

***Rights without Remedies: An examination of the problems
encountered in enforcing Employment Standards
in globalised markets***

by

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I) Introduction

While the debate on international labour standards is an old one dating back to the nineteenth century,¹ it has recently emerged as one of the central political topics of our time. This renewed interest in the issue can be explained by two developments.

First, the global communications revolution with its increased capacity for disseminating information has enhanced public awareness of exploitative working conditions around the world,² and in some places they are appalling. World-wide, an estimated 250 million children between the ages of 5 and 14 are working, often under hazardous conditions, and, in countries where debt bondage is practised, even child slavery is not unusual.³ Existing employment

¹ Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, 'International Labor Standards and Trade: A Theoretical Analysis' in Jagdish Bhagwati and Robert E. Hudec (eds.), *Fair Trade and Harmonization, Prerequisites for Free Trade?*, Volume 1, Economic Analysis, Cambridge, The MIT Press, 1996, p. 227, 231; International Monetary Fund, Research Department, 'International Labor Standards and International Trade', Prepared by Stephen S. Golub, IMF Working Paper WP/97/37, 1997, p. 14; André Sapir, 'The Interaction Between Labour Standards and International Trade Policy', 18 *The World Economy* (1995) No. 6, p. 791, 791.

² Munir Akram, 'Does the globalized market economy imply a global system of social justice?', August 1998, (Online), Available: <http://www3.itu.int/parkistan/Social%20justice%20.htm>; Eddy Lee, 'Globalization and labour standards: A review of issues', 136 *International Labour Review* (1997) No. 2, p. 173, 175; Gijssbert van Liemt, 'Minimum labour standards and international trade: Would a social clause work?', 128 *International Labour Review* (1989) No. 4, p. 433, 433; Dirk Meyer, 'Social Standards and the New World Trading Order', 21 *World Competition* (1998) No. 6, p. 33, 36.

³ International Labour Organisation, 'The ILO, What it is, What it does', ILO Information Brochure, December 1999, p. 16, (Online), Available:

laws are often ignored and in many countries the freedom to associate is also denied, with trade union leaders being jailed or even murdered.⁴ The revelation of such facts has provoked moral outrage. Spurred on by a growing number of non-governmental organisations with social concerns, public opinion is increasingly demanding action.⁵

Secondly, there are growing reservations over the process of globalisation itself.⁶ It is argued that intensified international competition resulting from this process has had a negative impact on domestic labour markets. Poor employment standards in developing countries are seen as a competitive threat, potentially resulting both in the increase of imports from such places and in the export of industrial activities to them.⁷ Thus, lax standards in the developing world can readily be blamed for job losses and social dislocation in developed countries.⁸

The combination of economic self-interest, and moral indignation over unacceptable working conditions has inevitably had political repercussions. One response, widely advocated, is to seek to enforce a set of universal minimum standards. The current debate is primarily concerned with finding the best means of achieving this objective.

There seems to be a consensus that these core labour standards should be based on a short list of key ILO Conventions.⁹ The ones usually included are those dealing with the abolition

<http://www.ilo.org/public/english/bureau/inf/brochure/index.htm>; Mark Lansky, 'Child labour: How the challenge is being met', 136 *International Labour Review* (1997) No. 2, p. 233, 243.

⁴ Wilhelm Adamy, 'International Trade and Social Standards', 29 *INTERECONOMICS* (1994) No. 6, p. 269, 270; Liemt, op. cit. 2, p. 433; Robert J. Liubicic, 'Corporate codes of conduct and product labelling schemes: The limits and possibilities of promoting international labour rights through private initiatives', 30 *Law and Policy in International Business* (1998) No. 1, pp. 111-158, (Online), Available: <http://proquest.umi.com/pqdweb?TS=9614209...C=1&Dtp=1&Did=000000037354195&Mtd=1&Fmt=4>.

⁵ European Commission, 'The Trading System and Internationally recognized Labour Standards', Communication from the Commission to the Council, COM (96) 402 final, Brussels, 24.07.1996, p. 20; Lee, op. cit. 2, pp. 175f.

⁶ Akram, op. cit. 2; Elisabeth Cappuyns, 'Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship', 36 *Columbia Journal of Transnational Law* (1998) No. 3, p. 659, 664; Padmanabha Gopinath, 'The ILO and Bretton Woods: A common vision?', 133 *International Labour Review* (1994) No. 5-6, p. 695, 696; International Labour Organisation, Working Party on the Social Dimension of the Liberalization of International Trade, 'Country studies on the social impact of globalization: Final report', Governing Body, 276th Session, GB.276/WP/SDL/1, Geneva, November 1999, (Online), Available: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb276/sdl-1.htm>; Brian A. Langille, 'Eight Ways to think about International Labour Standards', 31 *Journal of World Trade* (1997) No. 4, p. 27, 29; Meyer, op. cit. 2, p. 35.

⁷ Jagdish Bhagwati, 'Trade Liberalisation and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues', 18 *The World Economy* (1995) No. 6, p. 745, 746; United Nations Conference on Trade and Development, 'Trade and Labour Standards: Using the wrong instruments for the right cause', Prepared by Juan A. de Castro, Discussion Paper No. 99, UNCTAD/OSG/DP/99, May 1995, p. 4.

⁸ Eddy Lee, 'Globalization and employment: Is anxiety justified?', 135 *International Labour Review* (1996) No. 5, pp. 485, 486f.; Friedl Weiss, 'Internationally recognized Labour Standards and Trade', 23 *Legal issues of European integration* (1996) No. 1, p. 161, 164.

⁹ Cappuyns, op. cit. 6, pp. 660f.; Erika de Wet, 'Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the Agreement On Tariff and Trade/World Trade Organization', 17 *Human Rights Quarterly* (1995) No. 3, p. 443, 453; Pharis J. Harvey, Terry Collingsworth and Bama Athreya, 'Developing Effective Mechanisms for Implementing Labor Rights in the Global Economy', (Online), Available: <http://www.laborrights.org/projects/globalecon/ilrf/index.html>; Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and*

of forced labour, freedom of association and the right to organise, the right to engage in collective bargaining, non-discrimination in employment-related matters and the progressive elimination of child labour.¹⁰ The ILO itself declares these standards to be fundamental.¹¹ They are regarded as a precondition for the effective exercise of all other workers' rights and it seems to be generally accepted that they constitute basic human rights with a universal character and should, for this reason alone, be enforced as an absolute minimum.¹²

The aim of this article is to examine the various possible ways of establishing these core standards on a truly global basis. Bearing in mind the enormous difficulties involved in promoting multilateral conventions, we shall follow the principle of 'subsidiarity' and begin our investigation at a more parochial level.

II) Private sector initiatives

Starting at the most informal level of all, it may initially come as some surprise to discover that there are already a significant number of initiatives operating within the private sector.

1) Codes of conduct and social labelling schemes

In the globalised environment, both production and the trade in goods and services are coming inexorably under the control of a small number of multinational corporations.¹³ In view of the dominant role of these enterprises, pressure groups such as unions, churches, consumer

International Trade, Paris, OECD, 1996, pp. 10f.; Weiss, op. cit. 8, p. 176; Rorden Wilkinson, 'Labour and trade-related regulation: beyond the trade-labour standards debate?', 1 *British Journal of Politics and International Relations* (1999) No. 2, pp. 165, 167f..

¹⁰ In chronological order the relevant Conventions are: The *Forced Labour Convention, 1930 (No. 29)*, the *Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)*, the *Right to Organize and Collective Bargaining Convention, 1949 (No. 98)*, the *Equal Remuneration Convention, 1951 (No. 100)*, the *Abolition of Forced Labour Convention, 1957 (No. 105)*, the *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, the *Minimum Age Convention, 1973 (No. 138)*, and the *Worst Forms of Child Labour Convention, 1999 (No. 182)*.

