The relationship between Trade Law and Human Rights of Workers – the proposition to incorporate a Social Clause into the World Trade Organisation

Nikola S Georgiev
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Nikola Georgiev
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Table of Contents

1 INTRODUCTION
   1.1 General Background
   1.2 Subject and Aim

2 THE INTERNATIONAL LABOUR ORGANIZATION
   2.1 History and Principles
   2.2 The Human Rights of Workers
   2.3 Labour Rights in the United Nations’ Human Rights Framework
   2.4 The ILO Declaration on the Fundamental Principles and Rights at Work
   2.5 The ILO Supervising System
      2.5.1 The Reporting System
      2.5.2 Complaints

3 THE WORLD TRADE ORGANIZATION
   3.1 History - the GATT System
   3.2 Principles of the WTO
   3.3 International Trade Law

4 CURRENT EFFORTS OF LINKING TRADE AND LABOUR RIGHTS
   4.1 Generalised Systems of Preferences
      4.1.1 The US system
      4.1.2 The EU system
   4.2 International Strategy

5 A SOCIAL CLAUSE IN THE MULTILATERAL TRADING REGIME
   5.1 The ICFTU Proposal for a Social Clause
   5.2 The Discussion Surrounding the Social Clause
      5.2.1 The North-South Division
      5.2.2 Are the developing countries united in their opposition to the Social Clause?
   5.3 Is The Social Clause Justified?
      5.3.1 The WTO Position
      5.3.2 The Protectionist Argument

6 CONCLUSION

BIBLIOGRAPHY
1 Introduction

1.1 General Background

The subject of international trade and labour rights has been in focus of the international human rights debate since the end of the Cold War. The globalization has brought an expansion of the international ties between countries as regards to trade and international co-operation and competition. The creation of the World Trade Organization (WTO) in 1995 marked an important step in the development of the international rule of law. Thus, the old General Agreement on Trade and Tariffs (GATT) system, which was a patch-work compromise with no real power to uphold the principles of international trade, was replaced by the WTO. With its powerful institutions and automatic rules-based adjudication system it was clear that international trade was to be performed according to a certain set of principles, similar for all members. Hence, this development was not matched by a similar development regarding international labour standards. Despite the knowledge of the interaction between international trade and labour rights the latter was left outside the new organization, to the detriment of the international labour movement and human rights groups. The consequences of the increased globalization have been high lightened by the unprecedented growth of Export Processing Zones (EPZs), where labour standards are simply ignored. In numerous publications and media revelations the appalling labour conditions of workers in the developing countries has been directly linked to the Transnational Corporations (TNCs) that sell their products in the developed countries. The consumers in the West have through these channels become aware of their influence on the conditions of labour in developing countries. This has generated the violent confrontations that have accompanied all the high level meetings of the international trade institutions, especially memorable being the WTO Ministerial Meeting in Seattle in 1999. The pressure is mounting to provide fair labour standards for all the workers in the world as the TNCs voluntary and non-binding Codes of Conduct (CoC) often have been proved ineffective means of dealing with this issue.

The international trade union movement has since its creation been aware of the pressure international trade puts on the labour standards on all countries. Without a common framework of basic labour rights the pressure to compete with the most exploited labour force in the global market will lead to a ‘race to the bottom’ and increase in human rights abuses.

1 See Lucy Amis, Peter Brew and Caroline Ersmarker, “Human Rights: It Is Your Business”, The case for corporate engagement, 2005
1.2 Subject and Aim

The subject of this paper is to examine the proposal for incorporating a ‘social clause’ into the WTO. This essay focuses on the international labour unions proposal to make use of the international trading regimes’ main actor, the WTO, to enforce the human rights of workers. Thus, the aim of this paper is to describe the contents of this proposal and to evaluate if the social clause is justified.

