati, *Free Trade, 'Fairness' and the New Protectionism*, London, The Institue for Economic Affairs, 1995, p. 32.

[68] R. Howse / M. Trebilcock, ´The Fair Trade-Free Trade Debate: Trade, Labour and the Environment`, International Review of Law and Economy 1996, Vol. 16, No. 1, pp. 61, 72.

intentions. Finally, the mechanism of labelling is blindly directed only towards export (end-) products and not towards non-export products or intermediate goods, and so allows abuses to persist.[69]

### 3.3. Multilateralism

#### 3.3.1. The International Labour Organisation.

The debate over free trade and labour standards has to a certain extent shifted away from a debate about free trade and labour standards, to a debate about where and how to conduct that debate. The problem of sanctions is intrinsically linked to this aspect.[70]

The ILO was created in order to improve conditions of work and economic growth.[71] It essentially pursues a promotional approach and cannot impose trade sanctions. Its role is *inter alia* to '*define the fundamental social rules that should govern economic globalisation*'.[72] The 1998 ILO-Declaration stresses, ILO's role '*could never be more than an expression of good intentions'*.[73] With time, the ILO has developed an elaborate machinery for supervising the compliance with ratified ILO-Conventions involving the systematic checking of material laws, practice and the complaints, expressed by government's, employer's or other organisations.[74]

Accordingly, the ILO system relies on moral persuasion and a pro-active approach rather than on coercion. For instance, the 1998 ILO Declaration includes a promotional and non-punitive follow-up consisting of two elements: an annual follow-up in which states are asked to provide reports every year on each of the fundamental ILO Conventions that they have not ratified, yet. In addition a global report is devoted to the annual covering of one of the four[75] categories of fundamental principles and rights.[76]

Proponents emphasise the impact of ILO-Conventions and Recommendations on the social legislation and trade policy of states. They cannot imagine another international organisation than the ILO to set labour standards.[77] According to them ILO is the institution best equipped to create a consensus on labour rights[78] since it had the required expertise in labour related issues. Moreover, its tripartite structure helps to find balanced solutions. They add that the ILO-mechanism, based on collective decision to pursue and challenge social objectives, is to be preferred to trade sanctions that could be abused for protectionist purposes and could be poisoning the atmosphere.

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[69] E. Lee, 'Globalization and Labour Standards: A review of issues', International Labour Review 1997, Vol. 136, N° 2, pp. 173, 186.
[70] B. Langille, ´Eight Ways to think about International Labour Standards`, Journal of World Trade 1997, Vol. 31, No. 4, pp. 27, 48.
[71] X, ´The ILO and Bretton Woods`, International Labour Review 1994, Vol. 133, No. 5, p. 695.
[72] M. Cloutier, ILO Declaration on Principles: A new instrument to promote Fundamental Rights, A workers` education guide, ILO publications, Geneva, 2000, p. 10.
[73] Ibid., p. 6.
[74] M. Hansenne, ´International Trade and Labour Standards, The ILO Director General speaks out`, International Labour Review 1996, Vol. 135, No. 1, pp. 230, 231.
[75] The ILO counts only four categories, as the freedom of association and the right to collective bargaining are treated as intrinsic parts of a single right.
[76] M. Cloutier, *ILO Declaration on Principles: A new instrument to promote Fundamental Rights, A workers` education guide*, ILO publications, Geneva, 2000, p. 7.
[77] Confer exemplarily to the statement of the Maldives' Minister of Trade, Industries and Labour under http://www.wto.org/wto/archives/at113.html, (last visited July 2000).
[78] J. Bhagwati, *Free Trade, 'Fairness' and the New Protectionism*, London, The Institute for Economic Affairs, 1995, pp. 32, 33.

Opponents to the ILO-mechanism point out the lack of coercive elements within the ILO-system. This shortcoming worsens the protection of labour standards, because the ILO-system is indirect inefficient in implementing labour standards.[79] They argue that the ILO has been working on the promotion of labour rights since 1919, so there will be no reason why the 1998-Declaration should have more impact than the other ILO-measures, which have been adopted so far. The ILO has nevertheless reacted against these criticisms and is currently trying to re-gain the initiative on core labour standards. The ILO Working Party on the Social Dimension of Globalisation has commissioned the Director General of the ILO to prepare a authoritative and comprehensive report on 'the social dimension of globalisation, particularly the interaction between the global economy and the world of work'.[80] This has been identified as the first step in bringing the control over the debate back in the hands of the ILO. However, it is unclear whether the ILO would be the most efficient organisation in this discussion. Maybe the introduction of a social clause in trade agreements, such as the WTO, could be a much more efficient alternative?