¹¹ The *ILO Declaration on Fundamental Principles and Rights at Work* and its follow-up, which was adopted by the International Labour Conference in June 1998, reaffirmed the desire of the member states to respect, promote and realise the principles embodied in the ILO Conventions Nos. 29, 87, 98, 100, 105, 111 and 138. The recently adopted ILO Convention No. 182 has also been termed fundamental and included along with the other seven in the follow-up to the Declaration.

¹² Michel Hansenne, 'Trade and Labour Standards: Can Common Rules be Agreed?', Speech at the 464th Wilton Park Conference on Liberalising World Trade and Prospects for the Singapore Ministerial Meeting, Steyning, West Sussex, 6 March 1996, (Online), Available: <http://www.ilo.org/public/english/bureau/dgo/speeches/hansenne/1996/wilton.htm>; Langille, op. cit. 6, p. 32; Virginia A. Leary, 'Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)' in Jagdish Bhagwati and Robert E. Hudec (eds.), *Fair Trade and Harmonization, Prerequisites for Free Trade?*, Volume 2, Legal Analysis, Cambridge, The MIT Press, 1996, p. 177, 218; Lee, op. cit. 2, p. 176; OECD, op. cit. 9, p. 27; André Raynauld and Jean-Pierre Vidal, *Labour Standards and International Competitiveness: A Comparative Analysis of Developing and Industrialized Countries*, Cheltenham, Edward Elgar Publishing, 1998, p. 12; Sapir, op. cit. 1, p. 792; Nicolas Valticos, 'International labour standards and human rights: Approaching the year 2000', 137 *International Labour Review* (1998) No. 2, pp. 135, 137ff..

¹³ James Goldsmith, *The Response*, London, Macmillan, 1995, p. 59.

organisations and human rights groups have increased the pressure on them to become more sensitive to violations of workers' rights both on their own premises and those of their sub-contractors in developing countries.¹⁴ As a consequence, more and more companies have adopted either codes of conduct or social labelling schemes dealing with labour standards. The former are written statements of principles or policies intended to serve as a commitment to a particular standard of conduct within the enterprise, while the latter involve the attaching of a physical label to a product, in order to inform the consumer at the point of sale about the social conditions surrounding its production.¹⁵ The fear of negative publicity and a possible loss of market share is, however, not always the only motive of companies adopting such measures. Sometimes they will also aim to establish an ethical brand image in the hope that this will itself become a source of competitive advantage.¹⁶

The great virtue of codes of conduct and social labelling schemes is that they offer an easy opportunity for consumers to support demands for better labour standards by simply choosing one product brand rather than another.¹⁷ There is also an important ancillary gain in as much as such measures make a contribution to overall public awareness about unsatisfactory working conditions in certain parts of the world¹⁸ but, unfortunately, both types of measure also have their weaknesses.

¹⁴ Bob Jeffcott and Lynda Yanz, 'Voluntary Codes of Conduct: Do they Strengthen or Undermine Government Regulation and Worker Organizing?', (Online), Available: <http://www.laborrights.org/projects/globalecon/jeffcott.html>; Dwight W. Justice, 'The new codes of conduct and the social partners', (Online), Available: <http://www.icftu.org/displaydocument.asp?Index=991209382&Language=EN&Printout=Yes>; Weiss, op. cit. 8, p. 166.

¹⁵ Janelle M. Diller, 'A social conscience in the global marketplace? Labour dimensions of codes of conduct, social labelling and investor initiatives', 138 *International Labour Review* (1999) No. 2, pp. 99, 102f.; Janet Hilowitz, 'Social labelling to combat child labour: Some considerations', 136 *International Labour Review* (1997) No. 2, p. 215, 216; Robert Howse and Michael J. Trebilcock, 'The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment', 16 *International Review of Law and Economics* (1996), p. 61, 72; Liubicic, op. cit. 4.

¹⁶ Diller, op. cit. 15, p. 101; European Commission and U.S. Department of Labor, 'Joint Report on the Main Issues Emerging from the EU-US Symposium on Codes of Conduct and International Labor Standards (Brussels, 20.02.1998)', November 1998, (Online), Available: http://europa.eu.int/comm/employment_social/soc-dial/sociallabels/symposium_en.pdf, pp. 9f.; Liubicic, op. cit. 4; OECD, op. cit. 9, p. 18.

¹⁷ Unhappily, things don't always go to plan. At the height of apartheid, an idealist young lecturer persuaded the manager of a supermarket in Hull to display notices revealing the origin of all South African fruit. Sales trebled.

¹⁸ European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs, 'Social Labels: Tools for Ethical Trade', Executive Summary, Prepared by Simon Zadek, Sanjiv Lingayah and Maya Forstater of the New Economics Foundation, Luxembourg, 1998, p. 7; Howse and Trebilcock, op.

a) General limitations

One problem derives from the fact that there are still plenty of companies that do not need to bother about public opinion or their corporate image. Such enterprises fall broadly into two categories. On the one hand, there are those producing intermediate goods, such as metals and rubber, which are then purchased and used by other enterprises to make the goods coming to the consuming public and, on the other hand, there are low-profile enterprises which produce consumer goods, but derive little or no benefit from any corporate or brand image. In neither case is the “spotlight phenomenon” likely to be of much relevance in constraining them to adhere to any code or scheme of this nature.¹⁹

A second drawback is that it is only possible for Multinational enterprises’ in-house codes and schemes to target exploitative practices in developing countries’ export-related industries. They can do nothing for workers employed in the domestic sectors of such economies and it is here that the worst forms of exploitation tend to reside.²⁰

b) Lack of coherence and credibility

In addition to these general shortcomings, a perusal of existing codes of conduct and social labelling schemes reveals an almost total absence of certain features which would normally be regarded as the *sine qua non* of anything claiming to be a regulatory system – reasonable harmony and some kind of mechanism for securing compliance.²¹ A simple step towards the desired uniformity could have been an arrangement among multinational corporations subscribing to the principles in the above-mentioned ILO Conventions and providing for the public disclosure of violations,²² but most of the current codes of conduct and social labelling schemes fall well short of such a model.

cit. 15, p. 72; IMF, op. cit. 1, p. 32; Paul Waer, ‘Social Clauses in International Trade: The Debate in the European Union’, 30 *Journal of World Trade* (1996) No. 4, p. 25, 41.

¹⁹ Liubicic, op. cit. 4.

²⁰ Kaushik Basu, ‘International labor standards and child labor’, 42 *Challenge* (1999) No. 5, pp. 80-93, (Online), Available: <http://proquest.umi.com/pqdweb?TS=9614220...C=1&Dtp=1&Did=000000044549913&Mtd=1Fmt=3>; European Commission (Trading System), op. cit. 5, p. 14; Lansky, op. cit. 3, p. 243; Lee, op. cit. 2, p. 186; Liemt, op. cit. 2, p. 433 ; Liubicic, op. cit. 4; Sapir, op. cit. 1, p. 792; UNCTAD, op. cit. 7, p. 13.

²¹ Liubicic, op. cit. 4.

²² European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs, ‘European Workshop on Monitoring of Codes of Conduct and Social Labels (Brussels, 25.11.1998)’, January 1999, (Online), Available: [http://europa.eu.int/comm/employment_social/soc-dial/sociallabels/workshop_en.pdf](http://europa.eu.int/comm/employment_social/social/soc-dial/sociallabels/workshop_en.pdf), p. 18; Jeffcott and Yanz, op. cit. 14; Bill Jordan, ‘Trade Unions in the 21st Century’, (Online), Available: <http://www.ilo.org/public/english/bureau/inst/project/network/jordan.htm>; Justice, op. cit. 14.

