



**Enhancing Labour Rights in a Globalised World:
A Comparative Transatlantic Perspective**

Adriana Opromolla

CRIDHO Working Paper 2007/04



Université catholique de Louvain
Faculté de droit
Centre de philosophie du droit
Cellule de recherche interdisciplinaire en droits de l'homme
www.cpedr.ucl.ac.be/cridho

La Cellule de recherche interdisciplinaire en droits de l'homme (CRIDHO) a été constituée au sein du Centre de philosophie du droit, Institut extra-facultaire de l'Université catholique de Louvain, par des chercheurs soucieux de réfléchir le développement contemporain des droits fondamentaux à l'aide d'outils d'autres disciplines, notamment l'économie et la philosophie politique. La CRIDHO travaille sur les rapports entre les mécanismes de marché et les droits fondamentaux, aussi bien au niveau des rapports interindividuels qu'au niveau des rapports noués entre Etats dans le cadre européen ou international.

CRIDHO Working Papers

Tous droits réservés.

Aucune partie de ce document ne peut être
publiée, sous quelque forme que ce soit,
sans le consentement de l'auteur.

The Interdisciplinary Research Cell in Human Rights (CRIDHO) has been created within the Centre for Legal Philosophy (CPDR), an extra-department Institute of the University of Louvain, by scholars seeking to understand the development of fundamental rights by relying on other disciplines, especially economics and political philosophy. The CRIDHO works on the relationship between market mechanisms and fundamental rights, both at the level of interindividual relationships as at the level of the relationships between States in the European or international context.

CRIDHO Working Papers

All rights reserved

No part of this paper may be reproduced
in any form
without consent of the author

Introduction

Globalisation is unanimously defined as a complex phenomenon, grounded on a series of factors leading to profound economic and social changes. Among such factors are the liberalisation of international trade and the retreat of national protectionism, the huge expansion of the activities of transnational companies and of foreign investment, the consolidation of legal and economic regional systems (the European Union, the North American Free Trade Agreement (NAFTA), MERCOSUR in Latin America etc.), the advancement of technologies and communications, a change in production models, as well as the impressive advancement of organised civil society to the foreground of the political scene¹. Today's globalised society is extremely competitive. Increased competition between developing and developed countries, and between developed countries themselves, provokes a broad range of social consequences. Depending on national and local contexts, such consequences extend from sheer exploitation of workers in "sweatshops" of developing countries, to a drastically increased instability of the labour market in developed countries, more and more oriented towards "flexible" models like part-time, temporary work, informal work or work done outside of union membership. Such instability is compounded by competition from low-wage economies in developing countries, which is at the origin of movements such as relocation of companies or "offshore outsourcing"². Transnational companies play in fact a prominent role in this phenomenon. They have created new forms of business and investment transforming work relations. The agreements, alliances and contracts concluded by these companies transcend national spheres of interest and labour laws. The liberalisation of investments, favoured by regional agreements, has vested them with impressive power of relocation and restructuring, thus diminishing the effectiveness of the conditions set by national labour regulations for the protection of workers' rights. In developing countries, the race to attract foreign investment has overstretched competition in a way often disregarding basic labour rights.

I will start my reflection from the assumption that labour laws do not only respond to economic aims but also to a moral purpose, that is the protection of human dignity and rights of workers, allowing for empowering and self-determination³. The rights inherent to work are human rights guaranteed by international law and reflect the degree of advancement of a country's democratic regime. Guaranteeing the respect of workers' rights in the context of globalisation would ensure a double benefit: that economic growth can be achieved together with social justice.

The erosion of the State's authority to regulate and protect workers' rights has been accompanied by an increasing concern for such rights at supranational level. This tendency has been manifested at regional (both in the European and North-American context) and global level (namely, in the context of the International Labour Organisation (ILO) and of the World Trade Organisation (WTO)). The different approaches adopted and the controversies surrounding legal mechanisms linking labour standards and trade law show the absence of an international consensus on multilateral systems for an improved protection of labour rights. I will thus confront the two major transatlantic partners, the EU and the United States, starting with the provisions set by their respective Generalised Systems of Preferences. Subsequently, I will analyse the systems of protection adopted by the NAFTA (a system of pure co-operation mindful of national sovereignties) with its peculiar *social clause*. I will then illustrate examples of social clauses contained in EU and US bilateral trade agreements.

¹ M. A. Moreau, *Normes sociales, droit du travail et mondialisation – confrontations et mutations*, Dalloz, 2006, p. 1.

² B. Hepple, *Labour Laws and Global Trade*, Hart Publishing, Oxford and Portland, 2005, p. 6.

³ People work not only to earn a living, but also to achieve personal fulfilment. Labour laws then affect both their physical and psychological well being. They uphold human rights in the workplace and ensure that "labour is not a commodity or article of commerce" (ILO Declaration of Philadelphia of 1944), in B. Hepple, *ibidem*, p. 13.

The US consolidated approach, favourable to applying trade sanctions in case of failure to respect labour standards on behalf of its commercial partners, is essential to understand the heated debate which followed the US proposal to introduce a social clause in the text of the General Agreement on Tariffs and Trade (GATT) as of the mid-70s. The US made further attempts subsequently to the adoption, by the ILO, of the Declaration of Fundamental Principles and Rights at Work in 1998. This proposal was totally rejected by Southern countries, especially by India, out of fear of disguised protectionism. Such a clause, however, remains highly controversial also after a careful analysis of WTO rules, which are to date insufficient to guarantee the protection of labour rights⁴. The comparative perspective followed here will illustrate the reasons why, on the other hand, the EU does not support a social clause in the WTO system, rather preferring a strategy of promotion of “core” labour standards through positive incentives. An example is EU’s support for the voluntary inclusion of the respect for these standards in the Trade Policy Review Mechanism (TPRM) of WTO Member States, and, more recently, the positive contribution made by the EU to the implementation of the ILO agenda for decent work⁵.

The limits of this dissertation do not permit a detailed analysis of the many aspects of this complex issue. However, after taking stock of the existing transatlantic divide, my research will try to hint at ways forward to multilaterally accepted legal mechanisms for the protection of workers’ rights. After recalling the significance of labour rights, the first chapter of this paper will examine how globalisation impacts on their international regime. The second chapter, instrumental to understanding the *social clause* debate within the WTO, will give an outline of the EU and US approaches to the protection of labour rights in their respective trade agreements. The third chapter will explain the debate on the social clause in the WTO context and compare the EU and US opposite positions. The fourth chapter will look at future perspectives, comparing on the one hand the pursuit of US methods of sanction through new bilateral agreements with, on the other, the adherence of the EU to multilateral methods of improving working conditions. The conclusions will explain the opportunity of a ‘mitigated’ *social clause* and the necessity to revitalise the whole international labour rights regime.

I. The Impact of Globalisation on Labour Rights

A. Labour Rights are Human Rights: the Significance of Labour «Standards» for the Protection of the Dignity and Rights of Workers

International human rights law protects the whole range of rights whose exercise is necessary for everyone to lead a safe, healthy and free life. The right to live in dignity cannot be fulfilled unless human beings have at their disposal, to a sufficient and fair extent, all essential means of survival: *work*, food, housing, healthcare, education and culture⁶. A number of individual and collective rights have thus been recognised by international human rights law in the economic, social and cultural fields, just as well as in the civil and political fields, in conformity with the fundamental principle of the indivisibility of human rights. This principle requires the international community to treat human

⁴ B. Hepple, *ibidem*, p. 132 and ff.

⁵ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Promoting decent work for all – The EU contribution to the implementation of the decent work agenda in the world*, COM (2006) 249 of 24 May 2006. Available at http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=194254

⁶ Centre pour les droits de l’homme, Office des Nations Unies à Genève, *Le Comité des droits économiques, sociaux et culturels*, Fiche d’information n° 16 (Rev. 1) p. 3.

rights globally and equally⁷. In practice, however, civil and political rights have been for long time privileged to the detriment of economic, social and cultural rights. The latter have been subject to weaker implementation under national law, weaker judicial interpretation and lesser public awareness. Economic, social and cultural rights have therefore often been perceived as non-compulsory, not directly enforceable and only progressively implemented by States through long-term programs⁸. The notion of *rule of law* - introduced in the late nineteenth century – portraying a system where individual rights are substantiated by court enforcement orders grounded in the principles of law, has compounded this view of social rights⁹. The fact that their fulfilment required an administrative apparatus conferring large discretionary power to the State has contributed to present social rights as incompatible with the rule of law¹⁰.

And yet, economic, social and cultural rights ensure the protection of the human being in its entirety, making it possible to reconcile the enjoyment of rights and freedoms with social justice. They are recognised universally and with the same emphasis as civil and political rights. Concerning in particular labour rights, already in 1948 the Universal Declaration of Human Rights proclaimed freedom from slavery and servitude (art. 4), the right to non-discrimination and to equal protection of the law (art. 7), the right to peaceful assembly and association (art. 20), the right to social security (art. 22), the right to work, to the free choice of employment, to just and favourable working conditions and to protection against unemployment, to a just and favourable remuneration and to equal pay for equal work, the right to form trade unions (art. 23), the right to rest, to leisure and to paid leave (art. 24), the right to an adequate standard of living for health and well-being (art. 25). The International Covenant on Economic, Social and Cultural Rights of 1966 bound the States who ratified it to guarantee, *inter alia*, the right to a freely chosen work (art. 6), on the assumption that work is for most the main source of income on which human subsistence depends. The right to work is deemed fundamental to ensure the dignity and self-respect of the human person. This right encompasses both the right to be gainfully employed and the right not to be unjustly deprived of employment¹¹. The Covenant also binds States to guarantee the right to just and favourable working conditions (art. 7) including: a *minimum* remuneration ensuring a fair and equal pay for equal work and a decent living for workers and their families (art. 7 let. a); safety and health at work (art. 7 let. b); equal promotion opportunities for all (art. 7 let. c); rest, leisure and a reasonable duration of working hours with annual paid leave (art. 7 let. d). For all these aspects the State parties to the Covenant must set *minimal* rules and prohibit employers to offer their employees lower working conditions. Art. 8 of the Covenant guarantees the right to form trade unions and to adhere to the union of one's choice in the view of protecting one's economic and social interests. This right is solely limited by restrictions provided by law which are necessary, in a democratic society, to protect

⁷ GA World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Vienna, 14-25 June 1993, A/Conf. 157/24, Part I, par. 5, at <http://www.ohchr.org/english/law/vienna.htm>

The equality of all human rights had been already affirmed in the GA resolution 32/130 of 16 December 1977, whereby: “1. *Decides that the approach to the future work within the United Nations system with respect to human rights questions should take into account the following concepts:*

(a) *All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights;*

(b) *“The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development”, as recognised by the Proclamation of Teheran of 1968;”* at <http://www.un.org/documents/ga/res/32/ares32.htm>

⁸ Centre pour les droits de l'homme, *ibidem*, p. 4.

⁹ See on this issue S. Humphreys, *Are Social Rights Compatible with the Rule of Law? A Realist Inquiry*, Hauser Global Law Working Paper No. 10/2006, http://www.nyulawglobal.org/workingpapers/gl_2006.htm

¹⁰ S. Humphreys, *ibidem*, p. 3.

¹¹ Centre pour les droits de l'homme, *ibidem*, p. 14.

national security or public order, or the rights and freedoms of others (art. 8 par. 1 let. a). This article also covers the right of trade unions to form national federations or confederations and the right of the latter to form or adhere to international organisations (art. 8 par. 1 let. b). Trade unions are hereby vested with the right to freely carry out their activities, with the sole limits provided by law and necessary, in a democratic society, to protect national security or public order, or the rights and freedoms of others (art. 8 par. 1 let. c)¹². The right to strike is also guaranteed, in conformity with national laws (art. 8 par. 1 let. d). The right to social security is embedded in article 9, mindful that many States fail to provide sufficient protection to those of their citizens who, for invalidity, old age or illness, cannot have a decent life¹³.