A social clause is in this paper defined as a clause containing an obligation to uphold the basic human rights of workers. This clause is to be inserted into the present rules-based trading regime and to be enforced by the most powerful actor in this field, the WTO. The proposal examined in this essay is based on a co-operation between the WTO and the ILO. To be able to assess the rationale for the social clause, the historic background, principles, working methods and effectiveness of these two organizations will be examined. The current attempts to link trade and labour standards are also of great interest for the social clause debate and therefore the connections of greatest importance will be analysed. The debate surrounding the social clause has been intense among countries as well as among governments, economic and human rights scholars, NGOs and trade unions. Thus, the positions taken in this debate will be outlined and analysed as to make an attempt at assessing the justification for the proposed social clause.
2 The International Labour Organization

2.1 History and Principles

The ILO was founded in 1919 and currently has 178 member states.\(^2\) The organization was constructed as an autonomous part of the League of Nations system and its Constitution formed Part XIII of the Treaty of Versailles.\(^3\) The rationale for the creation of the ILO was connected with the increase of international trade that had taken place during the late nineteenth century during what has been called the first wave of globalization. An organization for the protection of labour rights and social justice was needed to ensure that abusive labour standards did not translate into unfair trading advantages.\(^4\) The preamble of the ILO Constitution clearly articulated that the improvements of labour rights in a country was dependant on the labour practices in other countries:

"The failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries"\(^5\)

The founders of the organization, which were mainly the labour movements in the US and Western Europe, saw the ILO as an instrument to raise labour standards throughout the world, by building up a code of international legislation.\(^6\) This function was performed with success during the period between the two World Wars.\(^7\) The ILO continued its work during WWII and in 1944 a conference was held in Philadelphia to plan the future work of the organization and its relationship with the planned United Nations Organization.\(^8\)

\(^2\) See the ILO homepage, available on <www.ilo.org/public/english/standards/relm/country.htm>, accessed on 09/12/10


\(^5\) ILO Constitution, Preamble para. 3.


\(^7\) Ibid.

\(^8\) Ibid., p. 29.
A declaration of labour rights, called the Declaration of Philadelphia, was incorporated into the ILO's Constitution and reaffirmed the fundamental principles of the organization:

(a) labour is not a commodity;  
(b) freedom of expression and of association are essential to sustained progress;  
(c) poverty anywhere constitutes a danger to prosperity everywhere;  
(d) the war against want requires to be carried on with unrelenting vigor within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

The Declaration of Philadelphia further contained a number of objectives for the future programmes of the ILO. The objectives concerning labour rights shared much in common with the later United Nations' Human Rights Covenants: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), such as equitable remuneration and protection for the life and health of workers. Furthermore, the Declaration of Philadelphia was focused on the relationship between social and economic policy and affirmed that economic progress by national and international action was necessary to achieve the objectives in the Declaration.

2.2 The Human Rights of Workers

The ILO has to this day adopted more than 180 conventions and 185 recommendations forming the basis of international labour legislation, the 'International Labour Code'. The labour rights conventions of the ILO preceded the human rights framework of the United Nations by decades. However, at the time of the drafting of the early ILO conventions the concept of human rights was not yet developed as binding legal obligations. The ILO declarations and conventions speak of social justice and humane conditions of labour. The concept of social justice is not contrary to human rights but it is different and wider. Where the United Nations’ Human Rights Conventions mainly focus on the relation between the individual and the state, the ILO conventions are often directed towards the employers and the states main role is as a guarantor.

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9 Declaration of Philadelphia para. I.  
10 Ibid. para. IV.  
12 See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, The International Labour Organization, p. 127.  
13 Ibid.
2.3 Labour Rights in the United Nations’ Human Rights Framework

The ‘International Bill of Human Rights’, which consists of the 1948 United Nations’ Universal Declaration of Human Rights (UNDHR) and the two covenants of 1966, the ICCPR and the ICESCR, forms the basis of international human rights law. Certain labour rights are included in the instruments of the International Bill of Human Rights. The prohibition of slavery found in article 4 of the UNDHR can be described as setting the outer limit on all labour rights. Rights more directly linked to the conditions of labour are laid out in article 23 and 24 of the UNDHR. Article 23 establishes the right to work, the freedom of association, the right to just remuneration and equal pay. Rights concerning reasonable limitation of working hours and the right to leisure and holiday are found in article 24. Labour rights were also incorporated in both the ICESCR and the ICCPR. ICESCR article 6 defines the right to work as an opportunity for everyone to gain his living by ‘work which he/she freely chooses or accepts’. Article 7 outlines a number of just and favourable conditions of work, such as fair remuneration, safe working environment, equal opportunity to be promoted and reasonable limitation of working hours. The ICESCR also contains regulations on child labour. Work that is ‘harmful’ to children’s development is to be prohibited and each country is to set a minimum age level below which paid employment of children is punishable by law. Trade union rights are protected by article 8, which ensures the right of anyone to form and join a trade union of his choice. The ICCPR also protects the right to organize trade unions as it forms part of the freedom of association. Article 8(3)(a) of the same Covenant states that ‘No one shall be required to perform forced or compulsory labour’.