To begin with, their contents often appear to be determined in a non-transparent and non-participatory fashion.²³ A recent empirical study of an ILO-Working Party discovered that most of the authors of such codes and schemes tend to formulate their own definitions and statements of principle.²⁴ These standards, frequently couched in vague “feel good” language, do not simply vary in matters of detail, but sometimes even contradict internationally recognised statements of labour standards such as those laid down in the various ILO Conventions.²⁵ In fact, two-thirds of the codes and schemes reviewed by the Working-Party made no reference whatever to international standards and, even those which did, generally focused on a limited range of principles, usually those concerning things like child labour, with a strong emotive appeal to consumers.²⁶

The Working-Party’s study revealed the huge number and enormous variety of codes and schemes currently in place.²⁷ This vast tangle of measures inevitably leads to confusion. It is extremely difficult for commentators, and impossible for the average consumer, to make any sense of the great diversity in the definitions of principles and come to an appreciation of what any particular code or scheme stands for.²⁸

In addition to this lack of coherence, the credibility of most codes and schemes also leaves a lot to be desired.²⁹ One obvious snag is their voluntary nature. Companies, adopting a code of conduct or operating a social labelling scheme, are not bound to follow it,³⁰ but even accepting the voluntary frame, there are still major shortcomings. One problem is that many codes and schemes are promulgated without the benefit of sufficient resources to implement them. Codes and labelling schemes, which are launched with maximum publicity in multinationals’ homelands, are often unheard of in their production facilities overseas.³¹

A further weakness is that most codes and schemes are not subject to satisfactory monitoring and review procedures. Companies are generally concerned about leaks of

²³ Diller, *op. cit.* 15, p. 112.

²⁴ International Labour Organisation, Working Party on the Social Dimension of the Liberalization of International Trade, ‘Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues’, Governing Body, 273rd Session, GB.273/WP/SDL/1, Geneva, November 1998, (Online), Available: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/sdl-1.htm>.

²⁵ Diller, *op. cit.* 15, p. 116; ILO (Overview), *op. cit.* 24; Justice, *op. cit.* 14.

²⁶ See Diller, *op. cit.* 15, p. 116; European Commission (Social Labels), *op. cit.* 18, p. 1; ILO (Overview), *op. cit.* 24; Lee, *op. cit.* 2, p. 186; Liubicic, *op. cit.* 4.

²⁷ More than 200 codes of conduct and a dozen social labelling schemes were reviewed by the Working Party.

²⁸ European Commission (Workshop), *op. cit.* 22, p. 5; European Commission and U.S. Department of Labor (Joint Report), *op. cit.* 16, p. 7; ILO (Overview), *op. cit.* 24; Liubicic, *op. cit.* 4.

²⁹ Basu, *op. cit.* 20; Liubicic, *op. cit.* 4.

³⁰ OECD, *op. cit.* 9, p. 18; World Bank, ‘Open Labour Standards: Towards a System of Rolling Rule Regulation of Labor Practices’, Prepared by Charles Sabel, Dara O’Rourke and Archon Fung, Discussion Paper presented at the Annual Meeting of the World Bank, Seminar on Labor Standards, September 28, 1999, p. 3.

confidential information and opt to rely exclusively on their own internal reporting systems.³² As such monitoring involves cost, there is an incentive to engage in tokenism. In addition, employees charged with the task will frequently lack the requisite training and there is also a danger that workers, fearing employer reprisals, may not trust internal monitors sufficiently to inform them about violations other than the patently obvious.³³ Thus, in the absence of professional external monitoring, corporations will be slow to acknowledge failings and even slower to fine-tune their regulatory provisions in the light of experience. In view of the fact that most codes and schemes contain no machinery for informing consumers about violations even when they have been reported, there is little scope for public opinion to have any impact either.³⁴

In short, current practice allows companies to use codes and labelling schemes as public relations tools to obscure what may well be a vast gulf between corporate image and corporate action.

c) Initiatives based on international codes

The obvious place in which to seek a solution to these problems is among the codes addressed to multinational enterprises by international bodies. Among these, the most promising seem to be the *OECD Guideline on Employment and Industrial Relations*³⁵ and the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*.³⁶

At first sight, each of these codes seems to have the wherewithal to steer private promulgators in the same direction. Both of them refer to the principles embodied in the fundamental ILO Conventions and include a monitoring and review procedure³⁷ but, in spite of these elements of coherence and credibility, they are themselves seriously flawed and there is little evidence of their effectiveness in promoting core standards.³⁸

The first problem is that they are essentially voluntary in nature, which is why they have been included in this part of the current investigation. Although they call for the observance of core labour standards, they do not provide for any sanctions where a multinational

³¹ Diller, op. cit. 15, p. 119; ILO (Overview), op. cit. 24.

³² Diller, op. cit. 15, p. 118; Hilowitz, op. cit. 15, p. 220; Liubicic, op. cit. 4; OECD, op. cit. 9, p. 18.

³³ Diller, op. cit. 15, p. 119; Justice, op. cit. 14; New Economics Foundation and Catholic Institute for International Relations, *Open trading: options for effective monitoring of corporate codes of conduct*, on behalf of the Monitoring and Verification Working Group (Maggie Burns, et al.), London, New Economics Foundation and the Catholic Institute for International Relations, 1997, p. 1; Liubicic, op. cit. 4.

³⁴ Liubicic, op. cit. 4.

³⁵ Part of the more general *OECD Guidelines for Multinational Enterprises, 1976*.

³⁶ See generally Justice, op. cit. 14; P. T. Muchlinski, *Multinational Enterprises and the Law*, Oxford, Blackwell Publishers Ltd, 1999, pp. 458f..

³⁷ See Muchlinski, op. cit. 36, pp. 459ff..

³⁸ OECD, op. cit. 9, p. 18.

corporation or host state fails to meet its obligations and this clearly impairs their standard-setting role.³⁹ Perhaps it should come as no surprise that the ILO-Working Party's study revealed that less than 1% of the private codes reviewed made any reference to either of them.⁴⁰

A second deficiency is that both codes envisage the primacy of national law, that is to say, they reaffirm the sovereignty of states to determine the conditions under which multinational corporations are to operate in their territories.⁴¹ In their turn, multinational enterprises are to observe the law of the land and take full account of the policy objectives of their hosts.⁴² Unfortunately, this represents the thin end of an insidious wedge. The codes are not able to prevent a state from establishing lax or repressive labour laws, which it may do deliberately in order to attract foreign direct investment, while, for their part, multinational corporations may be happy to acquiesce.⁴³ Any such multinational corporation confronted with accusations of exploitative working conditions, will be able to boast that its conduct amounts to an exemplary compliance with both the local law and the international codes.

d) Summary

Sadly, it has to be concluded that the effectiveness of current codes of conduct and social labelling schemes in enforcing core labour standards is rather limited, since most measures lack the necessary coherence and credibility. The two international codes we have encountered are only of minor relevance because of their voluntary character and their adherence to the principle of the primacy of national law.

There are, however, a number of other private sector initiatives addressing the issue of core labour standards to which we shall now turn.

2) Consumer boycotts

If a product can be clearly connected with non-observance of fundamental workers' rights, consumers may try to boycott it.⁴⁴ Occasionally, this method of protest may be effective but, in most cases, the outcome will be uncertain. Everything will depend on widespread consumer

³⁹ Muchlinski, op. cit. 36, pp. 459, 470.

⁴⁰ ILO (Overview), op. cit. 24.

⁴¹ See *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, paragraph 8; *OECD Guidelines for Multinational Enterprises*, General Policies, paragraph 7.

⁴² See *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, paragraph 10; *OECD Guidelines for Multinational Enterprises*, General Policies, paragraph 1.

⁴³ Muchlinski, op. cit. 36, p. 473.