Human labour determines the economic, cultural and moral development of persons, of their families and of society. The rights inherent to human labour, so explicitly and universally recognised, reflect the centrality of the human being in all working relations. This centrality is essential to understand, on the one hand, the intrinsic value of human labour and, on the other, the importance of organising economic and social systems in a way respectful of human rights¹⁴. This view helps us to understand why part of the contemporary doctrine assesses with pessimism the decline of the role of workers' rights in today's globalised economy¹⁵. The very nature of labour rights, their universal value seem to be put into question by the orientation taken in the last decade by the political discourse of international institutions, by regional free-trade agreements and private transnational companies, which has downgraded labour rights to the level of "principles", "standards" or "guidelines". The expression "labour principles" is in fact used in the NAALC and in the ILO Declaration of Fundamental Principles and Rights at Work of 1998¹⁶. Another cause of pessimism is the weak implementation of labour rights in the international (ILO) and the main regional systems (NAFTA and EU). With regard to the first, the report adopted in 2004 by the World Commission on the Social Dimension of Globalisation¹⁷ proposes an agenda based on four commitments to combine economic growth and social justice. These are: 1) calling upon the responsibility of "all relevant international institutions" for the promotion of the "core" labour standards; 2) programmes of technical assistance for countries lacking the capacity to ensure compliance with these standards; 3) strengthening the resources of the ILO for the follow-up of the Declaration; 4) recourse to sanction under Art. 33 of the ILO Constitution in case of persistent violation. According to this doctrine, such commitments are unsatisfactory, being more focussed on the 1998 Declaration and on the concept of "core" labour standards rather than on enhancing respect for labour rights. In addition, this report seems to give prominence to promotional measures instead of the more formal ILO supervisory mechanisms¹⁸.

¹² "Trade unions are essential to represent workers and give voice to their concerns and interests towards employers and public authorities, in addition to enhancing workers' social conscience and enabling them to actively participate in economic and social development." Pontifical Council of Justice and Peace, *Compendium of the Social Doctrine of the Church*, Libreria Editrice Vaticana, 2004, p. 170. For an extensive explanation of the value and dignity of human labour, see Chapter VI, pp. 143-177.

¹³ Centre pour les droits de l'homme, *ibidem*, p. 17.

¹⁴ Pontifical Council of Justice and Peace, *ibidem*, p. 151.

¹⁵ P. Alston, *Labour Rights as Human Rights: the Not So Happy State of the Art*, in *Labour Rights as Human Rights*, pp. 1-25, Collected Courses of the Academy of European Law, edited by P. Alston, Oxford University Press, 2005.

¹⁶ In the NAALC the term "principles" was due to the need to cover the disparate labour legislation of the three contracting States. In ILO Declaration the establishment of a hard core of "labour standards" was explained by the will of making the respect of the corresponding rights independent from the ratification of the relevant ILO Conventions. P. Alston, *ibidem*, p. 3.

¹⁷ A high-level group chaired by two Heads of State and gathering international experts appointed by the ILO Governing Body with the mandate of studying the interaction between the global economy and work. Within this mandate, it was in charge of exploring ways to reconcile the global trade agenda with the protection of workers' rights. *A Fair Globalisation: Creating Opportunities for All: Report of the World Commission on the Social Dimension of Globalisation*, 2004, at <http://www.ilo.org/public/english/fairglobalization/report/index.htm>

¹⁸ P. Alston, *ibidem*, p. 10.

With regard to the regional systems, the NAFTA's technique of linking trade and labour rights has proved ineffective¹⁹ and the EU seems caught in the incoherence of its double-standard regime, consisting of strongly promoting labour rights in its external relations while enjoying limited capacity of setting and enforcing labour standards in its own territory²⁰. EU Member States' compliance with ILO Conventions also raises doubts on the implementation capacity of the EU²¹.

The global trend of commercial liberalisation entails that the protection of labour rights will need a stronger accountability of transnational companies and other private actors, what raises questions about the role of international organisations such as the ILO. A true rights-based approach should be preferred to a "softer" approach based on "standards", "principles", "guidelines" etc., in order to avoid that labour rights become only one of the elements to take into account in orienting the liberalised global economy²². Labour rights, on the contrary, should be seen as instruments to advance social justice and be used, together with the whole range of all human rights, to shape economic globalisation²³. Human rights can serve as a normative framework for national and global policy choices, for example when States have to decide whether to cut social budgets or reduce the provision of healthcare, education or food security²⁴. Such a framework would be the expression of a global ethic and come into play also in areas beyond the simple State-individual relation. In this view, human rights are also a reference for horizontal relations between individuals (for example, when defining the social responsibility of private economic actors) and for international organisations²⁵. In this context, labour law has been described²⁶ as the *moral space* where the multiplicity of private interests is rationalised in the general interest²⁷. Keeping in mind the significance of labour rights, we can then understand why it is preferable to depart from an interpretation of labour issues in terms of technical "standards" to abide by in trade regulations. The balance found at national level between private and general interest should be sought also at global level, through efforts to reconcile trade liberalisation with labour rights. It is in this perspective that this paper will continue.

B. The ILO Declaration of Fundamental Principles and Rights to Work

Long before the adoption of the ICESCR in 1966, many of the rights relating to labour had been embedded into binding provisions through the adoption of several conventions of the ILO²⁸. Such

¹⁹ S. Charnovitz, *The Labour Dimension of the Emerging Free Trade Area of the Americas*, pp. 143-175, in *Labour Rights as Human Rights*, note 15 above.

²⁰ A. Davies, *Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States?*, in *Labour Rights as Human Rights*, note 16 above, pp. 177-213.

²¹ T. Novitz, *The European Union and International Labour Standards: the Dynamics of Dialogue between the EU and the ILO*, *ibidem*, p. 214-241.

²² P. Alston, *ibidem*, p. 23.

²³ K. De Feyter, introduction to *Economic Globalisation and Human Rights*, p. 5, edited by W. Benedek, K. De Feyter, F. Marrella, Cambridge University Press, 2007.

²⁴ J. Pikalo, *Economic Globalisation, Globalist Stories of the State*, in *Economic Globalisation and Human Rights*, note 26 above, p. 33.

²⁵ G. Ulrich, *Theory of Global Ethics in Support of Human Rights*, *ibidem*, p. 42.

²⁶ By A. Perulli, *Globalisation and Social Rights*, *ibidem*, p. 97.

²⁷ A. Perulli, *ibidem*.

²⁸ During the second half of the nineteenth century, the big industrial cities of Europe and North America experienced important social movements, fostered by tensions between the arising trade unions and the employers' associations. The International Labour Organisation was created in 1919, at the same time as the Versailles Treaty, in the wave of the Peace Conference of Paris. Its foundation had the purpose to improve the living conditions of the working class in the world through the conclusion of international social conventions. Enhanced social justice was then considered as an element of a durable and universal peace. The Organisation brought together national governments and representatives of employers and of workers, adopting tripartism as a unique and original formula among international organisations. It became the first specialised institution in the UN system in 1946. In addition to the fundamental conventions seen above,

conventions provided for the abolition of forced labour (n. 29, of 28 June 1930; n. 105, of 25 June 1957), for the freedom to join trade unions and the right to bargain collectively (n. 87, of 9 July 1948; n. 98, of 1 July 1949), for non-discrimination (n. 100, of 29 June 1951; n. 111, of 25 June 1958). Subsequently, others have been adopted on the minimum age for the admission at work (n. 138, of 26 June 1973), on the promotion of collective bargaining (n. 154, of 19 June 1981), on the elimination of the worst forms of child labour (n. 182, of 17 June 1999) and on the protection of maternity (n. 183, of 15 June 2000)²⁹.

Against this significant body of normative provisions, committing the ratifying States to give effect to the rights guaranteed in the ICESCR through precise legal action, a soft-law instrument was adopted in 1998 by the International Labour Conference (hence ILC): the Declaration on Fundamental Principles and Rights at Work³⁰. Since 1994, the reports of the ILO Director General to the 81st and 85th session of the ILC had advanced a series of proposals to reconcile trade liberalisation with adherence to labour standards³¹. This would be achieved by ensuring universal respect of four fundamental rights as defined in seven “core” ILO conventions. These were:

- freedom of association and collective bargaining (C.87 and C.98)
- the elimination of all forms of forced or compulsory labour (C.29 and C.105)
- the abolition of child labour (C.138 and C.182³²)
- the elimination of discrimination (C.100 and C.111)

It was thought that improved respect of such standards would raise economic efficiency, thus embracing a selective approach tending to promote certain aspects of human rights on the basis of their usefulness to economic liberalisation³³. This approach was endorsed by the World Summit for Social Development held in Copenhagen in 1995, and culminated subsequently in the adoption of the Declaration³⁴. At its paragraph 2, the Declaration states that

*“all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership of the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, **the principles concerning the fundamental rights** which are the subject of those conventions [...]”*

In recognising the obligation of the ILO to assist its Members, the Declaration offers them technical co-operation programmes and advisory services. It establishes a promotional “follow-up” system, largely based on reports. Its paragraph 5 stresses that

it has allowed for the conclusion of conventions on aspects of work such as the duration of working time and the limitation of weekly working days, the protection of children, of youngsters and women etc. Conventions are adopted by the yearly International Labour Conference at two-thirds majority. Afterwards, they have to be ratified by the ILO Member States, what does not always happen. See G. Fonteneau, *Normes internationales du travail: la double vie de l'Union européenne*, p. 7, in *Notabene* 2001, n. 123, p. 2-7.

²⁹ The full text of these Conventions can be found in *Code de droit international des droits de l'homme*, edited by O. De Schutter, F. Tulkens, S. Van Drooghenbroek, Bruylant, 2005.

³⁰ P. Alston affirms that this Declaration was adopted as a response to the pressure coming from the economic sector, the anti-globalisation movement, the growing consumers' demand for fair labour, the concerns of workers in the Northern countries that their jobs would be taken away by workers in the South and from employers seeking legitimacy for their voluntary codes. In “*Core Labour Standards*” and *the Transformation of the International Labour Rights Regime*, *European Journal of International Law* (2004), vol. 15 n. 3, p. 464.

³¹ B. Hepple, *Labour Laws and Global Trade*, note 2 above, p. 57.

³² This convention, adopted in 1999, was subsequently added to the list of “core” conventions.

³³ As reproached especially to economists by K. De Feyter in the introduction to *Economic Globalisation and Human Rights*, at note 23 above, p. 2.

³⁴ B. Hepple, *ibidem*, p. 57.

*“Labour standards should not be used for protectionist trade purposes and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes [...]”*³⁵

The choice of these “core” conventions among all others was explained by the objective of maintaining the link between social progress and economic growth, what could be achieved by ensuring in particular the right of workers to freely and equally claim their share in the wealth they contributed to create³⁶. This selective approach marked a significant shift from earlier ILO conventions, where priority was given to matters believed to have a direct effect on economic competitiveness, such as hours of work, night work, unemployment and minimum age³⁷. In a strictly promotional spirit, the follow-up procedure is entirely based on a reporting mechanism, aimed at identifying the areas where the ILO assistance could be useful to Members. No sanctions are foreseen. The reporting consists, on the one hand, in reviewing the situation of the Members which have not ratified the “core” conventions and, on the other, in producing a four-year global report on the situation of each category of rights to assess the effectiveness of ILO assistance and determine future priorities³⁸.

As of today, the Declaration has especially produced a significant increase in the number of ratifications of the eight “core” conventions. It has attracted enormous public attention and transformed the international discourse on labour rights³⁹. According to the doctrine, however, this transformation cannot be considered as an improvement; on the contrary, in many respects it seems more a regression than a progress. Its own adoption process shows the lack of a clear consensus among the tripartite partners and, I would add, the lack of serious political will for the respect of labour rights. The United States were apparently determinant for pushing towards a soft approach, focussing on the adoption of non-convention-based “core labour standards” and on a promotional supervisory system, in their intent to stop being criticised for not having ratified all but one –at that time- of the “core” conventions. The US was echoed by the Asia and Pacific countries, who insisted that the Declaration should be strictly promotional, with an emphasis on advisory programmes. The Employers’ group stressed, *inter alia*, that the Declaration should not establish new legal obligations, or new reporting obligations on Members and should not result in new complaints based bodies. Only the Workers’ group expressed its preference for strengthened supervisory procedures instead of simply promotional ones⁴⁰. Content-wise, the first criticism that can be made to such a Declaration is the artificial distinction made between “rights” and (undefined) “principles”⁴¹. This distinction seems to disregard the fact that the fundamental rights it brings forward are already recognised as such by the Universal Declaration of Human Rights and by the ICESCR. Secondly, the selective choice of these four “core” standards is something difficult to justify through the “lens” of human rights defence⁴². It represents a *minimum* of protection, without considering other rights such as the right to

³⁵ This paragraph was demanded by a group of 113 non-aligned Members plus five observers including China. This group issued a statement rejecting the Director General’s proposals for a voluntary system of “social labelling” which, in their view, would introduce an untenable link between labour standards and trade, thus legitimising the use of labour standards for protectionist purposes. See B. Hepple, *ibidem*, p. 61-62.