Regarding all human rights in the UNDHR and the two Covenants, discrimination of any kind is prohibited as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The human rights of workers that are incorporated in the International Bill of Human Rights are mainly reiterations of what had previously been elaborated in the conventions of the ILO. However, their incorporation in the human rights covenants demonstrate their status as global human rights.

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14 CESC art. 6.
15 CESC art. 7.
16 CESC art. 8.
17 CCPR art. 22.
17 See UNDHR art. 7, CESC art. 2(2) and CCPR art. 2(1).
18 See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, The International Labour Organization, p. 128.
2.4 The ILO Declaration on the Fundamental Principles and Rights at Work

In the 1990s the ILO declared a set of conventions as fundamental human rights conventions, or ‘core conventions’. In 1998 the General Conference adopted the ‘ILO Declaration on the Fundamental Principles and Rights at Work’. The Declaration stated that all member countries, whether or not they had ratified the relevant conventions, had an obligation arising from their membership in the organization to ‘respect, promote and realize, in good faith and in accordance with the Constitution’ the principles concerning the following fundamental rights:

(a) freedom of association and the effective recognition of the right to collective bargaining
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour and
(d) the elimination of discrimination in respect of employment and occupation

The origin of the Declaration is directly linked to the discussion surrounding the relationship of trade and labour rights. The effects of globalization and its impact on the workers were highlighted in the end of the nineties. There was an increasing interest in including a social pillar in the global economy, however there was much controversy about how to achieve this goal. In 1994, a Director-General report and the following discussion in the International Labour Conference led to the establishment of a working party in the Governing Body on the social dimensions of the liberalisation of international trade.

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20 Ibid., p. 129.
22 ILO Conventions No. 87 and 98.
23 ILO Conventions No. 29 and 105.
24 ILO Conventions No. 138 and 182 (The Worst Forms of Child Labour Convention was adopted in 1999).
25 ILO Conventions No. 100 and 111.
27 The forum was later renamed the Working Party on the Social Dimension of Globalization, see Ibid.
Outside the ILO, the 1995 World Summit on Social Development in Copenhagen renewed the political commitment for the labour rights in general and in particular the ILO conventions regarding the rights later protected in the Declaration. The Copenhagen Summit inspired an ILO ratification campaign that managed to increase the member states bound by the core conventions by 25%. The Ministerial Conference of the World Trade Organization held in Singapore in 1996 again recalled the world community’s commitment to core labour rights and spotted ILO as the competent body to deal with these issues. This outside recognition of the importance of the ILO led to the idea of the Declaration and its subsequent follow-up mechanism. The Declaration on the Fundamental Principles and Rights at Work was a clear statement of a renewed commitment to the fundamental human rights of workers. In the preamble economic growth is said to be ‘essential but not sufficient to ensure equity, social progress and the eradication of poverty’ and fundamental rights are necessary to enable workers to claim their share of the economic development.


29 Ibid.

30 Declaration on the Fundamental Principles and Rights at Work, Preamble, para. 2 and 5.
2.5 The ILO Supervising System

The supervising system of the International Labour Conventions and Recommendations is multilayered and consists of reporting by member states on both ratified and unratified conventions as well as the possibility of workers’ and employers’ organizations to make complaints and representations. A special procedure is established on the protection of the freedom of association.