⁴⁴ Bhagwati, op. cit. 7, p. 757; Virginia A. Leary, 'Globalisation and Human Rights' in Janusz Symonides (ed.), *Human Rights: New Dimensions and Challenges*, UNESCO manual on human rights, Aldershot, Ashgate Publishing Ltd, 1998, p. 265, 277; OECD, op. cit. 9, p. 18.

participation which can never be taken for granted. The German Federal Court of Justice has even expressed the opinion that the average consumer is only ever interested in information regarding the economic value of a product - price and quality, but not the working conditions of those producing it.⁴⁵ Although it may now be possible to regard this view as outdated,⁴⁶ it cannot be denied that there are always going to be some consumers who do not care about the social conditions surrounding the production of the goods they buy. In addition, there are potentially enormous practical difficulties in mounting a boycott. Before the organisers can even start, it is necessary for a huge proportion of would-be consumers of the relevant product to be informed about the conditions under which it was produced.⁴⁷ Conveying the desired message to the critical mass can be a daunting task.

3) Socially responsible investment schemes

Another initiative taken by the private sector is the promotion of socially responsible investment schemes. Investment fund managers support companies with high standards in their social policy and avoid those which fail to meet the criteria they set.⁴⁸ The objectives of such investment schemes are, however, extremely varied and usually based on highly subjective judgements. If they make any reference to core labour standards at all, they tend to focus exclusively on one or two issues rather than a principle embodying all fundamental workers' rights.⁴⁹ A further shortcoming inherent in such schemes is that they are only able to address the social policy of countries in which listed companies invest.⁵⁰

4) International sympathy actions

In the context of private sector initiatives, one final mechanism worthy of mention is the international sympathy action.⁵¹ International trade secretariats represent affiliated national unions in related industries and, among other things, provide facilities for the exchange of information. Occasionally, they may seek to organise concerted union action against the social policy of particular employers. The best-known instance of such action was the campaign organised by the International Transport Workers' Federation against poor working

⁴⁵ Bundesgerichtshof (German Federal Court of Justice), Decision from May 9th, 1980 (1 ZR 76/78), in *Arbeitsrechtliche Praxis* Nr. 9 zu § 1 UnlWG, p. 4.

⁴⁶ Muchlinski, op. cit. 36, p. 476.

⁴⁷ Leary, op. cit. 44, p. 277.

⁴⁸ Diller, op. cit. 15, p. 107; OECD, op. cit. 9, p. 19; Waer, op. cit. 18, p. 41.

⁴⁹ Diller, op. cit. 15, pp. 107, 117; OECD, op. cit. 9, p. 19.

⁵⁰ OECD, op. cit. 9, p. 19.

⁵¹ See Liemt, op. cit. 2, p. 433; Muchlinski, op. cit. 36, pp. 471f.; Robert Taylor, 'Trade Unions and Transnational Industrial Relations', (Online), Available: <http://www.ilo.org/public/english/bureau/inst/project/network/taylor.htm>.

conditions on ‘flag of convenience’ vessels. Dockers’ unions engaged in sympathy action by refusing to load or unload offending vessels until the relevant demands were met.⁵²

The scope for this sort of action is, however, severely limited. One problem is that most national laws do not allow it.⁵³ In Germany, for instance, sympathy actions are generally unlawful, even in relation to purely domestic matters.⁵⁴ Workers are only allowed to strike if their employer is legally competent to meet their demands.⁵⁵ A second difficulty is that cross-boarder co-operation between trade unions is a rather fragile commodity. Workers are too often divided by language, culture and, above all, economic self-interest to achieve anything of lasting significance.⁵⁶

5) Summary

In conclusion it may be said that all current private sector initiatives are riddled with weaknesses, but are not entirely without merit. Although they do not provide a comprehensive solution to the problem of securing core labour standards, they have contributed to increased consumer awareness about exploitative conditions and have occasionally led to an improvement in standards. The use of the more coherent and credible initiatives should be encouraged and seen as a valuable complement to other forms of medicine.⁵⁷ It seems, however, that, as a last resort, some kind of legal compulsion is always going to be required.

III) Actions by governments

The logical next step, therefore, is to consider the initiatives taken by governments, either on their own or in concert with the governments of other closely associated states. We shall focus on the United States and the European Union.

⁵² Muchlinski, op. cit. 36, p. 472.

⁵³ Ibid., p. 472.

⁵⁴ Bundesarbeitsgericht (German Federal Labour Court), Decision from January 12th, 1988 (1 AZR 219/86), in 41 *Neue Juristische Wochenschrift* (1988), p. 2061.

⁵⁵ Thus, in the above situation, the employer of the dockers would not be able to introduce improved working conditions for the seamen. That would be a matter lying exclusively within the power of the owner of the vessel (see generally Peter Hanau and Klaus Adomeit, *Arbeitsrecht*, Neuwied, Kristel and Berlin, Hermann Luchterhand Verlag, 12th edn., 2000, p. 82. For the position in English law, which takes a more circuitous route to a similar end, see I. T. Smith and G. H. Thomas, *Smith & Wood’s Industrial Law*, 7th edn., London, Butterworths, 2000, pp. 665f.).

⁵⁶ Muchlinski, op. cit. 36, p. 473; Taylor, op. cit. 51.

⁵⁷ European Commission and U.S. Department of Labor (Joint Report), op. cit. 16, p. 4; Howse and Trebilcock, op. cit. 15, p. 72; IMF, op. cit. 1, p. 32; Liubicic, op. cit. 4.

1) The United States

Since 1983, the US has adopted various pieces of legislation providing for unilateral trade sanctions against foreign states violating basic workers' rights.⁵⁸ Among these laws are the *Caribbean Basin Economic Recovery Act* 1983⁵⁹ and the 1984 renewal of the *Generalized System of Preferences* (GSP),⁶⁰ the 1985 *Overseas Private Investment Corporation Amendments Act*⁶¹ and the *Omnibus Trade and Competitiveness Act* 1988 (amending Section 301 of the Trade Act 1974).⁶²

The GSP programme is the most promising of these efforts in as much as it incorporates decision and review procedures specifically designed to maintain core labour standards.⁶³ The concept of the GSP was introduced in the UN Conference on Trade and Development (UNCTAD) in 1964 as a means of helping developing countries to balance their international trading accounts. It enables them to be granted the right to export specified classes of goods at lower tariffs to the developed world.⁶⁴ The US renewed GSP requires candidate countries to respect fundamental labour standards and allows the US Government to deny them preferences if they fail to do so.⁶⁵ The most notable feature of this programme is that it does not link labour rights requirements to specific products destined for trade. It does not matter which goods are related to the infringement of workers' rights, or whether any production of goods is involved at all. Even violations in the domestic sector of the relevant economy may

⁵⁸ Leary, op. cit. 12, pp. 210ff.; Liemt, op. cit. 2, pp. 439ff.; Stephen R. Sleight, 'The Social Dimension of Economic Integration' in Jo Marie Griesgraber and Bernhard G. Gunter (eds.), *World Trade: Towards Fair and Free Trade in the Twenty-first Century*, London and Chicago, Pluto Press, 1997, p. 32, 45; Weiss, op. cit. 8, pp. 166f..

⁵⁹ *Caribbean Basin Economic Recovery Act of 1983*, 19 USC § 2702(c) (8); see Steve Charnovitz, 'The influence of international labour standards on the world trading regime: A historical overview', 126 *International Labour Review* (1987) No. 5, p. 565, 573; De Wet, op. cit. 9, p. 445; Harald Großmann and Georg Koopmann, 'Minimum Social Standards for International Trade?', 29 *INTERECONOMICS* (1994) No. 6, p. 277, 279; Liemt, op. cit. 2, p. 440.