³⁶ Preamble to the Convention, 5th recital.

³⁷ B. Hepple, *ibidem*, p. 59.

³⁸ Annex to the Declaration, parts I, II and III.

³⁹ P. Alston, *ibidem*, p. 459.

⁴⁰ P. Alston, *ibidem*, p. 466-470.

⁴¹ Paragraph 2 refers indeed the obligation of respect for the principles inherent to the fundamental rights embedded in the “core” conventions to all States, even if they have not ratified the conventions in question. It seems therefore that the status of human rights is made dependent upon the States’ ratification, so that the rights recognised by unratified conventions are downgraded to less stringent “principles”.

⁴² Moreau finds this choice of four rights and freedoms difficult to qualify as “fundamental” in the view of the social justice objective defended by the ILO constitution. She explains it, however, by the need felt within the ILO to gather the largest possible consensus among all countries. The exclusion of rights implying heavy economic constraints was,

a safe and healthy workplace, to the limitation of working hours, to reasonable rest periods and to protection against abuse in the workplace⁴³. Thirdly, introducing “core” standards looks like a departure from the equal importance of human rights, proclaimed by the 1993 Vienna Declaration and Programme of Action. Fourthly, the promotional supervisory system put in place by the Declaration cannot be considered as an effective method for improving the respect of fundamental labour rights. It seems to have validated a trend to shift implementation from the ILO system towards alternative ways adopted in other contexts and relating to national, rather than international, labour standards (the US and EU Generalised System of Preferences, the NAFTA and US bilateral agreements, or private corporate codes of conduct), in what the doctrine calls “decentralisation”⁴⁴ or “the privatisation of enforcement”⁴⁵.

The Declaration, however, was saluted as carrying a strong symbolic power, changing the rights it proclaimed into imperative norms at international level and offering a sort of response to the debates on the introduction of a *social clause* in the WTO⁴⁶. It has influenced to a great deal the subsequent international labour rights regime. Its “core” standards have become the *minimal* reference for regional and bilateral free trade agreements and have inspired other soft law instruments like the UN Global Compact of 1999, the OECD Guidelines for Multinational Enterprises (as revised in 2000) and the ILO Tripartite Declaration (also amended in 2000), in addition to numerous corporate and multilateral codes of conduct⁴⁷. The international financial institutions (the IMF and the World Bank) have also begun considering the impact of their initiatives upon these “core” standards, and so have done the governments⁴⁸. It seems then that the current state of international compliance with labour rights is rather reducing to a *minimum* than expanding to a *maximum*⁴⁹. Understanding the problematic of the ILO Declaration is essential to enter the specific debate surrounding the “social clause” in the WTO system and to realise the magnitude of the changes undergone by the labour rights regime as a consequence of globalisation.

C. The Impact of Globalisation on the International Labour Rights Regime

The spread of new communication and information technologies has entailed the passage from an industrial economy to a services and knowledge-based economy. This “tertiarisation”⁵⁰ has made it possible for big enterprises to outsource on a large scale research facilities and services to providers based in foreign countries where market conditions are more attractive. In this new economy, a fundamental change occurs in the source of added value, which is no longer represented by the

therefore, due to the necessity to obtain the commitment of poorest countries, some of whom are excluded from the benefits of globalisation. M. A. Moreau, *Normes sociales, droit du travail et mondialisation*, note 1 above, p. 258-259.

⁴³ P. Alston, *ibidem*, p. 486. A particular aspect of its weakness is represented by the simple prohibition of **child labour**, addressing just the symptom of a deep social and economic disorder. In the absence of positive provisions to promote, for example, educational opportunities and access to health care, a prohibition on child labour may only exacerbate the problem. P. Macklem, *Labour Law Beyond Borders*, in *Journal of International Economic Law* 2002, v. 5, n. 3, p. 618.

⁴⁴ P. Alston, *ibidem*, p. 509. For reasons of political economy, R. Flanagan casts serious doubts on the effectiveness of “core” labour standards, for they are hardly defined and applicable in specific cases and because, to a large extent, they reflect standards that States have already attained. See *Globalisation and Labor Conditions – Working Conditions and Worker Rights in a Global Economy*, Oxford University Press, 2006, pp. 161-173.

⁴⁵ B. Hepple, *Social and Labour Rights in a Global Context: International and Comparative Perspectives*, 2002, p. 240-241, in P. Alston, *ibidem*, p. 513.

⁴⁶ M.A. Moreau, *ibidem*, p. 259.

⁴⁷ P. Alston, *ibidem*, p. 518.

⁴⁸ M.A. Moreau, *ibidem*, p. 262.

⁴⁹ This problem is particularly evident with corporate codes of conduct, where the formal reference to the Declaration can be nonchalantly used to legitimise the companies’ own norms, most often offering no higher protection than what already foreseen by national law. See paragraph C below.

⁵⁰ R. Blanpain and M. Colucci, *The Globalisation of Labour Standards – the Soft-Law Track*, Kluwer Law International, 2004, p. 2.

material factor (raw materials or industrial products), rather by the immaterial one (knowledge). This development has an enormous impact on the nature of work and on the way companies nowadays organise themselves⁵¹.

*The Changing World of Work*⁵²

Against the hierarchical structures of the past, with centralised control and maximal division of tasks, the new forms of work organisation tend rather to reduce the division of labour and decentralise responsibilities. This occurs mainly through recourse to teamwork and the distribution of decision-making powers among lower organisational levels. The spread of communication facilities has also made telework much more accessible, to the point of becoming even a solution to unemployment problems. Telework has also made possible the creation of virtual companies, mainly in the ICT sector.

A further development in the nature of work today is the rise in knowledge intensity, meaning that the required educational levels of workers are higher and that their tasks are more complex. Expensive investment in new technologies requires indeed workers with higher skills. The service economy has become more knowledge-intensive also because services are more and more customer-oriented. It is only by remaining competitive (thus, more innovative) that companies can cope with their relative labour cost disadvantage.

Employers have reacted to the growing competition, to the changes in the market and in the organisation models by introducing multiple changes in contracts and working time arrangements. Flexible employment relations have been systematically applied to counter production losses, perform short-term or seasonal work and reduce the personnel more easily when the future is uncertain. Over the past decades, policy-makers have seen labour market flexibility as a solution to unemployment. However, there is no research evidence that flexibilisation of labour market leads to job creation and lower unemployment. On the contrary, flexibilisation may lead to more segmentation and so-called "atypical" jobs prove to be more a "trap" than a solution to unemployment. This trend has an impact on working conditions, thereby on health. Next to non-permanent jobs, new patterns of working time have arisen: the entrance of more and more women into the labour market, for example, has boosted the recourse to part-time work. In many cases, working time arrangements have changed to cope with the demands of the 24-hours economy.

Against these radical changes, domestic labour laws have remained almost unaltered⁵³. This is due to several factors: new fiscal and economic policies pursued by governments that have opened up labour markets and which have not been accompanied by a corresponding increased power of trade unions; the decline of governments, where the self-induced lower taxation policies, a reduced presence of the State in the economy and more restrictive social programmes have curtailed their capacity to regulate labour markets; and a lack of innovative ideas for regulation. In sum, the reform of labour law models has given way to the imperatives of the international market⁵⁴. Labour laws are the primary legal sphere for the promotion and protection of labour rights; and yet, in the contemporary world, they seem no longer capable to pursue this public purpose. Changes occurred in work relations are no longer, or not enough, covered by labour legislation. On the other hand, the

⁵¹ R. Blanpain and M. Colucci, *ibidem*.

⁵² Extracts from *Research on Changing World of Work*, European Agency for Safety and Health at Work, 2002, p. 20-27. The same findings are enounced in the Consultation Paper of the Bureau of European Policy Advisers *Europe's Social Reality*, p. 8-9, available at http://ec.europa.eu/dgs/policy_advisers/publications/index_en.htm

⁵³ P. Macklem defines labour law as an "overwhelmingly domestic field of law, characterised by a unique blend of particular rules negotiated by parties to an employment relationship and general legislative imperatives enacted for the protection of workers", note 43 above, p. 605.

⁵⁴ J. Craig and M. Lynk, introduction to *Globalisation and the Future of Labour Law*, edited by J. Craig and M. Link, Cambridge University Press, 2006, p. 2.

unprecedented expansion of international trade, the segmentation of production stages across countries and continents operated by transnational companies and the long-distance transfer of work facilitated by modern technology demonstrate that globalisation is reshaping workplaces much faster than existing legislation can ever regulate them⁵⁵.

In our globalised economy, multinational companies play a major role. Their decisions concerning investments, delocalisation or disinvestments respond to market opportunities and transcend the national sovereignty. On their turn, governments compete with one another to attract foreign investments and trade. Their laws and policies must be investment-friendly, offering attractively low taxation rates. They have no countervailing power to oppose to the transnational economic “giants”, in terms of labour protection. And in fact, there is neither a global nor a regional comparable, legally binding, “counterbalance” in the field of labour legislation⁵⁶. Such a comprehensive legal framework is seen by part of the doctrine as unfeasible, due to the lack of political will and to the fact that elaborating this kind of instrument would be too complicated, too burdensome and long⁵⁷. In the light of the developments occurred in the last decades, we have to admit that this doctrine is realistic. As we have seen above, the 1998 ILO Declaration has influenced the subsequent labour rights regime. On its turn, the Declaration did not come out of the blue: already since the middle of the 1970s a global answer in the field of labour rights had been prepared in the form of multilateral initiatives, both by the OECD and the ILO. These initiatives aimed at maximising the benefits of globalisation and minimise its negative effects. Since a “hard law” answer was not possible, for the reasons seen above, the way of “soft law” was chosen. The OECD adopted the *Guidelines for Multinational Enterprises* in 1976 and the ILO adopted the *Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy* in 1977; both were revised in 2000 with references to the 1998 ILO Declaration⁵⁸. The *UN Global Compact* of 1999 also consists of principles dealing with human rights, labour and the environment, to which businesses are urged to commit. These initiatives have in common their non-binding, “soft” model, providing only for promotional ways of implementation, which is the same followed by the 1998 ILO Declaration⁵⁹.

These voluntary instruments are seen, by some, as carrying great moral weight. Being endorsed by representatives of the business sector, they enjoy the approval of the public opinion and consumers, who can consequently sanction companies’ social misbehaving by not buying their products or services. These guidelines and principles help companies maintain a positive image on the market and display good human resources policies⁶⁰. In parallel, many enterprises have adopted codes of conduct on their own initiative, which also contain references to labour standards to be applied to their management, employees and eventually their sub-contractors⁶¹. The limit of these codes is that

⁵⁵ J. Craig and M. Lynk, *ibidem*.

⁵⁶ See R. Blanpain and M. Colucci, *ibidem*, p. 5.

⁵⁷ R. Blanpain and M. Colucci, *ibidem*, p. 119.

⁵⁸ For a very clear explanation see also *Globalisation et normes fondamentales du travail*, in *Lettre mensuelle socio-économique* 2001, n. 63, p. 22-32. This document also contains a definition of *sectoral codes*, which are conventions concluded between enterprises and workers’ organisations, consumers’ associations or NGOs in order to promote the respect of labour standards in a given sector. This happens usually for sectors where a large part of the production takes place in low-wage countries. Examples are the clothing or footwear sectors, sports etc. See p. 29.

⁵⁹ P. Alston, “*Core Labour Standards*” and the Transformation of the International Labour Rights Regime, note 33 above, p. 507.

⁶⁰ R. Blanpain and M. Colucci, *ibidem*, p. 7.

⁶¹ R. Blanpain and M. Colucci point out four tracks of advancing “core” labour rights: (1) the *legal track*, through the adoption of ILO conventions and recommendations; (2) the *voluntary track*, followed by international organisations like the OECD and the ILO; (3) the *promotional track*, taken by the 1998 ILO Declaration and its follow-up; (4) the *commercial track*, chosen by multinational companies who adopt codes of conduct. *Ibidem*, p. 8.

relatively few of them refer to “core” labour standards and some use pretty evasive language. They mostly refer to the importance of standards, but attribute them a subjective meaning⁶².