2.5.1 The Reporting System

All member states are obliged to bring a convention or recommendation to the attention of the competent national authority within eighteen months of the adoption by the International Labour Conference. According to article 30 of the Constitution, other member states are authorised to bring the failure of another member state of this obligation to the attention of the Governing Body. However, this procedure has rarely been used. The Committee of Experts on the Application of Conventions and Recommendations is an independent body consisting of 20 expert jurists. The Committee reviews reports by states on ratified and unratified conventions. As regards ratified conventions member states are bound by article 22 of the ILO Constitution to report annually on the actions taken to comply with the conventions to which they are bound. However, due to the ever-increasing number of conventions and ratifications this obligation, both regarding timing and content, is now dependant on the specific convention. The Committee of Experts may request state reports whenever they find it necessary.

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31 See the ILO Constitution art. 19(5-6).
33 See Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, The International Labour Organization, p. 75.
34 Ibid., p. 68.
35 See the International Labour Office, Handbook of procedures relating to international labour Conventions and Recommendations, para. 34(b) and (c)(i).
2.5.2 Complaints

According to article 26 of the ILO Constitution, a member state can file a complaint to the Governing Body, if it considers another member state being in breach of a convention that they both have ratified. The Governing Body can also receive a complaint from a Conference delegate, either governmental, worker or employer, or commence the procedure ‘on its own motion’. Under the article 26 procedure, the Governing Body can establish a Commission of Inquiry to deal with the matter. The Commission of Inquiry does not have a fixed mode of procedure; its work will be guided by the general principles of the Constitution. Generally, the Commission will consider the complaints and receive communications from parties and hold hearings. The Commission may request to visit the country in question to interview public authorities, trade union members and others. Under article 27 member states agree to cooperate with the Commission. When the Commission has reached a conclusion, this shall be communicated in a report to the Governing Body and to the concerned parties. The governments shall then within three months inform the Director-General whether they accept the recommendations or not and if they intend to pursue the matter in the International Court of Justice (ICJ). The ICJ procedure has never been used. If the defaulting government does not carry out a recommendation by the Commission of Inquiry, the Governing Body may take action according to article 33. This article states that the Governing Body may ‘recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith’. The article 33 procedure leaves a venue open for the Governing Body to recommend a wide range of actions, including economic sanctions, to the International Labour Conference. Normally governments tend to accept the recommendations of the Commission and the case is then followed up through the regular reporting procedures.

36 See the International Labour Office, *Handbook of procedures relating to international labour Conventions and Recommendations*, para. 78.
38 See the ILO Constitution, para. 29(2).
3 The World Trade Organization

3.1 History - the GATT System

At the end of World War II, the United States and its allies started cooperating on creating a system for the regulation of international trade. The major reason for their actions was the catastrophic economic policies during the interwar period leading up to the Great Depression, which was seen as a major economic cause for the outbreak of World War II. The economic policies of the interwar period mainly consisted of gradually upgraded protectionist measures that put great constraints on international trade.

The US government invited a number of countries in 1945 to participate in negotiations to form a multilateral agreement for the reduction of tariffs. Thus, in 1948 a UN meeting was held in Havana to draft the charter of an International Trade Organization (ITO). The so-called ‘Havana Charter’ was divided into three parts, where one part concerned the structure of the organization and the other two the multilateral agreements to reduce tariffs and the general rules regulating this agreement. The Havana Charter was also an early attempt to create a link between trade and labour law. Article 7 of the Charter stated:

The members recognise that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognise that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The members recognise that unfair labour conditions, particularly in product for export, create difficulties in international trade, and accordingly, each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

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The text also stated that the ITO should consult and co-operate with the ILO on all matters regarding labour standards. The Havana Charter never came into force, due to the resistance in the US Congress against the creation of an international trade organization, but it demonstrates that international trade regulations have long been regarded to have an intimate connection with labour standards. However, even though no international trade organization was created, the agreements in the charter concerning the reduction of tariffs were applied as the GATT. These rules formed the basis for international trade regulation from 1947 to 1996. The GATT’s work in reducing trade tariffs was conducted through eight so-called trade rounds, beginning with the first in Geneva 1947 and finishing with the one establishing the WTO, which began in Uruguay in 1986. The trade rounds lowered the level of tariffs in international trade but there were several problems with the process, many of which originated in the flawed structure of the GATT system. Firstly, the loopholes in the GATT system were many and therefore the system had great troubles restricting measures imposed for protectionist reasons, so-called Non-Tariff Measures (NTM). Secondly, trade measures on agriculture were not adequately dealt with. Thirdly, the GATT was not able to establish an effective system for disciplining state trading activities. These defects initiated the interest for the creation of an organization that would be able to handle international trade issues in a more coherent way, as well as disciplining countries into abiding by the agreed standards. After several years of discussion the ‘Marrakech Agreement’ establishing the WTO was signed on 15 April 1994 and it came into force the following year.