#### 3.3.2. The World Trade Organisation.

Despite being heavily criticised in many aspects, the WTO is one of the most efficient international organisations. The rules it administers and creates are legally binding. They are backed up by a court-like dispute settlement system with compulsory jurisdiction. It is this efficiency that has brought about the debate about linking core labour rights with trade rules. In the following sections, we will review some mechanisms in WTO framework that could be used to link the compliance with core labour rights with free trade.

##### 3.3.2.1. The Trade Policy Review Mechanism.

The first approach we examine suggests to use the TPRM in order to ensure the compliance with core labour rights[81] as. it was for example the opinion of the French Economic and Social Council in 1996.[82]

The current purpose of the TPRM is to contribute to improved adherence by all members to rules made under the multilateral trade agreements signed in Marrakech 1994. It was created in order to foster smoother functioning of the WTO-system and to achieve greater transparency of the trade policies and practices of the WTO-members.
According to the TPRM, all members of the WTO are subject to periodic reviews of their trade policies and practices. Governed by the Trade Policy Review Body, TPRM enables regular collective appreciation and evaluation of the trade policies and practices of the member states and their impact on the functioning of the multilateral trade system.[83] Neither, however, is it intended to serve as the basis for the enforcement of specific obligations, for example of the GATT 1994, nor for dispute settlement procedures.
However, the approach we examine suggests that the WTO-Secretariat should also take into account social aspects in its regular surveys of countries' trade policies. Violations of labour

[79] B. Langille, ´Eight Ways to think about International Labour Standards`, Journal of World Trade 1997, Vol. 31, No. 4, pp. 27, 49-50.
[80] As reported in X, ILO Leads discussion on Trade and Labour, 5(24) BRIDGES Weekly Trade News Digest 8 (26 June 2001).
[81] P. Waer, ´Social Clauses in International Trade, The Debate in the European Union`, Journal of World Trade, 1996, Vol. 30, No. 4, pp. 25, 33.
[82] Avis et Rapports du Conseil Economic et Social, les droits fondamentaux de l´homme au travail dans une économie libre, Journal Officiel de la République Française, No. 9, 18/03/1996, p. 24.
[83] W. Benedek, *Die Welthandelsorganisation*, München, C. H. Beck, 1998, pp. 32, 33.

rights would then be published. Amelioration concerning the compliance with core labour rights could be attained by changes in trade policy of the country considered.[84]
Proponents of this approach emphasise that, firstly, this mechanism is an easy and realistic way to enhance the core labour rights. It does not require any new negotiation on the Agreement but only its reinterpretation. Secondly, the WTO is, particularly compared to the ILO, the more adequate and appropriate body to ameliorate the situation of core labour rights' by trade means.
However, the TPRM mechanism also lacks an enforcement system and a mandatory character. Thus, ist efficiency may be doubted, too.

#### 3.3.2.2. Article XX (e) GATT.

Article XX (e) GATT is the only provision in the GATT that explicitly establishes a direct link of labour matters to international trade in the framework of the WTO-agreement. It has been proposed to interpret the expression "prison labour" extensively as including all forms of forced labour, bonded labour or exploitive child labour.[85] Furthermore, it was suggested to amend Article XX (e) GATT 1947 in order to cover the full range of core labour rights.[86]
A Member State considering the violation of one of those rights were able to adopt or enforce measures to prevent this violation. As Article XX (e) GATT 1947 states a general exception from the Most-Favourite-Nation Clause, the invoking party would have to prove the alleged violation.[87] That would diminish the danger of protectionist tendencies.
However, there are some significant arguments to the disadvantage of this idea.
From the historical point of view, Article XX (e) GATT represents – as it was transferred without any amendment from GATT 1947 to GATT 1994 – the consensus of the contracting parties of 1947.[88] The only Human Rights Convention, however, that already existed in 1947 was on suppression of Slave Trade and Slavery and on Forced Labour, which are obviously not mentioned in the very provision.[89]
Furthermore, Article XX (e) GATT was originally conceived as protection against unfair competition deriving from the low costs of prison labour, any private company would not be able to compete with.[90] Therefore, its *telos* is to protect competition but not workers' rights. Additionally, Article XX (e) GATT explicitly refers to the *product* of prison labour and, thus, confirms its indifference towards the methods of production.[91]