The international labour rights regime resulting from this evolution is therefore characterised by: (a) the reduction of labour rights to a “core” of few selected rights, which in turn relate to generic “principles”, “standards”, “guidelines”, and (b) the transition from a “hard law” to a “soft law” approach at global level, resulting from the adoption of non-binding instruments and voluntary corporate codes of conduct. Part of the doctrine heavily criticises this regime as presenting “major potential flaws”⁶³. Another part nevertheless welcomes the *status quo*, considering these different instruments complementary to one another and contributing to an emergent field of law who might mitigate the adverse effects of employment flexibilisation. These international developments would offer new sources of authority for domestic legislation. Together with “more general principles of international human rights law” they would authorise states to require companies seeking access to their market to comply with nationally enforceable codes of conduct enshrining international labour rights. This reconstituted sovereignty would give room to “hybrid regulatory initiatives” that subject transnational companies to domestic legal scrutiny⁶⁴. I do not share this view. Firstly, because it refers to “international labour rights” while in fact only meaning the “core” fundamental rights (which can be criticised, as we have seen), calling for supplementary “more general principles of international human rights law” and thus reiterating the existing cleavage. Secondly, because it derives renewed legitimacy for national labour legislation from non-binding, declaratory and, mostly, recognitory instruments. Legally speaking, this conclusion is not defensible. Should States enact domestic legislation implementing international principles or guidelines, this will only rest upon their own initiative and not on legal obligations internationally contracted. Supporting the “soft-law” approach seems then to suggest that the protection of labour rights is nowadays largely depending upon States’ and private companies’ good will, as if forty years since the adoption of the ICESCR and innumerable ILO Conventions did not suffice.

2. Introducing the comparative perspective

The last two decades have seen the consolidation of an approach, pursued by influent developed countries and their regional economic organisations, seeking to bring international labour rights regime into the realm of international economic law. This approach intends to secure compliance with labour standards by either granting trade preferences to economic partners upon the condition of abiding by such standards (so-called *positive conditionality*) or, conversely, by imposing trade and financial sanctions against partners who fail to abide (so-called *negative conditionality*). The purpose is to encourage the exporting countries to adopt labour standards comparable to those of the importing country, thus creating a “level playing-field” and prevent potential unfair competition. In some notable cases, the purpose has been the enforcement of domestic labour laws, thereby reinstating the sovereignty principle⁶⁵. This approach has been followed through: 1) unilateral, non-reciprocal preferential trading arrangements; 2) regional and 3) bilateral trade agreements where the

⁶² P. Alston, *ibidem*, p. 508. In particular, the efficacy of these codes with regard to **child labour** is questionable. Most of them do not refer to a minimum age for the admission of children at work, or refer to the standards foreseen by the laws of the host State. Only a minority refer to the enterprises to which they apply, such as sub-contractors, providers of raw materials, importers etc. The control mechanisms referred to are also lacunose, as they are mostly internal to the companies. Positive measures aimed at helping children with school attendance, healthcare and alternative income are rarely contemplated. *Globalisation et normes fondamentales du travail*, note 58 above, p. 27.

⁶³ P. Alston, *ibidem*, p. 457.

⁶⁴ P. Macklem, *Labour Law Beyond Borders*, note 53 above, p. 608-609.

⁶⁵ See B. Hepple, *ibidem*, p. 90.

linkage with labour standards has taken the form of *social clauses*. This paper will give an overview of such mechanisms, thus introducing the analysis of the *social clause* debate at multilateral level.

A. *Unilateralism: the US and EU Generalised Systems of Preferences*

The Generalised System of Preferences (GSP) regimes originate from the United Nations Conference on Trade and Development (UNCTAD)⁶⁶ as a way of letting former colonial powers offer preferential market access to their former colonies and extend this access to other developing countries. Industrialised countries have each their own GSP system, which is non-contractual and can be revoked unilaterally⁶⁷. *Per se*, the GSP systems would be incompatible with the non-discrimination principle established by Article 1 of the GATT. However, after a temporary waiver, they were permanently authorised in 1979 by the “Enabling clause”⁶⁸.

The US has been referred to as “the major practitioners of unilateralism”⁶⁹; its GSP contains a number of conditionality clauses, one of which concerns the effective protection of labour rights. In 1984 an amendment to the 1974 US Trade Act introduced a labour rights provision, whereby any GSP beneficiary country could lose access to US market for its products if it had not “taken steps to afford internationally recognised worker’s rights to its workers”⁷⁰. Such “internationally recognised workers’ rights” do not correspond to the ILO “core” labour standards. They are in fact enumerated as: 1) the right of association and right to organise and bargain collectively; 2) the prohibition of any form of forced or compulsory labour; 3) a minimum age for the employment of children and the prohibition of the worst forms of child labour; 5) acceptable conditions of work with respect to minimum wages, hours of work, occupational safety and health. This catalogue leaves out the right to non-discrimination in employment and occupation, which is provided by the ILO Declaration, as a consequence of a political compromise on the amendment of 1984⁷¹. Neither has the US ratified the ILO Conventions pertaining to the “core” standards, except for two (C.105 on forced labour and C.182 on the worst forms of child labour). The reference to “taking steps” towards internationally recognised workers’ rights vests the US administration with maximum discretion in assessing the beneficiary country’s compliance. Similarly, the vague reference to “acceptable conditions of work” leaves a wide margin of appreciation of what can be deemed as “acceptable”. Lastly, the petition procedure provided by the Trade Act, allowing organisations to request the US government to review workers’ conditions in a country in order to examine whether GSP benefits should be suspended, has proved rather ineffective. The discretionary power recognised to the Executive, the absence of any obligation to follow the jurisprudence of the ILO supervisory bodies, the impossibility to challenge decisions and to file new petitions unless they present substantial new information have made of this

⁶⁶ Resolution 21 (II) of the 2nd UNCTAD Conference in 1968.

⁶⁷ R. Grynberg and V. Qalo, *Labour Standards in US and EU Preferential Trading Agreements*, in *Journal of World Trade* 40 (4), 2006, p. 619-653.

⁶⁸ The “Enabling clause” states: “*Notwithstanding the provisions of Article I (...) contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties (...) Any differential and more favourable treatment provided under this clause shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties*”.

⁶⁹ B. Hepple, *ibidem*, p. 91.

⁷⁰ This clause has originated a number of subsequent trade measures applying labour rights conditionality, such as the 1990 amendment to the Caribbean Basin Economic Recovery Act and the 2002 revision of the African Growth and Opportunity Act. Besides referring to the protection of “internationally recognised workers’ rights, this latter instrument mentions at least the ILO Convention n. 182 on the elimination of the worst forms of child labour. B. Hepple, *ibidem*, p. 91-91; R. Grynberg and V. Qalo, *ibidem*, p. 644-645.

⁷¹ The provision on non-discrimination was not included in order not to create tensions with several oil-producing countries applying a discriminatory regime to women and non-Muslims. Other political concerns regarding Israel also explain the reject of such a provision. See B. Hepple, *ibidem*, p. 94.

procedure a mechanism of little use. On the whole, by introducing a duplicate set of labour rights as a reference standard, the US GSP renders vain all attempts to create a unique international labour rights regime⁷². If the US GSP has succeeded in pushing many of the suspended countries⁷³ to undertake law reforms to improve their labour conditions, this was not due to humanitarian concerns. It was rather the fear that off-shoring US manufacturing industries to the Caribbean Basin would entail a loss of jobs and competition for the US-based producers which pushed trade unions to lobby for labour rights provisions in the GSP and its subsequent trade measures. Unions fiercely opposed the competitive advantage derived from the denial of freedom of association, of safe working conditions and the practice of child labour⁷⁴. Some of the decisions taken under the GSP program were also highly political: the US suspended benefits towards countries whose trade had little impact on US markets (Belarus) while maintaining benefits towards countries whose exports to US were more significant (Thailand). The decision to lift the suspension towards Pakistan in 2002, notwithstanding persistent labour abuses including child and bonded labour, was said to be due to Pakistan's support for the US in the Afghanistan war⁷⁵. The US experience is exemplary for its "radical" social conditionality; however, it shows the limits of a unilateral perspective revealing a strong political, "aggressive" use of the social clause⁷⁶.

The EU has operated a GSP system since 1971; this system runs on a 10-year cycle⁷⁷. The new cycle started on 1 July 2006, based on Council Regulation 980/2005⁷⁸ which innovated to some extent the previous regime instituted by Regulation 2501/2001. The benefits provided consist of tariff preferences, without any quantitative restrictions, for more than 7000 products imported from developing countries, as well as a "duty-0" for all products of Least Developed Countries⁷⁹. The system establishes a graduation among categories of products⁸⁰. In 1998 "special incentive" clauses were inserted, providing for further tariff reductions in favour of countries respecting and implementing the ILO "core" conventions. The rationale was to promote the objective of sustainable development and avoid the "race to the bottom" often provoked by global competition⁸¹. A GSP beneficiary country must apply for these preferences and demonstrate that its legislation incorporates the *substance* of the standards laid down by the ILO "core" conventions. The ratification of such conventions is not required. The applying country must also demonstrate that it effectively applies

⁷² B. Hepple qualifies this approach as "idiosyncratic", see *ibidem*, p. 95.

⁷³ Especially the apparel exporting countries of the Caribbean Basin Initiative.

⁷⁴ B. Hepple, *ibidem*, p. 100.

⁷⁵ B. Hepple, *ibidem*, p. 101.

⁷⁶ A. Perulli, *Globalisation and Social Rights*, in *Economic Globalisation and Human Rights*, note 26 above, p. 129. It is worth stressing that Section 301 of the US Trade Act, as amended in 1988, allows for retaliatory sanction against any foreign trade practice that is considered as unfair upon US trade. These practices include violations of "internationally recognised workers' rights". In addition to being unjustifiable under WTO rules, this retaliatory mechanism against violation of social rights has been considered by some authors as treating identically the norms relating to merchandises and those relating to labour rights. M. A. Moreau, *La Clause sociale dans les traités internationaux: bilan et perspectives*, in *Revue française des affaires sociales*, Paris, Année 50, n. 1, janvier-mars 1996, p. 97.

⁷⁷ The EU's support for the protection of core labour rights worldwide was reaffirmed by the conclusions of the Council on trade and labour in October 1999. Consequently, the European Commission adopted in 2001 a Communication on "Promoting core labour standards and improving social governance in the context of globalisation" (COM(2001) 416 final of 18 July 2001), stating that sustainable economic growth goes together with social cohesion, implying respect for core labour standards. A key element of this strategy was the use of GSP, seen as a helpful measure to assist developing countries in fighting poverty. *The EU Generalised System of Preferences and workers' rights*, in *European Industrial Relations Review*, Issue 346, November 2002, p. 26.

⁷⁸ OJ L 169 of 30 June 2005, pp. 1-43.

⁷⁹ H. Chaubiron, *Le Système de Préférences Généralisées (SPG) de l'Union européenne pour la période 2006-2015*, in *Carrefour de l'Economie*, 2006/6A, p. 3.

⁸⁰ Considered as "non-sensitive", "sensitive" and "very sensitive", the latter two representing protected products of EU domestic industries. R. Grynberg and V. Qalo, *ibidem*, p. 646.

⁸¹ *The EU Generalised System of Preferences and workers' rights*, note 79 above, *ibidem*.

this legislation and undertake to monitor compliance. This demand is announced by the European Commission on the Official Journal of the European Communities, for publicity and transparency purposes. After a detailed procedure, during which the Commission consults the Generalised Preferences Committee (composed of representatives of EU Member States), the special incentive may be granted⁸². A “negative” mechanism is also foreseen, whereby special incentives can be temporarily withdrawn in a number of circumstances, including: (a) the practice of any form of slavery or forced labour as defined in the Geneva Conventions (of 1926 and 1956) and in the ILO C.29 and C.105; (b) serious and systematic violations of freedom of association, the right to collective bargaining or the principle of non-discrimination, or the ban on the use of child labour, as defined in the relevant ILO conventions; (c) the export of goods made by prison labour. By considering slavery and prison labour, these conditions go further than the ILO “core” standards⁸³. Furthermore, the special incentives may be temporarily withdrawn if: (a) a beneficiary country’s legislation no longer incorporates the “core” labour standards, or that legislation is not effectively applied; (b) if the undertaking of monitoring the application of the special incentive arrangement is not respected. These procedures are equally submitted to publicity requirements, they go through consultations with the Generalised Preferences Committee and involve co-operation with the country concerned⁸⁴. They present a clear connection with the decisions, recommendations and conclusions of the ILO supervisory bodies, as they constitute the point of departure for investigations. Until recently, the only case of temporary withdrawal of GSP preferences concerned Myanmar, for its routine and widespread recourse to forced labour, in 1987. On 21 June 2007, however, GSP preferences towards Belarus have also been withdrawn as a result of serious and systematic violations of workers’ freedom of association in that country⁸⁵. The new GSP cycle started on 1 July 2006 presents some new aspects, following an important decision of 7 April 2004 of the WTO Appellate Body, settling a dispute initiated by India (the “India Panel” case)⁸⁶. The previous separate regimes on labour rights, drugs and the environment have now been replaced by a single regime (“GSP+”) granting benefits to vulnerable countries subscribing to conventions on “core” labour standards, environmental protection and good governance⁸⁷.