At the meeting establishing the WTO, a workers’ rights clause was on the agenda and the topic was heavily debated, but there was no concrete outcome. In the first Ministerial Conference of the WTO in Singapore, in 1996, the social clause issue was discussed once again. The proponents of the social clause were mainly the US, France and other industrialized countries, whilst a substantial amount of developing countries heavily opposed the suggestion and claimed that the connection was hidden protectionism aimed at reducing the comparative advantages of the developing countries.

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42 Ibid. p. 17.
43 Ibid. p. 12.
44 Ibid. p. 24.
The outcome of the debate was the following paragraph in the Final Declaration of the Conference, known as the ‘Singapore Declaration’:

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

The ‘existing collaboration’ mentioned in the statement has this far meant no collaboration at all. The paragraph in the Final Declaration was clearly a victory for the countries opposing a social clause as it removed the question from the agenda by naming the ILO as the organization with the exclusive competence to deal with labour issues. However, even if the social clause discussion has not formally been reintroduced on the WTO agenda, the efforts to bond labour standards to trade were not stopped by the Singapore Declaration.

3.2 Principles of the WTO

The WTO was established in 1995 and currently has 148 member states. The WTO can be described as the outcome of longstanding efforts to regulate international trade. The WTO differs from the GATT in that it is an independent organization with its own legal personality and that it in regard to membership and substantive content extends much beyond the GATT. The more coherent rules-based approach in the WTO system is formulated in the ‘single undertaking’ in article II:2 that expresses the legally binding obligation of all member states to abide by the international trade agreements. The WTO’s function is outlined in article II:1:

“The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement”.

49 The collaboration consists of a lunch between the legal directors of the WTO and the ILO every two weeks, see interview with Lee Swepston.
51 See the WTO homepage, available on <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, accessed on 19/12/10.
The WTO system thus comprises organizational rules as well as substantive trade rules. The organization aims at legally converging State performance to promote the common purposes of the organization. The common purposes are the conduct of trade and economic endeavours with a view to raising standards of living and ensuring full employment whilst using the world’s recourses in accordance with the objective of sustainable development. Furthermore, the least developed countries shall secure a share in the growth of international trade. The means for achieving these objectives are substantively pointed out as: “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations”.

The reduction of tariffs coupled with a more integrated and viable trading system is the model for the improvement of multilateral trade. Apart from upholding the current rules-based international trading system, the WTO is meant to function as a negotiating forum for the creation of new rules.

### 3.3 International Trade Law

The WTO consists of three major substantive agreements, the GATT, the General Agreement on Trade in Services (GATS) and the Trade-Related Intellectual Property Agreement (TRIPS). The GATT deals almost entirely with trade in products. The main focus is to ‘liberalize trade’ by constraining governments from imposing means to distort trade such as tariffs, quotas, international taxes and regulations that discriminate against imports, subsidies, dumping practises and other Non Tariff Measures that discourage trade. The GATT also contains the Most Favoured Nation (MFN) principle, which states that governments export and import regulations should not discriminate between other countries’ products. In short, the GATS and TRIPS agreements are aimed at establishing similar rules for their respective areas of trade.