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[84] OECD, *Trade, Employment and Labour Standards, A Study of Core Workers' Rights and International Trade*, OECD Publications, Paris, 1996, p. 175.
[85] J. Diller / D. Levy, 'Child Labour, Trade and Investment: Towards the Harmonisation of International Law', American Journal of International Law 1997, Vol. 91, pp. 652, 683.
[86] See also: P. Waer, ´Social Clauses in International Trade, The Debate in the European Union`, Journal of World Trade, 1996, Vol. 30, No. 4, pp. 25, 31, J. Diller / D. Levy, 'Child Labour, Trade and Investment: Towards the Harmonisation of International Law', American Journal of International Law 1997, Vol. 91, pp. 652, 683.

[87] R. Howse / M. Trebilcock, *The Regulation of International Trade*, Routledge, London, 1995, p. 189.
[88] J. Jackson / W. Davey / A. Sykes, *Legal Problems of International Economic Relations, Cases, Materials and Texts*, West Publishing, 3rd Edition, St. Paul, Minnesota, 1995, p. 1008.
[89] Ibid., p. 1009.
[90] J. Diller / D. Levy, 'Child Labour, Trade and Investment: Towards the Harmonisation of International Law', American Journal of International Law 1997, Vol. 91, pp. 652, 682-4.
[91] R. Eglin, ´Comments: Core Labour Standards and the WTO`, International Trade Law and Regulation 1997, Vol. 3, N° 3, pp. 101, 103.

Finally, including core labour standards as a General Exception in the framework of the GATT could even decline their performance since the permission of unilateral measures is followed by the disadvantages described above.[92]

Consequently, Article XX (e) GATT in its present form should not be invoked for the protection against forced, bonded or exploitive child labour and the idea of amending the provision with the attitude to cover core labour rights is not convincing either.

#### 3.3.2.3. Anti-Dumping.

The third approach we investigate is to consider violations of core labour rights as constituting social dumping.[93] This approach is based on the assumption that the price of products manufactured under poor labour standards is lower than the price of domestic production with higher standards only because of violation of core labour rights.[94] This argument is related to Article VI(1) GATT. The dumping margin would be the difference between production costs in case of compliance with core labour standards in comparison to the costs in case of non-compliance with them.[95] The term "Social Dumping" becomes particularly relevant when countries use low labour standards deliberately in order to increase competitiveness of exports, e.g. in Export Processing Zones (EPZ).[96] According to this approach, countries affected by imports of such products could levy anti-dumping duties as a trade sanction (Article VI(2) GATT).
However, the proposal is ill advised in several aspects. To begin with, as it has been discussed above, the difference in production costs in case of compliance with core labour rights and in case of non-compliance with them are insignificant. Consequently, the required material injury of domestic countries' industries (Article VI(1) GATT) could hardly be proved. Secondly, the agreement on the implementation of Article VI GATT states clearly that the norm only covers price-dumping,[97] but not dumping in other respects. Thirdly, if determination of a dumping margin involves an assessment of costs of production, these must be actual and not hypothetical.[98]
Thus, Article VI GATT cannot be a legal basis for the protection of core labour standards within the WTO.

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[92] Cf. to: J. Bhagwati, *Free Trade, 'Fairness' and the New Protectionism*, London, The Institute for Economic Affairs, 1995, p. 27.
[93] OECD, *Trade, Employment and Labour Standards, A Study of Core Workers' Rights and International Trade*, OECD Publications, Paris, 1996, p. 170; [93] J. Diller / D. Levy, 'Child Labour, Trade and Investment: Towards the Harmonisation of International Law', American Journal of International Law 1997, Vol. 91, pp. 652, 680; H. Ward, ´Common But Differentiated Debates: Environment, Labour and the WTO`, International and Comparative Law Quarterly 1996, Vol. 45, pp. 592, 610; E. de Wet, 'Labour Standards in the Globalised Economy: The Inclusion of a Social Clause in the General Agreement On Tariff and Trade / World Trade Organisation', Human Rights Quarterly 1995, Vol. 17, N° 3, pp. 443, 447.
[94] E. de Wet, 'Labour Standards in the Globalised Economy: The Inclusion of a Social Clause in the General Agreement On Tariff and Trade / World Trade Organisation', Human Rights Quarterly 1995, Vol. 17, N° 3, pp. 443, 448.
[95] H. Ward, 'Common But Differentiated Debates: Environment, Labour And The WTO', International and Comparative Law Quarterly 1996, Vol. 45, pp. 592, 610.
[96] Ibid., p. 610
[97] Cf. to H.-G. Myrdal, "The ILO in the cross-fire: Would it survive the social clause?", in W. Sengenberger / D. Campbell, *International Labour Standards and Economic Interdependence*, Geneva, International Institute for Labour Studies, 1994, pp. 339, 349.
[98] OECD, *Trade, Employment and Labour Standards, A Study of Core Workers' Rights and International Trade*, OECD Publications, Paris, 1996, p. 171, with reference to article 2 of the Agreement on the Implementation of Art. VI GATT.