⁶⁰ *Generalized System of Preferences Renewal Act of 1984*, 19 USC § 2462; see De Wet, op. cit. 9, p. 445; Janelle M. Diller and David A. Levy, 'Child Labor, Trade and Investment: Towards the Harmonization of International Law', 91 *The American Journal of International Law* (1997) No. 4, p. 663, 690; IMF, op. cit. 1, p. 17.

⁶¹ *Overseas Private Investment Corporation Amendments Act of 1985*, 22 USC § 2191 (a); see Brown, Deardorff and Stern, op. cit. 1, p. 234; Liemt, op. cit. 2, p. 440; Raynauld and Vidal, op. cit. 12, p. 11.

⁶² *Omnibus Trade and Competitiveness Act of 1988*, 19 USC § 2411 (a); see Großmann and Koopmann, op. cit. 59, p. 280; Muchlinski, op. cit. 36, p. 475; Sleight, op. cit. 58, p. 45.

⁶³ See Liemt, op. cit. 2, p. 440; UNCTAD, op. cit. 7, p. 7.

⁶⁴ Diller and Levy, op. cit. 60, p. 690; Klaus Heidensohn, *Europe and World Trade*, London and New York, Pinter, 1995, p. 224. This is permissible by virtue of the added Part IV of the GATT. The operation of the GSP is enabled by a waiver of the basic Most Favoured Nation obligation in Articles XXXVI and XXXVII of the Agreement; see Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, London and New York, Routledge, 1995, p. 35.

⁶⁵ Charnovitz, op. cit. 59, p. 573; IMF, op. cit. 1, p. 17; Leary, op. cit. 12, p. 211.

suffice.⁶⁶ This broad-brush approach is an obvious improvement on the limited private sector initiatives discussed above.

Seemingly, the US stand has had a significant impact, especially on smaller countries. States heavily dependent on the US market for their export earnings are forced to make concessions and give undertakings regarding their future policies.⁶⁷ Unfortunately, it is also to be observed that the US Government has not used its powers consistently.⁶⁸ In spite of the fact that China resisted all pressure to mend its ways as an unwarranted interference in its domestic affairs, it was still granted most-favoured-nation status.⁶⁹ Another instance of inaction concerns Malaysia, whose prime minister went so far as to lead a ‘southern’ challenge to the whole concept of universal human rights. Notwithstanding that working conditions in Malaysia fall well short of the requisite standard, it is still a full beneficiary of the GSP programme. Perhaps it is not just a coincidence that the major recipients of GSP exports from Malaysia are US-based electronics firms!⁷⁰

The half-hearted and inconsistent administration of the GSP programme has led both to disruptions in trade relations and to serious questions about US motivations.⁷¹ It is claimed that its ‘aggressive unilateralism’ is nothing but a form of protectionism.⁷² Furthermore, the lesson from China seems to be that unilateral action is utterly incapable of enforcing core labour standards on a truly global basis.

2) The European Union

The first recognition of the need to guarantee fair labour standards can be found in the *Lomé Convention* 1984, an Agreement dealing with trade preferences, made between the European Community and Asian and African developing countries.⁷³ The impact of this agreement has,

⁶⁶ Pharis J. Harvey, ‘U.S. GSP Labor Rights Conditionality: “Agressive Unilateralism” or a Forerunner to a Multilateral Social Clause?’, (Online), Available: <http://www.laborrights.org/publications/usgsp.html>.

⁶⁷ See OECD, op. cit. 9, p. 17; UNCTAD, op. cit. 7, p. 7.

⁶⁸ Muchlinski, op. cit. 36, p. 474.

⁶⁹ Howse and Trebilcock, op. cit. 15, p. 71; UNCTAD, op. cit. 7, p. 7.

⁷⁰ Such as Harris and Motorola (Harvey, op. cit. 66).

⁷¹ In 1990, US labour unions and human rights groups filed a complaint in the US District Court for the District of Columbia alleging that president George Bush had failed adequately to enforce the GSP worker rights provisions (Muchlinski, op. cit. 36, p. 474). This suit was ultimately unsuccessful due to the Court ruling that the president had absolute discretion to administer the GSP program as a foreign policy initiative (See *International Labor Rights Education & Research Fund v. Bush*, 752 F. Supp. 495 (DDC 1990)). This judgement was affirmed in 1991 by the United States Court of Appeals, District of Columbia Circuit [is discussed in Harvey, op. cit. 66; Leary, op. cit. 12, p. 212].

⁷² Basu, op. cit. 20; Jeff Clark, ‘The Globalization of Production and International Labour Standards’, February 1995, (Online), Available: <http://www.uottawa.ca/hrrec/publicat/GLOBALstandards.html>; Hansenne, op. cit. 12; Leary, op. cit. 44, p. 267; Sleight, op. cit. 58, p. 45.

⁷³ See De Wet, op. cit. 9, p. 445; Peter Dicken, *Global Shift: Transforming the World Economy*, London, Paul Chapman Publishing Ltd, 3rd edn., 1998, p. 114; Trebilcock and Howse, op. cit. 64, p. 308.

however, been rather limited, principally because it contains neither proper definition of principles nor any follow-up or control machinery.⁷⁴

A more important contribution to the enforcement of core labour standards on a global level is the EU's new GSP adopted in 1994,⁷⁵ which confronts the issue from two directions. On the one hand, the European Commission has authority to withdraw a country's preferential entitlements where the practice of any form of slavery or forced labour (as defined in the relevant ILO Conventions) is detected, while, on the other hand, as from 1998, an additional preferential margin may be granted to countries actively complying with certain other standards, in particular, the fundamental ILO Conventions concerning the freedom of association, the right to organise and bargain collectively and the abolition of child labour.⁷⁶

This "stick and carrot" approach seems likely to have a positive impact on social standards in developing countries, especially as it targets violations of rights in all sectors of their economies.⁷⁷ There are, nevertheless, still some shortcomings.

One weakness is that not all the fundamental ILO conventions are covered. Apart from the recent Convention on the worst forms of child labour, those dealing with equal remuneration and discrimination have not yet been brought into the scheme.⁷⁸

A far more serious problem is that the system of granting and withdrawing preferences is not automatic. The operative text is facultative, enabling the Commission to take such action as may be dictated by the circumstances.⁷⁹ This opens the door to politics and to all the inconsistencies in the administration of the rules that we encountered in relation to the US GSP.

Looking ahead, there is another factor which will seriously undermine the efficacy of this sort of mechanism both in Europe and in the USA. Following the Uruguay Round, the general

⁷⁴ Adamy, *op. cit.* 4, p. 273.

⁷⁵ See Council Regulation of 19 December 1994 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries (3281/94/EC; OJ 1994, No. L348/1); see also Council Regulation of 21 December 1998 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001 (2820/98/EC; OJ 1998, No. L357).

⁷⁶ See Articles 22 and 11 of the GSP; see also Steve Peers, 'Reform of the European Community's Generalized System of Preferences: A Missed Opportunity', 29 *Journal of World Trade* (1995) No. 6, pp. 79, 92f..

⁷⁷ Article 11 of the GSP requires developing countries to point out any sectoral restrictions on the application of social legislation. See generally UNCTAD, *op. cit.* 7, p. 7; Waer, *op. cit.* 18, pp. 29f.

⁷⁸ See European Trade Union Confederation (ETUC), International Confederation of Free trade Unions (ICFTU) and World Confederation of Labour (WCL), 'ETUC/ICFTU/WCL proposal to incorporate the ILO conventions on discrimination and equal remuneration into the European Union (EU) GSP Special Incentive Arrangements for labour rights and environmental protection', (Online), Available: <http://www.icftu.org/displaydocument.asp?Index=990916182&Language=EN&Printout=Yes>.