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53 The Marrakech Agreement, Preamble para. 1.
54 The Marrakech Agreement, Preamble para. 3.
55 The Marrakech Agreement article III:2.
56 GATT article I.
4 Current Attempts to link Trade and Labour Rights

4.1 Generalised Systems of Preferences

The efforts to link trade with the human rights of workers have taken many different forms. The current forms of linkage between trade and labour rights will be described and assessed as a background to the discussion on a multilateral social clause in the international trading regime. The most general and coherent systems in this field are the Generalised Systems of Preferences (GSP). The GSPs are arrangement by the US, the EU and other industrialized countries by which developing countries get privileged access to these developed countries’ markets by tariff-reductions or duty free access. The rationale for the system is to promote the economic development of developing countries through trade. For the GSP systems to be able to operate; a waiver was required from GATT article 1, which contains the Most Favoured Nation principle that prohibits discrimination. The waiver was granted in 1971 (and prolonged indefinitely in 1979) by the creation of the so-called ‘enabling clause’. This clause enabled the developed countries to give more favourable treatment to developing countries without extending this treatment to all countries. The systems of the US and the EU include references to certain basic labour standards.

4.1.1 The US system

The GSP of the US was adopted in 1974. By the enactment of the Trade and Tariff Act of 1984 the system of preferential treatment is conditioned on the respect for 'internationally recognized workers' rights', defined as the freedom of association, the right to organize and bargain collectively, prohibition of forced or compulsory labour, prevention of child labour, and acceptable conditions with respect to minimum wages, hours of work and occupational safety and health. These rights are not based on the ILO conventions in the field (the US has only ratified two of the eight core conventions) and on account of this the standards used in the system are in many cases unclear. The negative effects of not basing the system on the conventions of the ILO are significant as countries through this can be held accountable for violations of standards they have not signed up for and that does not form part of customary international law. Another negative aspect of the US' GSP is the complete discretion invested in the executive power. The failure to uphold the workers' rights standards may not 'prevent the granting of GSP eligibility if the President determines that such a designation would be in the national economic interest of the United States'. The President thus has complete discretion over the whole process.

The US' GSP is based on an annual petition and review process. Petitions may be filed by individuals, organizations or any other party with 'a significant economic interest' in the subject of the petition. The United States Trade Representative (USTR) decides whether the petition is rejected or accepted and, if a review is performed, whether to suspend or remove the preferential system with regard to the concerned country. The fairness of the review system is thus dependant on the efforts of petitioners to file claims and the impartiality of the USTR when assessing the claims. The burden of evidence gathering when filing petitions has resulted in the fact that only large organizations can undertake the task of petitioning. The bulk of the petitions have been filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation of unions in the US, and the International Labor Rights Fund (ILRF), a human rights organization.

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59 See the Office of the USTR, the U.S. Generalized System of Preferences Guidebook, p. 24, available via the Office of the USTR’s homepage <www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html>, accessed on 04/01/11.
60 Conventions nr. 105 and 182, see the ILO homepage, <webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN>, accessed on 04/01/11.
62 See the Office of the USTR, the U.S. Generalized System of Preferences Guidebook, p. 24
4.1.2 The EU system

The GSP of the EU has been operating since 1971. There was a major reform of the system in 1994-95\(^{64}\) and the principles of that system are followed through in the current regulation, which came into force in 2002.\(^{65}\) The current regulation produces “incentives” for countries to observe labour rights and “withdraws” GSP privileges from countries that do not observe the standards. The “incentives” programme creates a possibility for a developing country to gain additional tariff preferences on products if the country can demonstrate that it abides by the standards in the ILO Declaration of Fundamental Rights and Principles at Work.\(^{66}\) The process is initiated by a request for a special incentive arrangement from a developing country to the European Commission.\(^{67}\) The request shall demonstrate that the country’s legislation is in conformity with the Declaration and that the legislation is properly implemented. However, the country is not obliged to have signed the conventions of the Declaration. The examination is conducted with the participation of the concerned government and within a year the Commission decides on whether to grant the request. However, if a country needs more time to conform to the requirements it may ask for the decision to be postponed.\(^{68}\) The GSP privileges can be “withdrawn” if any of the following practices occur in the concerned country:

(a) practice of any form of slavery or forced labour as defined in the Geneva Conventions of 25 September 1926 and 7 September 1956 and ILO Conventions No 29 and No 105;
(b) serious and systematic violation of the freedom of association, the right to collective bargaining or the principle of non-discrimination in respect of employment and occupation, or use of child labour, as defined in the relevant ILO Conventions;
(c) export of goods made by prison labour;