A comparison between these two unilateral regimes shows us two different approaches. Against US unilateralism, the EU conditionality can be deemed as “soft”: indeed, by referring to ILO “core” conventions (which all EU Member States have ratified⁸⁸) and to the body of ILO decisions, it does not undermine the rule of international law. Secondly, it follows clear and transparent procedures for the concession or the withdrawal of preferences. Thirdly, it is hard to charge it of protectionism, as demonstrated also by the absence, in the EU GSP system, of retaliatory sanctions. This indicates that a linkage between trade preferences and labour rights can be legitimate under given conditions⁸⁹.

⁸² In the opposite case, upon demand of the country the Commission has to explain the reasons of rejection.

⁸³ B. Hepple, *ibidem*, p. 103.

⁸⁴ See *The EU Generalised System of Preferences and workers’ rights*, p. 27-28, for more details.

⁸⁵ At http://ec.europa.eu/trade/issues/global/gsp/pr150607_en.htm

⁸⁶ In December 2002 India challenged the EU GSP before a WTO Panel, accusing the “special incentive” rules relating to labour rights, the protection of the environment and combating the production and trafficking of illicit drugs to be incompatible with WTO norms. India claimed in particular that the incentives were granted in a discriminatory way. It invoked Article I of the GATT (the Most-Favoured-Nation clause), requiring that any advantage given to imports of one WTO member must be automatically extended to all other members. India also invoked Article 2(a), 3(a) and 3(c) of the 1979 Enabling Clause. However, it later limited its complaint under the GSP Drugs Arrangements, what technically put labour rights issues out of the final findings. In 2004 the WTO Appellate Body accepted India’s claim, having found the EU GSP system discriminatory and thus not authorised under the terms of the Enabling Clause. However, the admissibility of non-trade concerns under the Enabling Clause *per se* was not examined.. See R. Grynberg and V. Qalo, *ibidem*, p. 648-649.

⁸⁷ H. Chaubiron, *ibidem*, p. 3.

⁸⁸ Except for Estonia and the Czech Republic, who have not ratified ILO Conventions on child labour.

⁸⁹ B. Hepple, *ibidem*, p. 105. See also A. Perulli, *Globalisation and Social rights*, p. 129.

B. Regional and Bilateral Economic Agreements

(i) The North-American Agreements: *NAFTA* and *NAALC*

A trilateral free-trade pact between the US, Canada and Mexico was first conceived by President Reagan. However, in 1991, the Bush administration started negotiating a North American Free Trade Agreement (NAFTA), whose aim was opening up the markets of the three partner countries by, *inter alia*, eliminating tariff, non-tariff barriers and other restrictions such as import licenses, local production and export performance requirements, eliminating investment conditions, ensuring extended protection of intellectual property rights and access to government procurement. It came to the newly-elected Clinton administration to adopt the agreement, but this was only possible through a political compromise after massive opposition from labour and environmental movements, both important Clinton's constituencies. This is why NAFTA negotiations were completed with added protection for the environment, labour and other social issues through side-agreements⁹⁰. Together with the NAFTA, the North American Agreement on Labour Co-operation (NAALC) came into force in January 1994, being the first labour agreement explicitly related to a regional trade instrument providing for potential sanctions for labour rights violations⁹¹. It has influenced several subsequent bilateral trade agreements, giving rise to a uniquely American model for the enforcement of domestic labour laws⁹².

It goes well beyond what has been endorsed in 1998 as "core" labour rights and, conversely, retains a set of rights subsequently excluded by the ILO Declaration. Under the NAALC, each contracting state must ensure that its national laws provide for "high labour standards" (Article 2), undertake to promote compliance with and effectively enforce them (Article 3) and ensure access to "fair, equitable and transparent" enforcement mechanisms (Article 5)⁹³. The NAALC requires the enforcement of domestic labour laws, instead of international labour standards or the "internationally recognised workers' rights" recalled by the US GSP. Such domestic laws must be enforced in relation to a list of eleven fundamental labour rights, divided in three categories⁹⁴. Evidently, this system is dominated by the principle of national sovereignty. The language used is deliberately vague because the three countries, in particular Mexico, refused an agreement restricting their control over national labour laws⁹⁵. It establishes a review and dispute resolution procedure, with trade sanctions being applicable in very limited circumstances. The NAALC establishes a Commission for Labour Co-operation (comprising a Ministerial Council and a Secretariat) and National Administrative Offices (NAOs) in each national Ministry of Labour. Complaints for non-compliance on behalf of a state may be filed at the NAOs of the other parties. If the matter is not resolved at this level, an Evaluation Committee of Experts is convened, but (and here the procedure starts showing its weakness) only with regard to the principles grouped in categories 2 and 3. It follows that most frequent issues pertaining to freedom of association, collective bargaining and the

⁹⁰ C. Taylor, *NAFTA, GATT and the current free-trade system: a dangerous double standard for workers' rights*, in *Denver Journal of International Law and Policy*, 2000, v. 28, n. 4, p. 404-405.

⁹¹ R. Grynberg and V. Qalo, *ibidem*, p. 626.

⁹² See B. Hepple, *ibidem*, p. 107.

⁹³ P. Alston, *ibidem*, p. 499. The text of NAALC is available at <http://www.naalc.org/english/agreements.html>

⁹⁴ Category 1: freedom of association and right to organise, right to bargain collectively, right to strike; Category 2: prohibition of forced labour, elimination of employment discrimination, equal pay for women and men, compensation in case of occupational injuries and illnesses, protection of migrant workers; Category 3: labour protection for children and young persons, minimum employment standards such as wages and overtime pay, prevention of occupational injuries and illnesses. Annex 1 to the NAALC. See also B. Hepple, *ibidem*, p. 108-109.

⁹⁵ For Mexico, cheap labour and lax laws were competitive advantages to attract foreign investment. C. Taylor, *ibidem*, p. 415.

right to strike are never subject to the experts' scrutiny. Moreover, to be brought before the Evaluation Committee of Experts, the matter must be "trade-related and "covered by mutually recognised labour laws"⁹⁶. If neither this body can help reach a satisfactory resolution, then a country can require consultations with any other party, but only in respect of the principles of category 3, when subject to a persistent pattern of failure (Articles 27 and 49 of NAALC). If also consultations prove fruitless, a special session of the Ministerial Council may be convened with mediation and conciliation tasks. If this fails too, an arbitral panel may be established to hear about issues related to category 3, which are "trade-related", "covered by mutually recognised labour laws" and constitute a "persistent pattern of failure". The panel can only adopt recommendations. It is only very eventually that trade benefits can be suspended, after the said recommendations have not been executed and the subsequent monetary fines have remained unpaid⁹⁷. The political character of this procedure and the uncertainty of its outcome are patent. And in fact, the procedure provided by the NAALC has been largely criticised for its ineffectiveness⁹⁸. To some extent, it may also be considered perverse, as less and less categories of rights can be examined in its subsequent stages and so, by resisting pressure from the plaintiff party, a violator state can see its obligations reduced substantially⁹⁹. Neither are the dispute-settlement bodies bound to hold on to ILO decisions, conclusions or recommendations. At most, the complaints have led to inter-governmental consultations or to informative initiatives at local level¹⁰⁰. This model has also been accused to perpetuate the inequitable double standard of free trade, with much stronger protection for commercial than for labour rights¹⁰¹.

(ii) Examples of US Bilateral Trade Agreements

The bilateral trade agreement entered by the US and Jordan in 2000 was the first to contain labour rights provisions in the main text, rather than in a side-agreement. It builds significantly upon the NAALC, but it also tries not to reproduce its shortcomings. Firstly, labour rights provisions are subject to the same dispute settlement procedure as all other trade provisions (being contained in a single text). Secondly, although the central obligation is again the effective enforcement of domestic laws, an explicit link is made between ILO and domestic standards. The parties in fact reaffirm their commitments under the ILO Declaration and its Follow-up; they undertake to *strive to* ensure that such labour principles and the "internationally recognised labour rights"¹⁰² are protected by national laws. Finally, as a reaction to the criticism expressed towards the NAALC, the parties agree to *strive to* ensure that they will not waive or derogate from domestic labour law standards in order to attract foreign investment¹⁰³. However, this agreement generates further confusion: while making reference to the 1998 ILO Declaration, it defines five categories of "internationally recognised labour rights" (not related to any specific international convention), which partly take after the ILO "core" standards but omit any reference to employment discrimination¹⁰⁴. This marks a regression by comparison to the eleven categories established by the NAALC¹⁰⁵. The dispute settlement mechanism (consultations followed by a panel with recommendation powers, then by a "Joint

⁹⁶ B. Hepple, *ibidem*, p. 110.

⁹⁷ B. Hepple, *ibidem*, p. 111; R. Grynberg and V. Qalo, *ibidem*, p. 628.

⁹⁸ The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) assessed the NAALC as "an utter failure". C. Taylor, *ibidem*, p. 419.

⁹⁹ See B. Hepple, *ibidem*, p. 114.

¹⁰⁰ P. Alston, *ibidem*, p. 501.

¹⁰¹ "[GATT and NAFTA] make it easier to challenge the infringement of a copyright than the imprisonment of a striking worker" Statement by Congressman David E. Bonior at a conference hosted by AFC-CIO on 1 December 1999, in C. Taylor, *ibidem*, p. 412.

¹⁰² Resembling to the rights referred to by the US GSP system.

¹⁰³ P. Alston, *ibidem*, p. 504; B. Hepple, *ibidem*, p. 117.

¹⁰⁴ See for more details R. Grynberg and V. Qalo, *ibidem*, p. 629.

¹⁰⁵ P. Alston, *ibidem*, p. 504.

Committee”) allows for ultimate unilateral sanctions in case of failure to solve the dispute. Under rather formal and undefined requirements of “appropriateness” and “commensurateness”, each party will be allowed to resort to anti-dumping duties and countervailing measures¹⁰⁶.

In 2002, as a condition to confer the US President with trade promotion authority, the Congress required the incorporation of ILO “core” labour standards/“internationally recognised worker rights” in any bilateral trade agreement. The Trade Act of 2002 establishes that US trade negotiating objectives shall include: a) promoting respect for worker rights and the rights of children consistently with ILO “core” standards; b) to seek provisions that do not reduce the protection afforded in domestic labour laws as an encouragement of trade; c) promoting the universal ratification and full compliance with ILO C.182 on the worst forms of child labour¹⁰⁷. The US-Singapore agreement of 2003 resembles very much to the US-Jordan agreement: the catalogue of labour rights protected is the same, although the concept of “minimum wage” is made more precise by reference to the guidelines of the National Wage Council. But, unlike the US-Jordan agreement, here it is specified that labour standards should not be used for protectionist purposes and sanctions are only authorised for a “sustained or recurring failure to enforce one’s labour laws in a manner affecting trade”¹⁰⁸. The US-Chile agreement, also signed in 2003, refers to the same “internationally recognised labour rights” listed in the US-Jordan agreement and to the parties’ obligation not to fail to effectively enforce their domestic labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade¹⁰⁹. All other disputes susceptible to arise under the labour section of the US-Chile agreement are excluded from the dispute resolution procedure.

(iii) Examples of EU Agreements

Alongside its GSP system, the EU offers *non-reciprocal* preferential access to its market in favour of African-Caribbean-Pacific (ACP) countries. This regime was first contained in successive Yaoundé conventions, signed at the end of the colonial period in West Africa in the 1960s, then in the four Lomé Conventions¹¹⁰. Lomé IV in particular introduced new commitments on the promotion of human rights and democracy. When this expired, the new Partnership Agreement, signed in Cotonou on 23 June 2000, endorsed this engagement for human rights, democratic principles and the rule of law as an “essential element” (Article 9 of the agreement) and added, for the first time, a separate provision on labour rights (Article 50)¹¹¹. While reaffirming the ILO “core” commitments, the Cotonou agreement does not impose further obligations on domestic legislation. Moreover, the formulation of Article 50 allows inferring that the list of rights presented therein is not exhaustive¹¹². The 2002 EU-Chile Association Agreement¹¹³ was the first *bilateral* trade instrument to contain a reference to labour standards. Its Article 44 sets as priority the respect for social rights, notably by

¹⁰⁶ R. Grynberg and V. Qalo, *ibidem*, p. 631.