⁷⁹ See Articles 11 and 22 of the GSP; see also Paul Waer and Bart Driessen, 'The New European Union Generalised System of Preferences: A Workable Compromise in the EU - but a Better Deal for Developing Countries?', 29 *Journal of World Trade* (1995) No. 4, p. 97, 112.

lowering of tariffs and other trade barriers will reduce the scope for GSP preferences, which means both less ‘stick’ and less ‘carrot’.⁸⁰

The European Parliament has recently come up with a new idea. This is to produce a model code of conduct for European businesses operating in developing countries.⁸¹ Among other things, this code would incorporate core labour standards and would be backed by European enforcement procedures.⁸² Bearing in mind the inherent weakness of all voluntary codes, this aspiration to force multinationals to observe core standards in all their production facilities is especially welcome.

Again, however, the proposed regime is less than ideal. Apart from all the delicate issues of extraterritoriality that it would raise,⁸³ its impact on working conditions would necessarily be limited to multinationals’ own workforces. It would be unable to do anything about the domestic sectors of developing country economies where, as we have seen, the worst forms of worker exploitation are usually found. Nevertheless, in spite of this deficiency, it seems that it could make a valuable contribution to the establishment of core labour standards as ruling norms.

3) Summary

Both the United States and the European Union have tried to address the issue of international labour standards, principally through their GSPs. Although these schemes have had some impact especially in smaller developing countries, they often have to take second place to political pragmatism which carries the risk of provoking confrontations and retaliations. A further problem in the offing for all mechanisms of this type is the reduced scope for granting preferences after the Uruguay Round. The European Parliament’s proposal for a code of conduct seems to epitomise the fact that neither individual governments nor regional organisations are ever going to be able to enforce core labour standards on a truly global basis.

⁸⁰ Leary, op. cit. 12, p. 213; OECD, op. cit. 9, p. 17.

⁸¹ European Parliament, ‘Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct’, European Parliament Resolution A4-0508/98 of 15 January 1999, (Online), Available: <http://www3.europarl.eu.int/omk/omnsapir.so/pv2?APP=PV2&PRG=CALEND&FILE=990115&TPV=DEF&LANGUE=EN>.

⁸² Diller, op. cit. 15, p. 123.

⁸³ For example, it would often be found in effect telling foreign subsidiaries how to behave in their home countries; see also Clark, op. cit. 72.

IV) Multilateral approaches

If we pause to take stock, our failure so far to identify an effective means of securing the enforcement of core labour standards may not be so surprising. Their human rights character means that they are not the property of any country or group of countries, but a shared concern of humanity. Logically, it should follow from this that their enforcement ought to be a co-operative enterprise with a global dimension.⁸⁴ There appear to be two organisations capable of providing the support for such a multilateral initiative, the International Labour Organisation and the World Trade Organisation.

1) International Labour Organisation

Since its inception in 1919, the ILO has built up a system of international standards covering a huge range of work-related matters and grown into an organisation with a membership of 175 states and near-global coverage.⁸⁵ As we have seen above, it has been responsible for producing the key Conventions defining fundamental workers' rights, all of which are further reinforced by its *Declaration of Fundamental Principles and Rights at Work*. Perhaps its most important feature is its tripartite structure. In its executive bodies it brings together representatives of governments, employers and workers.⁸⁶ It is commonly acknowledged that, thanks to the presence of these non-government experts, its supervisory functions are more highly developed than those of any other international organisation.⁸⁷

In view of the ILO's vast wealth of experience, it seems appropriate to ask why there should still be an ongoing debate about how to enforce core labour standards. The answer is that the ILO is an essentially voluntary organisation. Member states have the right to decide whether to ratify Conventions and, even when they have done so, the ILO is not able to compel their compliance with the standards in question. It relies solely on member states' willingness to honour their commitments.⁸⁸ There is some suggestion that many countries

⁸⁴ UNCTAD, op. cit. 7, p. 3.

⁸⁵ See generally Lee, op. cit. 2, p. 174.

⁸⁶ Hansenne, op. cit. 12; IMF, op. cit. 1, p. 15; Langille, op. cit. 6, p. 49; Raynauld and Vidal, op. cit. 12, p. 16; Juan Somavia, 'Menschenwürdige Arbeit: vorrangige Aufgabe im neuen Jahrtausend', 48 *Vereinte Nationen* (2000) No. 2, p. 49, 52.

⁸⁷ Jordan, op. cit. 23; Valticos, op. cit. 12, p. 143.

⁸⁸ Adamy, op. cit. 4, p. 271; Cappuyns, op. cit. 6, p. 660; De Wet, op. cit. 9, p. 446; Hansenne, op. cit. 12; Harvey, Collingsworth and Athreya, op. cit. 9; Langille, op. cit. 6, p. 48; Lee, op. cit. 2, p. 179; Jai S. Mah, 'Core Labour Standards and Export Performance in Developing Countries', 20 *The World Economy* (1997) No. 6, p. 773, 775; Raynauld and Vidal, op. cit. 12, p. 19; Valticos, op. cit. 12, p. 140; World Bank, op. cit. 30, p. 32.

have been happy to ratify Conventions solely because the ILO lacks the means to enforce them.⁸⁹

There are some commentators, however, who are not dismayed by this gap between ratification and implementation. They take the view that it is better to raise labour standards indirectly by stimulating economic growth in the developing world through the medium of financial inducements and improved access to markets.⁹⁰ In the long-term, sustained growth and development are seen as having a more positive impact on social standards. Developing countries need support, not sanctions.⁹¹

While this may be partly true, it seems likely that, if a country's government is hostile to the whole idea of raising labour standards, the trickle-down effect from economic growth to better working conditions will be slow and frequently cut off completely by anti-labour interests.⁹² Financial aid to such a country might simply serve to bolster the incumbent regime while being of no benefit whatever to workers seeking improved conditions. Hence, it is submitted that any strategy designed to enhance labour standards solely by focusing on economic growth can never be remotely equivalent to clear rules effectively enforced.⁹³

The bottom line is that the ILO is not able to enforce the standards it prescribes. The fact that working conditions around the world can still be so poor is stark confirmation of its weakness. As presently constituted, it is plainly incapable of functioning as a structure for achieving world-wide compliance with core labour standards.

2) World Trade Organisation

In marked contrast to the ILO, the WTO has no difficulty in enforcing its rules. Its integrated dispute settlement machinery runs virtually automatically, from the inception of a complaint to the imposition of trade sanctions, ensuring that member states can be effectively called upon to account for any transgressions.⁹⁴

⁸⁹ Jagdish Bhagwati, *Free Trade, 'Fairness' and the New Protectionism: Reflections on an agenda for the World Trade Organisation*, IEA Occasional Paper 96, London, The Institute of Economic Affairs, 1995, p. 28.

⁹⁰ See Akram, op. cit. 2; Howse and Trebilcock, op. cit. 15, p. 71; Lee, op. cit. 2, p. 178.

⁹¹ See Cappuyns, op. cit. 6, p. 670; Leary, op. cit. 12, p. 199; Chris Milner, 'New Standards Issues and the WTO', 30 *The Australian Economic Review* (1997) No. 1, p. 90, 92; Sapir, op. cit. 1, p. 792; UNCTAD, op. cit. 7, p. 8.

⁹² Howse and Trebilcock, op. cit. 15, p. 71; Lee, op. cit. 2, p. 187.

⁹³ Adamy, op. cit. 4, p. 270; Liubicic, op. cit. 4; see generally Tatjana Ansbach, 'Peoples and individuals as subjects of the right to development' in Subrata Roy Chowdhury, Erik M.G. Denters and Paul J.I.M. de Waart (eds.), *The Right to Development in International Law*, Dordrecht, Martinus Nijhoff Publishers, 1992, p. 155, 160.