#### 3.3.2.4. ICFTU-Proposal

The most complete proposal for a link of CLS with multilateral trade measures stems from the International Confederation of Free Trade Unions (ICFTU). It aims at combining the ILO-procedure with the enforcement power of the WTO. A joint WTO/ILO-advisory board would be set up to oversee the implementation of the CLS. According to this proposal CLS will be integrated in the WTO-agreement. If they were infringed, a report would make recommendations. If the targeted country - after a further report - continuously fails to comply with its obligations, the matter would be referred to the WTO-Council with the option of possible trade measures. These could include the suspension of the right to apply to the Dispute Settlement Body (DSB) or a multilateral application of tariffs on exports of the targeted country.[99]
Combining the efforts of ILO and WTO is in favour of the proposal. The combination of monitoring, recommendation and assistance with trade sanctions only as a means of last resort links development support with multilateral sanctions to assure the implementation of the standards while avoiding any protectionist tendencies.
Against the proposal, it can be said firstly, that only the export sector of an economy is affected by trade sanctions. However labour standards tend to be higher in exporting industries than in the domestic sector[100] (though there are exceptions in EPZ's). Secondly, the proposal is still rather vague as far as the exact measure of offence warranting sanctions is concerned.[101] Thirdly, considering the current attitude of the WTO-Council towards any changes concerning labour right issues in the WTO-agreements, this proposal has dim prospects to become reality since it requires considerable re-negotiations on the WTO-agreement.

## 4. Linkage Mechanisms: Some Reflections.

In this section we will establish, that whatever mechanism is chosen to link trade with core labour rights, certain minimum requirements must be respected. First, we will show that this mechanism cannot be based on competition law regulations. It will further be demonstrated that a consensus on the mechanism chosen is needed and finally, that this mechanism must be effective and realistic.

### 4.1. Core Labour Rights are Human Rights.

As discussed *supra*, core labour rights are human rights issues.[102] As such, they transcend all domestic social, cultural , political and economic peculiarities and traditions. [103] Consequently, the violation of core labour rights should not be used in order to justify any measures based on competition laws since they are always in danger of protectionist misuse. With the perception of core labour rights as universal Human Rights the discussion as to whether they are efficient in economic terms becomes invalid.[104] The Human Rights

[99] The procedure is described in detail in ICFTU, *Building Workers' Human Rights Into The Global Trading System*, Brussels, 1999, pp. 23, 24.
[100] G. van Liemt, 'Minimum Labour Standards and International Trade: Would a Social Clause Work?', International Labour Review 1989, Vol. 128, N° 4, pp. 433, 435, 436; E. de Wet, 'Labour Standards in the Globalised Economy: The Inclusion of a Social Clause in the General Agreement On Tariff and Trade / World Trade Organisation', Human Rights Quarterly 1995, Vol. 17, N° 3, pp. 443, 449.
[101] P. Waer, ´Social Clauses in International Trade, The Debate in the European Union`, Journal of World Trade, 1996, Vol. 30, No. 4, pp. 25, p. 41
[102] See above, part 2.1.4.
[103] OECD, *Trade, Employment and Labour Standards, A Study of Core Workers' Rights and International Trade*, OECD Publications, Paris, 1996, pp. 26-27.
[104] Ibid., p. 186.

Approach moves claims for CLS from the inappropriate economic stage[105] to another higher stage of moral concerns.
Therefore, legal tools such as Section 301 of the US 1988 Trade and Competitiveness Act are not only incoherent because of the negligible effect of core labour rights on a country's competitive position,[106] they also miss the genuine reason for the protection of core labour rights. The same is true for the proposal of extending the application of anti-dumping provisions included in the GATT to the case of social dumping, as it would enable countries to take Competition Law based measures. Finally, the proposal founded on the amendment of article XX (e) GATT cannot, logically, be accepted; this mechanism would enable countries to take unilateral measures under the GATT system, in the case that their Competition Law regulations permit it.