¹⁰⁷ E. Potter, *The growing importance of the International Labour Organisation: the view from the United States*, in *Globalisation and the Future of Labour Law*, edited by J. Craig and M. Link, note 55 above, p. 363.

¹⁰⁸ Article 17.2(1)(a) of the US-Singapore agreement, in R. Grynberg and V. Qalo, *ibidem*, p. 632.

¹⁰⁹ Article 18.2.1(a) therein.

¹¹⁰ R. Grynberg and V. Qalo, *ibidem*, p. 650.

¹¹¹ Article 50 states:

“1. The Parties reaffirm their commitment to internationally recognised core labour standards, as defined by the relevant International Labour Organisation (ILO) Conventions, and in particular the freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of the worst forms of child labour and non-discrimination in respect to employment.

2. They agree to enhance cooperation in this area [...]

3. The Parties agree that labour standards should not be used for protectionist trade purposes.” The text of the agreement is available at http://ec.europa.eu/development/Geographical/Cotonou/CotonouDoc_en.cfm

¹¹² B. Hepple, *ibidem*, p. 124.

¹¹³ Available at http://ec.europa.eu/trade/issues/bilateral/countries/chile/euchlagr_en.htm

promoting the relevant ILO conventions covering issues *such as* freedom of association, the right to collective bargaining, non-discrimination, the abolition of forced and child labour and equal treatment between men and women. Like the Cotonou agreement, the agreement with Chile does not require the parties to include in their domestic laws labour rights going beyond those foreseen by the 1998 ILO Declaration. This is the major difference from US approach, which is based on unilaterally defined “internationally recognised labour rights”, reflecting very much domestic US concerns on trade policy¹¹⁴. As we can see, the regime applied to labour rights by EU trade agreements is not sanction-based (except for those provisions introducing a “human rights conditionality” in the Cotonou agreement, although there is no clarity on whether “core” labour rights may fall under them¹¹⁵). Most labour rights are proclaimed as a matter for co-operation; the reason for this is the fear of disguised protectionism against developing countries, what is also expressed in Article 50, paragraph 3, of the Cotonou agreement. This is why the approach chosen is rather positive, focused on capacity-building programmes, than negative¹¹⁶.

Over about a decade, the NAALC and the bilateral agreements seen here have only had relatively minor effects on labour standards in developing countries, neither have they been effective in preventing the decline in US manufacturing industry¹¹⁷. The doctrine does not hesitate to conclude that these instruments have failed to protect human rights, workers’ rights and labour standards¹¹⁸. The EU approach seems more balanced, encouraging countries to comply with “core” ILO standards through positive co-operation (including education and training) rather than negative sanction.

3. The Social Clause in the WTO Agreements

A. The US Proposal to Link Non-Respect for Labour Rights with Trade Sanctions

The American approach in favour of economic sanctions – perceived by most as a unilateral will to impose changeable, self-selected rules to US economic partners – explains the opposition raised by the developing countries (especially the G-77 group) to the proposals of integrating labour rights into the multilateral trade system¹¹⁹. As of today, significant divergences exist as to whether free trade and labour rights should be linked in this context, and no concrete results have come out of the debate. The difficulties are largely due to political arguments on one side, and on the insufficient capability of the international organisations on the other¹²⁰. We will analyse this second order of arguments further below. As to the first one, we should keep in mind that the social repercussions of free trade have raised different concerns in developed and developing countries. In developed countries, the increased perception that imports of manufactured goods from low-wage countries are responsible for significant job losses¹²¹ has stirred the demand for protectionist policies. In this line, the proposal to include labour standards in trade agreements by introducing a *social clause* was motivated by the intent of eliminating unfair competition based on labour exploitation. The opponents – mainly developing countries – have denounced this clause as being an instrument of

¹¹⁴ R. Grynberg and V. Qalo, *ibidem*, p. 643.

¹¹⁵ B. Hepple, *ibidem*, p. 124.

¹¹⁶ B. Hepple, *ibidem*, p. 126.

¹¹⁷ B. Hepple, *ibidem*, p. 127.

¹¹⁸ L. Compa, *Labour Rights in the FTAA*, in *Globalisation and the Future of Labour Law*, note 57 above, p. 245.

¹¹⁹ M. A. Moreau, *La Clause sociale dans les traités internationaux: bilan et perspectives*, note 79 above, p. 98.

¹²⁰ A. Perulli, *Globalisation and Social Rights*, *ibidem*, p. 109.

¹²¹ See above, under Chapter 2, paragraph A.

disguised protectionism aimed at reducing the competitiveness of exporting countries, thereby hampering their economic growth¹²².

The US made a first attempt to raise this issue during the Tokyo Round of multilateral negotiations (1973-79), then again during the Uruguay Round (1986-1994), where the mutual allegations of social dumping and of protectionism between developed and developing countries came fiercely to the political scene. The linkage between trade and labour rights was put again on the agenda of the WTO ministerial conference of Singapore in 1996 by the US, France and Canada¹²³. The conference ended with the adoption of a Declaration which renewed the commitment to the observance of “internationally recognised core standards”, while recognising the ILO as the competent body to deal with these standards. Under the pressure from developing countries, the Declaration also rejected the use of labour standards for protectionist purposes and stated that the comparative advantage of countries, particularly low-wage developing countries, was in no way put into question. After insistence of the US, Norway and -nominally- the EU, the Declaration concluded that the WTO and ILO Secretariat would continue their collaboration. Very soon, however, opposition to such collaboration came from many WTO member states, so that no forum for joint work on the issue was created. It was this stagnation that motivated the Clinton administration to push strongly in order to bring labour standards back into the debate at the ministerial conference of Seattle (1999)¹²⁴. After the Seattle talks failed, no other similar initiative was taken by the Bush administration at the Doha ministerial of 2001, which simply reaffirmed the commitments of the Singapore Declaration.¹²⁵

B. Overview of WTO Exceptions to Free Trade: the Compatibility of a Social Clause

Unlike its predecessor, the Havana Charter, no provision on labour standards was included in the 1947 GATT, with the only exception of Article XX(e), authorising State parties to adopt restrictive measures for trade in products of prison labour. This was left unchanged by the GATT 1994¹²⁶. Indeed, the question whether trade sanctions are compatible with WTO rules remains controversial. A number of GATT rules have been invoked to justify their applicability, but the analysis of these provisions releases problematic results. Besides interpreting GATT in conformity with its object and purpose¹²⁷ and with the relevant rules of international law applicable to the parties¹²⁸, we cannot ignore that, originally, the main concern of its negotiators was protection against unfair competition deriving from low labour costs. Labour standards were therefore considered only as production factors impacting upon international trade, and not as a human rights matter¹²⁹. This historical detail

¹²² M. Burianski, C. Négri, M. Ulbrich, *Free Trade and Core Labour Rights: Status Quo of a Discussion*, in *Tilburg Foreign Law Review* 2002, v. 9, n. 4, p.398-399.

¹²³ B. Hepple, *ibidem*, p. 130

¹²⁴ A. J. Samet, *Doha and Global Labour Standards: the Agenda Item that Wasn't*, in *The International Lawyer*, 2003, v. 37, n. 3, p. 754. This author, however, stresses that the US was proposing a forum bringing together WTO, ILO and other institutions looking at an agenda involving labour standards, trade, employment and development. See *ibidem*, p. 756.

¹²⁵ Par. 8 of the Doha Ministerial Declaration, 14 November 2001, available at

http://www.wto.org/english/thewto_e/minutes_e/min01_e/mindecl_e.htm

¹²⁶ In spite of a committed initiative taken notably by France, in order to protect workers' rights in the new order of global trade. M. A. Moreau, *ibidem*, p. 90.

¹²⁷ “General rule of interpretation” contained in Article 31.1 of the Vienna Convention on the Law of Treaties. The Preamble to the Marrakesh Agreement contemplates among its objectives the raise in standards of living, full employment, the expansion in the production and trade of goods and services, while allowing for the optimal use of the world's resources and the protection and preservation of the environment. There is no mention of labour concerns, or of the general objective of achieving social justice.

¹²⁸ Article 31.3 of the Vienna Convention.

¹²⁹ M. Burianski, C. Négri, M. Ulbrich, *ibidem*, p. 410.

makes it more difficult to integrate labour rights into the WTO mechanisms where they do not directly affect production costs; and, in practice, trade conditionality is very difficult to justify¹³⁰.

The first obstacle is represented by the two key principles of GATT/WTO: the Most Favoured Nation (MFN) and the National Treatment (NT). The MFN translates into trade law the principle of non-discrimination between similar (“like”) imported products¹³¹ and responds to the aim of countering politically-oriented measures excluding certain countries from the benefits of world trade¹³². In its positive meaning, the MFN principle generalises all commercial advantages negotiated between WTO members. Conversely, in its negative meaning, it imposes the equal and generalised retreat of commercial concessions¹³³. Thus, should a country establish that trade in goods with a partner country is conditional upon respect of labour rights, while maintaining unconditional trade in “like” products with another partner, the MFN principle would be infringed. While the MFN does not exclude national protectionist measures, the NT¹³⁴ goes further by imposing equality of treatment between similar products, be they national or imported, in both legal and fiscal terms¹³⁵. The compatibility of a *social clause* with this principle would also be doubtful.

Neither Article VI GATT, the “anti-dumping” provision¹³⁶, can justify a *social clause*. This provision cannot be interpreted as covering the notion of “social dumping”, which is the export of products that owe their competitiveness to low labour standards¹³⁷. As we have seen, the history of GATT shows that only price dumping is relevant, while the methods of production are not¹³⁸. In addition, the 1994 Agreement on Implementation of Article VI excludes unequivocally labour standards, besides requiring special regard for the situation of developing countries¹³⁹. Article XIX, the “safeguard clause”, allows WTO members to unilaterally retreat or modify commercial concessions if, as a result of liberalisation and of unforeseen circumstances, the imports of the specific products increase to the point of causing serious injure to domestic competitive producers¹⁴⁰. A *social clause* could not be assimilated to this provision: again, the conditions thereby required would be hardly established in relation to labour rights abuses.

The only norm in the GATT that can be compared to a *social clause* is enshrined in Article XX, relating to a series of derogations called “general exceptions”¹⁴¹. These exceptions have a permanent nature and largely derive from former customary commercial rules¹⁴². They allow WTO members to adopt trade restrictions when they are necessary, *inter alia*, for (a) the protection of public morals; (b) the protection of human, animal or plant life or health and (e) when they concern the product of prison labour. This latter provision has been so far narrowly interpreted¹⁴³, although the doctrine

¹³⁰ M. Burianski, C. Négri, M. Ulbrich, *ibidem*, p. 412; B. Hepple, *ibidem*, p. 135.

¹³¹ Article I.1 GATT: “[...] any advantage, favour privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[...]”

¹³² B. Hepple, *ibidem*, p. 136.

¹³³ D. Carreau and P. Juillard, *Droit international économique*, L.G.D.J., 1998, p. 233-234.

¹³⁴ Article III GATT.

¹³⁵ D. Carreau and P. Juillard, *ibidem*, p. 235-237.

¹³⁶ Meaning by “dumping” the practice whereby the products of a country are introduced into the market of another country at a price lower than the normal value of those products in the home country. B. Hepple, *ibidem*, p. 144.

¹³⁷ B. Hepple, *ibidem*, p. 13.

¹³⁸ M. Burianski, C. Négri, M. Ulbrich, *ibidem*, p. 410.

¹³⁹ B. Hepple, *ibidem*, p. 144.

¹⁴⁰ D. Carreau and P. Juillard, *ibidem*, p. 263.

¹⁴¹ A. Perulli, *Globalisation and Social Rights*, *ibidem*, p. 110.

¹⁴² D. Carreau and P. Juillard, *ibidem*, p. 293.

¹⁴³ Also considering that, at the time GATT 1947 was negotiated, the only human rights conventions existing were the Convention on Slavery of 1926 and the ILO Convention (C.29) on Forced Labour.

finds no reason to exclude products of other forms of forced or compulsory labour, as defined by ILO Conventions¹⁴⁴. In these latter cases Article XX lett. (a) could also apply, considering that the conventions on slavery, forced and compulsory labour and the worst forms of child labour express “international public morals”. Article XX lett. (b) could justify restrictions on the grounds of health and safety at work. It is not sure, however, whether these “general exceptions” would be legitimate in case of labour rights violations occurring in *other* countries. And in fact, it is difficult to prove a legitimate interest in the observance of international labour standards under the conditions currently set by WTO rules¹⁴⁵. Another hurdle comes from the “necessity” requirement contained in lett. (a) and (b). This requirement renders the exception inapplicable whenever there exist available alternatives to trade sanctions. For example, in the case of a ban on products of child labour, the sanctioned state could defend itself by arguing that less restrictive measures, such as programmes of technical assistance, are available¹⁴⁶. In any case, were trade sanctions for labour rights abuses admissible under the above provisions, they should still satisfy the general criteria set by the *chapeau* of Article XX, which forbid discriminatory, openly protectionist and unnecessary (i.e. not proportional)¹⁴⁷ measures. In the example made above, sanctions against products of child labour could not consist in the suspension of *all* imports from the misconducting country.