⁹⁴ See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 1994, Annex 2 to the *Marrakesh Agreement Establishing the World Trade Organization*. In brief, if the parties to a dispute cannot settle their differences through mediation or arbitration, the Dispute Settlement Body (DSB), which is in

The prospect of a perfect solution to our problem was raised during the Uruguay Round when the United States and the European Parliament put forward proposals advocating the inclusion of fundamental workers' rights within the WTO framework in the form of a so-called "social clause".⁹⁵ This initiative was, however, unsuccessful and, in spite of the lead given by Article XX (e) of the GATT, which allows member states to set up trade barriers against goods produced by prison labour,⁹⁶ the WTO is not currently dealing with the matter.

It is tempting to seek a solution in the antidumping clause of Article VI of the GATT.⁹⁷ It seems plausible to argue that 'social dumping' in the shape of policies reducing costs through the exploitation of workers should actually be seen as an especially offensive breach of the provision, but the history of the GATT negotiations in 1947 clearly shows that the ambit of the rule is limited to straightforward price dumping. A more far-reaching proposal from the Cuban delegation to outlaw dumping practised through other mechanisms such as currency depreciation, subsidised freight rates or sweated labour, was explicitly rejected.⁹⁸ An added difficulty is that the *1994 Agreement on the Implementation of Article VI of the GATT*,⁹⁹ which clarifies the rules relating to anti-dumping actions that can be taken by affected states, requires "special regard" to be paid to the "special situation" of developing countries.¹⁰⁰ Hence, the WTO, like the ILO, does not presently do anything to secure the enforcement of core labour standards.

essence the WTO Council in another guise, will set up a panel to decide the matter. Although the Panel's report will still have to be delivered for formal adoption by the DSB, it is no longer possible for a disgruntled party to wield a power of veto as under the pre-existing GATT machinery. See generally John Howard Jackson, William J. Davey and Alan O. Sykes, *Legal problems of international economic relations: cases, materials and text on the national and international regulation of transnational economic relations*, St. Paul, MN, West Publishing, 3rd edn., 1995, p. 332; Steve Hughes and Rorden Wilkinson, 'International labour standards and world trade: No role for the World Trade Organization?', 3 *New Political Economy* (1998) No. 3, pp. 375-389, (Online), Available: <http://proquest.umi.com/pqdweb?TS=9614224...C=1&Dtp=1&Did=000000035829285&Mtd=1&Fmt=3>; J. G. Merrills, *International Dispute Settlement*, Cambridge, Cambridge University Press, 3rd edn., 1998, p. 200; Weiss, op. cit. 8, p. 176.

⁹⁵ In fact, it had already since the 1950s been the aspiration of the United States to include more labour standards in the GATT framework. The reason for this can be found in the failure of the International Trade Organisation (ITO). Among other things, the mandate of the ITO, as enunciated in 1947 by the Havana Charter, called for countries to take measures against unfair labour conditions. However, the ITO was never created, which left the post-war international economic constitution incomplete. Thus, the 1947 GATT, originally designed as a provisional short-term agreement for the liberalisation of tariffs, became a permanent system of great complexity. However, despite the proposals brought forward by the United States, no new labour standards had been incorporated. See generally Brown, Deardorff and Stern, op. cit. 1, p. 232; De Wet, op. cit. 9, p. 445; Leary, op. cit. 12, p. 198; Mah, op. cit. 88, p. 776.

⁹⁶ Brown, Deardorff and Stern, op. cit. 1, p. 232; Meyer, op. cit. 2, p. 34.

⁹⁷ See Meyer, op. cit. 2, p. 43.

⁹⁸ See Diller and Levy, op. cit. 60, pp. 680f.

⁹⁹ *Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994*, Annex 1 A to the Marrakesh Agreement Establishing the World Trade Organization.

¹⁰⁰ Diller and Levy, op. cit. 60, p. 680.

This raises the question whether the WTO can be expected to change its stance at some time in the future. This subject was in fact addressed at the first WTO Ministerial Meeting in Singapore in December 1996, but there were major disagreements among the participants. The compromise position ultimately adopted recognised core labour standards but identified the ILO as the most appropriate body to deal with them.¹⁰¹ Although the wording of this Declaration clearly revealed reluctance to extend WTO activities into the field of social standards, it was not sufficient to end the debate.¹⁰² Leading industrialised countries have continued to press for core labour standards to become a WTO concern¹⁰³ and, it is submitted that there are compelling reasons why this should be the case.

We shall begin by considering export industries. While the WTO is primarily interested in the liberalisation of world trade and the production of rules to that end, there has recently been a general move towards the regulation of economic activities which are ‘trade-related’ rather than ‘trade-specific’.¹⁰⁴ Trade-related activities are those which are intrinsic to the production of goods or services, but do not themselves rank as tradable commodities. Two major agreements concerning such matters to emerge from the Uruguay Round were the *Agreement on Trade-Related Aspects of Intellectual Property Rights*¹⁰⁵ and the *Agreement on Trade-Related Investment Measures*.¹⁰⁶

Against this backdrop, it is increasingly difficult to argue that trade-related labour standards have no place in the WTO setting.¹⁰⁷ Although it is obvious that the conditions to be endured by workers cannot be classified as tradable commodities, they clearly constitute an intrinsic part of the process culminating in the production of goods or services to be traded. Thus, in order to avoid a gap in the logic of the system, working conditions in export industries have to be brought within the same regulatory framework as other trade-related inputs.¹⁰⁸ Seemingly, the preamble of the *Marrakesh Agreement*, the very foundation of the

¹⁰¹ World Trade Organisation, ‘Singapore Ministerial Declaration’, Adopted on 13 December 1996, WT/MIN (96)/DEC, (Online), Available: http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec.htm, paragraph 4.

¹⁰² Virginia A. Leary, ‘The WTO and the Social Clause: Post-Singapore’, 8 *European Journal of International Law* (1997) No. 1, p. 118, 120; Wilkinson, op. cit. 9, p. 176.

¹⁰³ See for instance European Council, ‘Preparation of the Third WTO Ministerial Conference’, Council Conclusions, Brussels, 25 October 1999, (Online), Available: <http://europa.eu.int/comm/trade/pdf/agr15en.pdf>, paragraph 3; European Parliament, ‘Resolution on the Third Ministerial Conference of the World Trade Organisation in Seattle’, Brussels, 15 December 1999, (Online), Available: http://europa.eu.int/comm/trade/2000_round/ep_reswto.htm, paragraph 3.

¹⁰⁴ See European Commission (Trading System), op. cit. 5, p. 19; Wilkinson, op. cit. 9, p. 166.

¹⁰⁵ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1994, Annex 1 C to the *Marrakesh Agreement Establishing the World Trade Organization*.

¹⁰⁶ *Agreement on Trade-Related Investment Measures*, 1994, Annex 1 A to the *Marrakesh Agreement Establishing the World Trade Organization*.

¹⁰⁷ Langille, op. cit. 6, p. 50; Leary, op. cit. 12, p. 200.

¹⁰⁸ Hughes and Wilkinson, op. cit. 94; Langille, op. cit. 6, p. 50; Leary, op. cit. 12, p. 200.