### 4.2. Core Labour Rights are Common Values.

The idea of core labour rights as basic human rights renders them universal public goods independent of economic evaluations. Basic human rights are commitments *erga omnes*[107] that have to be honoured and respected by every nation and therefore even justify concerns of their compliance towards non-nationals.
Thus, the most appropriate mechanism to protect core labour rights should be based on a multilateral foundation. Indeed, a multilateral system would allow the international community - and not only individual states - to act and react on core labour rights' violations. Mechanisms based on unilateral actions are conceivable as complementing but not as the main measures. The USA's and European Union's GSP programmes may only be elements of an entire safeguarding system encouraging countries to ameliorate and stabilise the protection of core labour rights. The same considerations must be applied for private campaigns such as labelling.
Finally, and in addition to the arguments outlined before, multilateral mechanisms would thwart every criticism based on protectionism.

### 4.3. Finding a Consensus on Effective Solutions.

The problem we are faced with is that none of the multilateral mechanisms are perfect. The 1998 ILO- Declaration recognises core labour rights and embodies the countries' commitments to respecting them. However, it lacks an effective link with trade. Indeed, the 1998 ILO-Declaration, puts much more emphasis on the social dimension than on the trade dimension. Thus, an efficient means to protect core labour rights within the context of trade is still looked for. This conveys the inadequacy of the ILO to deal with social issues related to trade. Consequently, the "ILO solution" must be rejected.
As for the ICFTU-mechanism, it is certainly the most perfected mechanism that has been investigated, linking the role of the WTO with that of the ILO and – in a wider sense - free trade with core labour rights by envisaging trade sanctions. Nonetheless, it must be stressed here that the ICFTU-proposal seems politically improbable. Indeed, it will certainly take decades before a political consensus is reached on the inclusion of trade sanctions. Although a similar mechanism could be aimed at for the far future, a mechanism with instant effect seems to be preferable.
The best proposal seems to be to reinterpret the TPRM. This would create a link between core labour rights and free trade, since this proposal envisages the introduction of social issues in

[105] B. Langille, ´Eight Ways to think about International Labour Standards`, Journal of World Trade 1997, Vol. 31, No. 4, pp. 27, 38.
[106] See above, part 2.3.
[107] Belgium vs. Spain (Barcelona Traction, Light and Power Co. Case – Second Phase), I.C.J. <http://www.icj-cij.org/icjwww/idecisions/isummaries/ibtsummary700205.htm,> (last visited 7 June 2000), para. 70.

the TPRM and the improvement of the core labour rights' situation by changes in a country's economic policy. Therefore, this solution should be preferred to the ILO-mechanism, which lacks the link between economics and labour rights.[108] From a political point of view, this proposal is the most realistic one, as it does not require any new negotiation on the Agreement.
Finally, we will conclude that the solution which is the most conceivable on a political level and the most capable of linking trade issues with social one is to amend the TPRM. It should be supported by labelling initiatives and GSP-programmes, the latter permitting, respectively, avoidance of any further core labour rights´ violations and the economic reward of countries respecting them.

## 5. Conclusion.

In this article, we have analysed some of the proposals to link free trade and labour rights. Despite the lack of a real international consensus, there appears to be a consensus amidst most countries that the debate should only focus on some labour standards, called "core labour rights". These core labour rights are fundamental and therefore transcend all economic policies. They are basic human rights. Every economic approach trying to deal with the repercussions of labour standards on free trade is, therefore, inappropriate. Economic dynamism and the rise in labour standards are however not in conflict. Countries could nevertheless continue maintaining low labour standards and using them as a means of improving their economic situation as long as they do not violate the core labour rights.

A number of mechanisms have, therefore, been proposed in order to protect core labour rights in the context of free trade. None of these systems is entirely satisfactory. But, some of them seem more appropriate, efficient or easier to implement than others. This is the case for the TPRM in its amended version. Other mechanisms seem to suit as second best solutions and auxiliary measures: labelling and GSP.

There still exist many places in the world where people unfortunately are forced to work under unbearable and inhumane conditions. Considering raising labour standards as the real source of competitiveness and economic growth will permit workers to enjoy better working conditions and increase overall productivity.

[108] See above, part 3.3.1.