Article XX would authorise sanctions based on production processes and certain authors have advanced *de jure condendo* proposals to amend this article by inserting new exceptions for failure to respect labour rights¹⁴⁸. This option would, however, pave the way to fears of protectionism; recourse to Article XXIII would help overcome these fears. A country could invoke the “nullification or impairment” of the benefits expected under the trade agreement and, in the absence of a satisfactory adjustment, all contracting parties may authorise the suspension of trade concessions. This kind of multilaterally authorised sanction should be preferred to unilateral sanction, as it would ensure legitimacy and due process for the defendant state. ILO could be consulted, both under Article XXIII.2 and as a technical adviser to dispute panels under Article 13 of the Dispute Settlement Understanding¹⁴⁹. The fundamental issue, however, is whether labour rights matters should be decided within WTO, which is a purely intergovernmental instance. In this context, where decisions are normally taken by consensus, each member can impose its veto and it would be extremely difficult to adopt sanctions in response to labour rights violations. The ILO tripartite system, on the contrary, requires simple majority to secure compliance with the recommendations of the Commission of Inquiry (Articles 17 and 33 ILO Constitution). We shall now explore the arguments defended by the EU, which represents an opposite pole in this debate.

C. The EU’s positive incentive approach

The EU position on the trade-labour issue was firmly stated in the Council conclusions of October 1999 on the preparations of the third WTO ministerial conference¹⁵⁰. These conclusions embrace a *promotional* view of the role of WTO for the observance of “core” labour rights and, consequently, of EU initiatives in this respect. They call upon the WTO to take a *positive incentive* approach, in cooperation with other relevant international organisations. For this purpose the EU advances itself as a “mediator” to undertake continuous dialogue with partners in the WTO and the ILO, as well as civil

¹⁴⁴ B. Hepple, *ibidem*, p. 141.

¹⁴⁵ B. Hepple, *ibidem*, p. 142.

¹⁴⁶ B. Hepple, *ibidem*, p. 143.

¹⁴⁷ D. Carreau and P. Juillard, *ibidem*, p. 296.

¹⁴⁸ A. Perulli, *Globalisation and Social Rights*, *ibidem*, p. 111.

¹⁴⁹ B. Hepple, *ibidem*, p. 149. The ILO does not enjoy a permanent observer status, although it has a standing invitation to attend WTO ministerial conferences.

¹⁵⁰ The conclusions can be found in Annex I to the Communication COM (2001) 416, “Promoting core labour standards and improving social governance in the context of globalisation”, note 77 above.

society, in order to agree on positions reflecting workers' best interests. These conclusions call for enhanced co-operation between the WTO and the ILO, for the ILO to be granted observer status at the WTO and for the creation of a joint Standing Forum on trade, globalisation and labour issues to promote better understanding. At the same time, the conclusions engage the EU to increase the incentives already existing for the enhancement of labour rights, in particular by improving market access for developing countries. They firmly oppose any sanction-based approach, rejecting the use of labour rights for protectionist purposes¹⁵¹.

The Commission's Communication of 2001 builds on these conclusions. It specifies that EU's overall objective is to redress the imbalance between global economic and social rules. In a perspective of sustainable economic, social and environmental development, the aim of reducing poverty – often the main cause of low labour standards – must be achieved through fostering employment, access to social services and social integration. The integration of “core” labour standards is thus in line with EU development policy. Co-operation agreements, and in particular the Cotonou Agreement, are significant examples of a comprehensive approach combining trade, “core” labour standards and political dialogue to realise social development¹⁵². In this overall re-balancing of the global system, the organisation competent over the social dimension should be the ILO, not the WTO. The latter's power and relative effectiveness have motivated proposals to extend its responsibilities in areas other than trade, thus to apply its rules also to labour standards. The Communication, however, explicitly rejects this option, embracing a multidisciplinary approach for the promotion of “core” labour standards¹⁵³. The EU commits to undertake a number of actions to strengthen the ILO, in particular to give greater publicity to its supervisory mechanism and to improve the effectiveness of complaint procedures. The EU also strongly supports ILO promotional measures, in particular technical assistance programs. For sake of policy coherence, organisations like UNCTAD, the IMF and the World Bank should also include social development and “core” labour standards in their programmes. For its part, the EU commits to increase trade incentives through the renewed GSP, to promote “core” labour standards in its development assistance programs, in future co-operation agreements and capacity-building projects for national ministries and civil society. Specific measures are foreseen for the elimination of child labour¹⁵⁴. Finally, the EU supports private and voluntary schemes, namely social labelling and corporate codes of conduct, though stressing that they remain *complementary* to government action and cannot substitute for ratification and implementation of labour standards by States¹⁵⁵.

The Council conclusions of 17 July 2003 confirmed plainly this approach: they reinstated EU's rejection for sanctions, but supported all forms of incentives to “core” labour standards, mainly through corporate social responsibility and the GSP. It suggested focusing the EU strategy on improving coherence among various policies and all international organisations concerned, on strengthening the ILO, on technical assistance to developing countries and on private schemes¹⁵⁶. This positive incentive approach has been nevertheless criticised for not reflecting the social reality¹⁵⁷. Firstly, the unsatisfactory implementation of “core” labour standards in the practice of EU Member States legitimates the critique of using double standards inside and outside the EU. Secondly, strengthening the ILO requires parallel reforms of the other international organisations (WTO, IMF, World Bank, WIPO and also G7-G8 Summits) which the EU does not seem to

¹⁵¹ Council conclusions, *ibidem*.

¹⁵² Communication COM (2001) 416, p. 12.

¹⁵³ *Ibidem*, p. 3-4.

¹⁵⁴ *Ibidem*, p. 16-18.

¹⁵⁵ *Ibidem*, p. 20. This Communication is closely linked with the subsequent Communication COM (2002) 347 of 2 July 2002 on Corporate Social Responsibility.

¹⁵⁶ Bulletin of the European Union, EU 7/8-2003, at <http://europa.eu/bulletin/en/200307/p106045.htm>

¹⁵⁷ G. Fonteneau, *Normes internationales du travail: la double vie de l'Union européenne*, note 29 above.

consider. Thirdly, valuing so highly private voluntary schemes entails the risk of weakening labour law and social regulations¹⁵⁸.

4. Latest Developments: Hints for an Even More Uncertain Future

A. The New Social Clause in Latest US Bilateral Agreements

The free trade agreements negotiated by the US in the recent years constitute a further step towards bringing labour concerns into the *multilateral* trade system. Under these agreements, in fact, parties may refer their disputes on labour standards directly to the WTO Dispute Settlement Body (DSB), what represents an absolute prime. The US-Morocco agreement of 2004 states that the parties shall *strive to ensure* that the principles of the 1998 ILO Declaration and the “internationally recognised labour rights” are protected by their domestic legislation. The parties shall be deemed not to be in compliance with their obligation to effectively enforce their laws if, through a sustained course of action or inaction, bilateral trade is affected. This shall not apply if such action or inaction reflects the reasonable exercise of a party’s discretion, or results from *bona fide* decisions. The parties cannot derogate from the “internationally recognised labour rights” listed in the agreement in order to encourage trade or investment. Like under the US-Chile agreement, only labour disputes where the weak enforcement of labour laws affects trade are subject to the dispute settlement process hereby foreseen. This process starts with consultations, failing which the matter is referred to a subcommittee on labour affairs, with powers of good offices, conciliation and mediation. If, after a number of further stages, the parties fail to compose the dispute, a monetary sanction can be imposed on the violator. However, the parties can choose the forum they prefer to seize for disputes arising under the US-Morocco agreement, the WTO agreement and any other they have subscribed¹⁵⁹. Here lays the novelty of this trade agreement. Also the US-Australia agreement of 2005 enables the parties to select a forum to hear of their disputes under any agreement of which they are parties, including the WTO. In this way, a party may invoke the WTO DSB whenever another party has failed to implement its labour laws in a manner affecting trade¹⁶⁰.

The US-Central American Free Trade Agreement (US-CAFTA), stipulated in 2003 between the US and five central-American countries¹⁶¹, establishes two dispute settlement processes: the first, a mechanism contemplated in the body of the agreement, has to be previously exhausted. Only after this a party may have recourse to the process foreseen by the labour section of the agreement. In this phase, the party can opt to choose a different forum for settling the dispute. This means that parties may seize the WTO DSB, if more appropriate to address the issue¹⁶². It clearly appears that a new trend in US trade policy is to find ways for direct referral of trade-labour issues to WTO panels. This, again, suggests that the US is acting unilaterally to obtain what political consensus within WTO has been unable to achieve. Some have seen here an attempt to change multilateral trade law

¹⁵⁸ G. Fonteneau, *ibidem*, p. 7.

¹⁵⁹ Art. 20.4 US-Morocco agreement, at http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html; R. Grynberg and V. Qalo, note 68 above, p. 636.

¹⁶⁰ Art. 21.4 US-Australia agreement, at http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html; R. Grynberg and V. Qalo, *ibidem*, p. 638.

¹⁶¹ Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.

¹⁶² R. Grynberg and V. Qalo, *ibidem*, p. 640.

through a strategy seeking to win a series of bilateral victories, so that when their number is sufficient a new “assault” is made in multilateral fora¹⁶³.

B. The EU's Contribution to a Multilateral Solution

Consistently with the approach adopted in 1999 and reinstated in 2003, the EU promotes the respect of “core” labour rights by reactivating the existing international organisations, namely the ILO. On 24 May 2006 the European Commission issued the Communication COM (2006) 249 “Promoting decent work for all – The EU contribution to the implementation of the decent work agenda in the world”¹⁶⁴. Since the year 2000, the ILO “Decent Work Agenda” pursues opportunities for work ensuring a fair income, security at the workplace and social protection for families, better possibilities of personal development and social integration, freedom to organise and participate in decisions affecting workers’ life, as well as equal opportunities and treatment for women and men. In 2004 it was incorporated into the recommendations of the World Commission on the Social Dimension of Globalisation¹⁶⁵. Through this strategy, the ILO wants to fight poverty and achieve equitable and sustainable development. At global level, the “Decent Work Agenda” involves the mobilisation of the main institutions and economic subjects. At national level, it is translated into integrated country programmes defining the specific priorities and targets for economic and social development¹⁶⁶. Given the matters covered, the “Decent Work Agenda” encompasses ILO “core” labour standards and goes beyond them by seeking to combine economic competitiveness with social justice. This is the model that the EU declares to follow¹⁶⁷.

Recognising that economic growth does not always increase or improve employment, the EU proposes a global strategy to tackle the informal employment sector, poor quality jobs and to combat the most flagrant abuses of “core” labour standards such as child labour. In order to change the current reality, the EU sees as necessary to create an environment conducive to national and foreign investment capable of generating jobs at local level; to improve governance, including social dialogue; to establish a regulatory framework to protect workers, as well as viable systems of social protection; to ensure legal certainty for businesses, fair competition rules and to fight corruption¹⁶⁸. This Communication reiterates that under no circumstances can the endorsement of social objectives be used for protectionist purposes. Co-operation with the ILO, the UN and other organisations will be initiated to get deeper knowledge of the issue¹⁶⁹. In its external trade policy, the Commission promotes decent work in particular by improving the link between the GSP+ and its external development assistance and by encouraging other WTO members to follow its approach, expressed in its Trade Policy Review Mechanism of 2004, which underlies the interaction between trade, social rights and employment. The Commission supports dialogue between the international financial institutions, the ILO, the UN and the WTO for the consistency of their policies¹⁷⁰. It favours strengthening the capacity of the social partners and civil society, facilitating bipartite and tripartite social dialogue and improving the participation of social partners and other social stakeholders in

¹⁶³ J. Braithwhite and P. Drahos, *Global Business Regulation*, Cambridge University Press, 2000, in G. Griffin, C. Nyland, A. O'Rourke, *Trade Unions and the Trade-Labour Rights Link: a North-South Union Divide?*, in *The International Journal of Comparative Labour Law and Industrial Relations*, Volume 19/4, 2003, p. 471.