WTO, with its commitment to full employment and the raising of living standards could itself be wide enough to justify this step.¹⁰⁹

A more controversial question is whether such a regime should also apply to the domestic sector of a country's economy, where working conditions cannot be so clearly related to trade. Indeed, most of those seeking to include labour standards within the WTO framework seem to accept that the impact of any "social clause" should be limited to labour standards in export industries.¹¹⁰ To their minds, the aim of such a provision would primarily be to eliminate external involvement in unacceptable exploitation.¹¹¹ As the import of products manufactured under inhumane conditions clearly helps to perpetuate the status quo in their country of origin, working conditions in export industries are the things to be targeted. As there is no such participatory involvement in violations of fundamental workers' rights in the domestic sector of the economy of such a state,¹¹² it is argued that there is no place for such matters in an organisation concerned with the liberalisation of international trade.¹¹³ Almost by way of apology, it is asserted that, in the long-term, domestic production would probably gain spillover benefits from things like the legalisation of trade unions in export industries.¹¹⁴

It is respectfully submitted that this view is misguided. Core labour standards are basic human rights and the moral obligation of the international community to enforce them does not stop at the border of the domestic part of a delinquent state's economy. Apart from this, it should be borne in mind that the membership of the WTO is essentially the same as that of the ILO.¹¹⁵ WTO members, which are also members of the ILO, will have already made solemn commitments to observe and enforce fundamental workers' rights and these undertakings are most emphatically not limited to working conditions in export industries.¹¹⁶

To sum up, the enforcement of core labour standards should become part of the business of the WTO and the obligation to comply should be free from any sectoral limitation.

¹⁰⁹ The essential part of the preamble states: "*Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and ...*". See Cappuyns, op. cit. 6, pp. 674f.; Waer, op. cit. 18, p. 26; Weiss, op. cit. 8, pp. 174f..

¹¹⁰ See for instance De Wet, op. cit. 9, p. 452; Hughes and Wilkinson, op. cit. 94; Liemt, op. cit. 2, p. 435.

¹¹¹ De Wet, op. cit. 9, p. 452.

¹¹² Actually, the drawing of this distinction is harder than it first appears. How do you distinguish between unsatisfactory conditions in the factories of sub-contractors supplying your components and appalling conditions being suffered by employers of the local gas company or agricultural labourers producing your canteen food?

¹¹³ De Wet, op. cit. 9, p. 452.

¹¹⁴ See Meyer, op. cit. 2, p. 46.

¹¹⁵ See Diller and Levy, op. cit. 60, p. 695; European Commission (Trading System), op. cit. 5, p. 19.

¹¹⁶ See Hansenne, op. cit. 12; Leary, op. cit. 12, p. 202

3) Joining forces

When it comes to securing the enforcement of core labour rights, both the ILO and the WTO have serious deficiencies. The ILO has no ‘teeth’, while the WTO lacks both relevant experience and the benefits deriving from the ILO’s tripartite structure. Without the help of the ILO’s non-government experts, it is doubtful whether it could provide the necessary monitoring and supervisory machinery.¹¹⁷

For these reasons, it is essential for the WTO to join forces with the ILO, combining the “teeth” of its Dispute Settlement System with the ILO’s expertise.¹¹⁸ An added advantage of such a union is that it would eliminate the possibility of the two organisations dealing with the same issue, but coming to different conclusions, a scenario potentially damaging to the reputation of both.¹¹⁹

This brings us to the question of how to forge the necessary links between the two bodies. One proposal is that core labour standards should be added to Article XX (e) of the GATT which, as we have seen, deals with products produced by prison labour.¹²⁰ The common purpose could then be pursued through institutional linkages. In the first place, there should be a duty on WTO member states to consult with the ILO before taking trade measures against exporters alleged to be in default¹²¹ and, in addition, there should also be a measure of ILO input into any relevant WTO dispute settlement proceedings. This should be secured by imposing an obligation on the Panel to consult with the ILO before presenting its report for adoption by the Dispute Settlement Body.¹²²

Although this proposal is clearly a step in the right direction, it suffers from a serious weakness. On its own, the amendment of Article XX (e) would only be capable of addressing labour standards in export industries because its ambit would be limited to products produced for trade. It would have no impact at all on the conditions which are generally in most need of improvement.

It is submitted that the best approach would be to make membership of the WTO conditional upon the acceptance of core labour standards.¹²³ Thus, WTO membership would *ipso iure* oblige every country to guarantee fundamental workers’ rights in all parts of its

¹¹⁷ European Commission (Trading System), op. cit. 5, p. 21; Weiss, op. cit. 8, p. 176.

¹¹⁸ Basu, op. cit. 20; De Wet, op. cit. 9, p. 446; Leary, op. cit. 12, p. 201; Somavia, op. cit. 86, p. 52.

¹¹⁹ De Wet, op. cit. 9, p. 456.

¹²⁰ See Trebilcock and Howse, op. cit. 64, p. 189.

¹²¹ This is necessary to prevent countries from unilaterally setting up trade barriers on the basis of their own, possibly crude and prejudiced, assessments (see generally Leary, op. cit. 12, p. 204; De Wet, op. cit. 9, p. 457).

¹²² Trebilcock and Howse, op. cit. 64, p. 189.

¹²³ See Harvey, Collingsworth and Athreya, op. cit. 9; Incognito, ‘The World Trade Organization and the social clause’, 133 *International Labour Review* (1994) No. 3, p. 407, 414.

economy. The ILO, with its efficient supervisory machinery, would be in charge of monitoring compliance with the rules and, whenever any dispute arose, the WTO's Panel would have to consult with it before delivering its report to the Dispute Settlement Body.¹²⁴ If a country continued to disregard its obligations, it could be suspended from the benefits of the WTO, allowing all other member states to adjust tariffs or impose such sanctions as they saw fit.¹²⁵ Although this form of punitive action should only be imposed as a last resort and after a reasonable amount of time, all countries would know that at some stage there could be sanctions and that those sanctions could hurt.

There is only one concession which seems to be appropriate. It would almost certainly be necessary to offer technical and financial assistance to some developing countries in order to enable them to meet the required standards.¹²⁶ One potential problem area would be the abolition of child labour.¹²⁷ We need to bear in mind that many families in the developing world still depend on the income of their children in order to survive and, in some countries, a good education in a clean, safe classroom is not an alternative option anyway.¹²⁸ A sudden enforcement of core standards without any sort of financial intervention could be a recipe for disaster.¹²⁹

V) Conclusion

Certain core labour standards, that is to say, the outlawing of forced labour, the safeguarding of the freedom of association, the protection of the right to organise and engage in collective bargaining and the elimination of discrimination and child labour, are founded on basic human rights and should, for that reason alone, be enforced world-wide as an absolute minimum. When it comes to the question of how to guarantee these norms, neither unilateral nor regional government action, nor any form of private sector initiative seems able to offer a complete answer. Clearly, some form of multilateral approach is necessary.

The most promising idea seems to be to make membership of the WTO conditional upon the acceptance of the ILO's core labour standards. The highly effective Dispute Settlement Mechanisms of the WTO should be married with the experience of the ILO which should

¹²⁴ See Hughes and Wilkinson, op. cit. 94.

¹²⁵ Harvey, Collingsworth and Athreya, op. cit. 9.

¹²⁶ See generally De Wet, op. cit. 9, p. 461; Hansenne, op. cit. 12; Weiss, op. cit. 8, p. 177f.

¹²⁷ See Kenneth A. Swinnerton, 'An Essay on Economic Efficiency and Core Labour Standards', 20 *The World Economy* (1997) No. 1, p. 83; UNCTAD, op. cit. 7, p. 13.

¹²⁸ Even if the education is available, the labour may sometimes be the means of paying for it. See various reports, e.g. Daily Telegraph, 8 March 2001 p. 13, relating to the deaths of over 40 children as a consequence of the scandalous manufacture of fireworks in the Fang Lin Primary School in Jiangxi Province, China.

¹²⁹ Basu, op. cit. 20; Langille, op. cit. 6, p. 36; Lee, op. cit. 2, p. 188.

monitor the performance of WTO member states and act in an advisory capacity in any dispute situation. It would, of course, be essential to provide support to developing countries in order to help them make the grade, and this would obviously cost money, but it is submitted that this would be money well spent.