¹⁶⁴ Available at http://ec.europa.eu/employment_social/emplweb/news/news_en.cfm?id=158

¹⁶⁵ See above, at note 18.

¹⁶⁶ See www.ilo.org/public/english/decent.htm

¹⁶⁷ COM (2006) 249, p. 2.

¹⁶⁸ *Ibidem*, p. 3.

¹⁶⁹ *Inter alia* through identifying good practices, developing methodologies to measure how decent work is affected by global trade liberalisation and examining in depth the impact of trade on sustainable development through the EU Sustainability Impact Assessment (SIA). *Ibidem*, p. 5.

¹⁷⁰ *Ibidem*, p. 7-8.

global governance. It acknowledges the importance of corporate social responsibility¹⁷¹. On 20 December 2006 the European Parliament and the Council adopted Regulation (EC) No 1927/2006¹⁷², establishing a European Globalisation Adjustment Fund. This Fund was launched on 1 January 2007 and aims at providing specific support for workers made redundant as a result of major structural changes in world trade patterns due to globalisation, notably where these changes lead to a substantial increase of imports into the EU, or a rapid decline of the EU market share in a given sector or a delocalisation to third countries¹⁷³. This instrument aims at compensating job losses resulting from globalisation by assisting workers' reintegration into the labour market.

C: The WTO-ILO Co-operation for the Enhancement of Labour Rights

Following the Singapore Declaration, the WTO and ILO secretariats have carried out mainly a technical collaboration. The first-ever WTO/ILO joint study on the relations between trade and employment¹⁷⁴ was adopted on 19 February 2007 to offer a better understanding of how trade agreements affect labour markets and working conditions. It does not give policy advice but it wants to help policy-makers to enhance coherence between trade and employment policies, so as to better tackle inequalities and let everybody benefit from global trade. The messages delivered are quite clear: first of all, trade affects jobs in all sectors, therefore imports cannot be the only target of trade-related policies; secondly, off-shoring will make it more and more difficult to predict the at-risk jobs in the future; thirdly, the knowledge on the effect of trade reform on employment, especially on wages, is still incomplete, due to lack of data concerning the informal economy. Another important focus of the study is the trade-inequality link. The report concludes that trade policy relates to several others, like employment, education and redistribution, and that coherence between them would maximise the results of trade liberalisation¹⁷⁵.

There is no other work on labour rights in WTO Council and Committees. The only collaboration, so far, has concerned technical issues under the "coherence" policy strategy. But apart from this WTO and ILO have not (yet) agreed on other ways of co-operating, and the question of the international enforcement of labour rights is a "minefield"¹⁷⁶.

Conclusions

There is no more controversial issue among WTO member states than the issue of trade and "core" labour standards. While it continues to be a "hot" one, it is unlikely that it will be officially taken up again during the Doha Round¹⁷⁷. After the US dropped this issue from its agenda, a number of other countries (mainly EU member states, plus Canada, South Africa and Venezuela) asked for some sort of co-operation and dialogue between the ILO and the WTO¹⁷⁸. The major developments since then have been the 2004 report of the World Commission on the Social Dimension of Globalisation (see above, at chapter 1, par. A) and, most recently, the WTO/ILO study on trade and employment. However, there are many signs to indicate that this issue will come up again in the future. At the

¹⁷¹ *Ibidem*, p. 9.

¹⁷² OJ L 406, 30 December 2006, p. 1.

¹⁷³ Articles 1 and 2 of the Regulation.

¹⁷⁴ ILO-WTO study "Trade and Employment: Challenges for Policy Research", available at <http://www.wto.org> and http://ec.europa.eu/employment_social/international_cooperation/decent_work_en.htm

¹⁷⁵ See http://www.wto.org/english/news_e/news07_e/ilo_feb07/e.htm

¹⁷⁶ http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm

¹⁷⁷ As confirmed also by D. L. Mullaney, Senior Trade Representative at the US Mission to the EU and by MEP Erika Mann, member of the Committee on International Trade, during the Policy Dialogue *Perspectives for transatlantic co-operation and integration*, held by the European Policy Centre on 20 March 2007 in Brussels.

¹⁷⁸ A.J. Samet, *Doha and Global Labour Standards: the Agenda Item that Wasn't*, note 124 above, p. 757.

international level, the ILO has become more and more active. On a regional and bilateral level, social clauses are now systematically introduced into preferential trade agreements, creating precedents that make the absence of a multilateral social clause simply paradoxical¹⁷⁹. In addition, codes of conduct and similar private initiatives increasingly refer “core” labour standards, although with varying degrees of seriousness. Finally, international trade union organisations (such as the ICFTU) nowadays testify that an overwhelming majority of union leaders from Southern countries support the trade-labour linkage in the WTO, contrarily to the official views of their governments¹⁸⁰. Rejecting a world trade frame without social responsibility, many of them support a social clause combined with trade incentives and mechanisms allowing violators sufficient time for redress, rather than outright sanctions¹⁸¹. These developments show that, even though not included in the Doha talks, trade-labour linkages have captured the world’s attention and might lead to a change in the balance of interests.

The effectiveness of trade sanctions against labour rights abuses remains, as of today, still to be proven¹⁸². There exists hardly any research on the economic consequences of a social clause in the world trade order¹⁸³. But apart from any economic quantification, I would conclude by defending the view that labour rights are human rights and they are in a way or another related to – and affected by – global trade. As they express universal values and are legally binding on every state¹⁸⁴, they should justify concern for non-respect occurring in other countries. A multilateral mechanism of protection would, therefore, be appropriate, ensuring that reaction would take place in the realm of international law, rather than by unilateral decision¹⁸⁵. The doctrine is also divided on the methods of such a mechanism. Part of it does not believe that spreading the benefits of globalisation can occur by relocating labour law into international trade law, therefore it prefers strengthening the many “pillars” of the new international labour rights regime, notably the authority of the ILO¹⁸⁶. Another part, on the contrary, estimates that negative sanctions are not the only model to consider. Positive measures, such as preferential concessions to countries improving their labour standards, can work simultaneously. Therefore, a multilateral, non-protectionist social clause is possible and could avoid

¹⁷⁹ C. Granger and J.-M. Siroën, *Core Labour Standards in Trade Agreements: from Multilateralism to Bilateralism*, in *Journal of World Trade*, 40(5), 2006, pp. 813-836.

¹⁸⁰ It should be noticed, however, that some human rights activists fear that the return of the social clause debate in WTO would confer it undue jurisdiction on human rights matters. See FIDH, *Understanding Global Trade & Human Rights*, May 2005, p. 11.

¹⁸¹ G. Griffin, C. Nyland, A. O' Rourke, note 164B above, p. 489.

¹⁸² B. Hepple, *ibidem*, p. 150. A vehement opposition to the social clause comes from J. Bhagwati, who explicitly accuses it of being of protectionist nature and imposing asymmetrical trade relations. This takes him to favour reinforcing the authority of the ILO and “core” labour standards. On the other hand, he mistrusts the efficacy of trade sanctions and pleads for recours to alternative strategies such as moral suasion. See *In Defence of Globalisation*, Oxford University Press, 2004, pp. 240-252.

¹⁸³ According to a recent study, such a clause would reduce imports from violating countries but this would be compensated by additional imports from non-violating ones. Therefore, imports for OECD countries would remain unchanged. On this basis, one could estimate groundless the concerns of protectionism shown by developing countries. This study concludes that a social clause might indeed facilitate liberalisation by raising welfare for compliant countries while keeping limited costs for non-compliance. A. Flasbarth and M. Lips, *Effects of a Humanitarian WTO Social Clause on Welfare and North-South Trade Flows*, in *Aussenwirtschaft*, 61, 2006, p. 159-178. See also C. Granger and J.-M. Siroën, note 179 above.

¹⁸⁴ To the point of constituting imperative norms of international law, as stated by the CIJ in 1970 in the case *Barcelona Traction Light and Power Company (Belgium v. Spain)*. The CHR has further established, in its General Observation n. 24 (1994) that, *inter alia*, the prohibition of slavery, torture or cruel, inhuman or degrading treatment, the freedom of thought, conscience and religion and the prohibition of incitement to racial, national or religious hatred are part of international customary law. These fundamental rights are pertinent to most ILO “core” labour rights.

¹⁸⁵ This view is also shared by H.-M. Wolfgang and W. Feuerhake, *Core Labour Standards in World Trade Law – The Necessity for Incorporation of Core Labour Standards in the World Trade Organisation*, in *Journal of World Trade*, 36(5), 2002, pp. 883-901.

¹⁸⁶ B. Hepple, *ibidem*, p. 271.

the risk of “social dumping” and “race to the bottom” among WTO members. The absence of any trade-labour linkage in the WTO system, it is said, encourages parallel arrangements in bilateral trade agreements in a manner that jeopardises multilateralism¹⁸⁷. Insofar as the feasibility of a social clause remains uncertain, other authors have suggested the use of the TPRM¹⁸⁸ to ensure compliance with labour rights. The purpose of the TPRM is to enhance adherence to GATT rules through periodic review of the policies and practices of WTO members, thus allowing for collective evaluation and voluntary compliance. Labour rights considerations would then realistically lead to improvements through the reinterpretation of existing rules, without adding new obligations¹⁸⁹. This is also the line followed by the EU. But, again, this mechanism remains voluntary. Consistently with what has been said at the beginning of this paper, the protection of labour rights cannot be left to the good will of States or private economic subjects. And indeed, even those who oppose a social clause in the WTO do not exclude the possibility of ultimate trade sanctions towards countries that grossly disregard human rights, such as the expulsion from WTO¹⁹⁰. Given the multiplied concerns for the trade-labour rights linkage world-wide in the last years, global trade regulation can no longer ignore this important issue. The forthcoming elections for the US presidency might produce a change in trade policy orientation, which could lead to re-opening the debate. On the other hand, if we agree that promotion only will not be effective without a legal sanction, we should be willing to reconsider the inclusion of labour rights among trade law rules. This could take place through a newly-conceived social clause, not following the U.S. model but rather combining positive and negative conditionality in the style of the EU GSP. This would require amending the GATT accordingly, a thing that, first and foremost, necessitates large political consensus. We know at the moment how difficult this consensus is. This is why, in my opinion, a social clause in the WTO system should not be the only answer to labour rights concerns. Global problems demand global responses. Political consensus can be prepared by a global action articulated at various levels, including the reinforcement of the ILO and policy reforms in the other relevant international organisations, a deeper understanding of the trade-employment relation, co-operation and technical assistance to developing countries so as to help them raising their labour standards and no longer fearing to lose their comparative advantage¹⁹¹. The strategy adopted by the EU in this respect seems to go the right way. In a visionary perspective for the coming decades, this political evolution could help revitalising the international labour rights regime by enlarging and modernising the catalogue of the “core” labour rights and providing it with a binding enforcement mechanism, based more and more on rights than on principles.

Improving labour standards and creating the best possible conditions for the respect of labour rights will respond to the call of Article 28 of the Universal Declaration for a social and international order enabling the full realisation of human rights.

¹⁸⁷ C. Granger and J.-M. Siroën, *ibidem*, p. 836.

¹⁸⁸ Annex 3 to the Marrakesh Agreement.

¹⁸⁹ M. Burianski, C. Négri, M. Ulbrich, note 122 above, *ibidem*, p. 409. H.-M. Wolfgang and W. Feuerhake support this suggestion, thereby explaining the need to rethink the goals of WTO. It should no longer be serving exclusively the regulation of market access, rather it should become the guardian and administrator of a comprehensive world trading order, in which development policy is at the foreground. *Ibidem*, p. 899.

¹⁹⁰ B. Hepple, *ibidem*, p. 274.

¹⁹¹ A global action is also the best strategy to tackle the problem of **child labour**, which does not find adequate answers through trade sanctions. And in fact poverty, not globalisation, is the root cause of child labour, which mostly occur in the informal sector of domestic market (such as agriculture), rather than in export industries. Public policies addressing the root causes of child labour are needed, namely through structural interventions offering children better education perspectives and compensating parents for loosing their children’s income mainly through better job opportunities. Trade sanctions against countries with extensive child labour are not adequate responses, in that they further diminish the alternatives available to poor families. See R. Flanagan, note 44 above, p. 184-185, as well as F. Roselaers, *The Challenge of Child Labour*, in *Confronting Globalisation – The Quest for a Social Agenda*, edited by R. Blanpain, Kluwer Law, 2005, pp. 117-129.