If the Commission, or a member state, receives information of such violations and considers there being possibilities for an investigation the Committee for the Management of Generalized Preferences shall be informed. This is a body composed of representatives of the EU member states and chaired by a representative of the Commission.\(^{70}\) Following an investigation initiated by trade unions Myanmar was suspended indefinitely from the GSP in March 1997.\(^{71}\) However, a claim in 1995 posed against Pakistan did not even provoke an investigation from the Commission, despite that no challenge had been made against the facts presented in the claim.\(^{72}\) This casts doubts as to the impartiality of the EUs GSP.

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64 Council Regulation 3281/94.
66 Ibid., article 14(2).
67 Ibid., article 15(1).
68 Ibid., article 16(4).
69 Ibid., article 26(a-c).
70 Ibid., article 27(1).
72 ICFTU, Building workers’ human rights into the global trading system, p. 60.
4.2 International Strategy

A number of international commodity agreements, such as the 1981 Tin Agreement, the 1986 Cocoa Agreement and the 1987 International Rubber Agreement, refer to core labour standards. These labour clauses are mainly statements of intent with no attached control mechanisms or sanctions.

In the 1970s several initiatives were taken to establish a framework for the conduct of multinational enterprises. In 1976 the Organisation for Economic Development and Co-operation (OECD) adopted its Guidelines for Multinational Enterprises and the following year the ILO adopted its Tripartite Declaration of Principles Concerning Multinationals and Social Policy. These instruments sought to define the social responsibility of multinationals but none of them were legally enforceable. Their value has thus been questioned.

In recent years the interest of ‘Codes of Conduct’ for private corporations and social responsibility issues has augmented considerably. A wide range of multinationals have formulated codes of conduct, which often include labour issues. The mounting public interest in ethically produced products has urged the international corporations to create mechanisms to ensure that their products are produced in a ‘fair’ environment. However, since the codes are voluntary they are not legally enforceable. There are also often deficiencies in the monitoring and enforcement procedures. Despite these problems the codes can definitely have a positive impact on the behaviour of business in developing countries.

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73 ICFTU, *Building workers’ human rights into the global trading system*, p. 61.
75 *Ibid.*, chapter 5.1.5.
5 A Social Clause in the Multilateral Trading Regime

5.1 The ICFTU Proposal for a Social Clause

The International Confederation of Free Trade Unions (ICFTU) is the largest organization of trade unions in the world. It has 233 affiliated organizations in 154 countries, with a total membership of over 145 million workers. This makes it an important actor in the labour rights movement and this essay will therefore examine this organization’s proposal for a social clause in the international trading regime. Other proposals for a social clause normally share much in common with the ICFTU proposal.

The contents of and rationale for the ICFTU proposal are laid out in the 1999 report ‘Building workers’ human rights into the global trading system’. ICFTU has since stressed on numerous occasions the importance of incorporating workers’ rights into the WTO system. An important point of the ICFTU proposal for a social clause is that it does not create any new rights but strengthens the enforcement of already existing rights. The social clause is to enforce the standards adopted in the ILO Declaration on Fundamental Rights and Principles at Work.

The ICFTU proposal is designed to combine the authority and impartiality of the ILO with the power of the WTO. The purpose appears to be both to provide strength for the international human rights protection of the ILO and to highlight the pressure the present trade system puts on the human rights of workers.

\[\text{See the ICFTU homepage} \langle \text{www.icftu.org/displaydocument.asp?DocType=Overview&Index=990916422&Language=EN} \rangle, \text{accessed on 19/12/10.}\]

Daniel S. Ehrenberg proposes a similar social clause, based on the co-operation of ILO and the WTO in a joint Dispute Panel, in chapter 8 of Lance A. Compa and Stephen F. Diamond (Ed.), Human Rights, Labour Rights, and International Trade.

ICFTU, Building workers’ human rights into the global trading system, 1999, available via the ICFTU homepage \langle \text{www.icftu.org/list.asp?Language=EN&Order=Date&Type=Publication&Subject=ILS} \rangle, accessed on 19/12/10.

See e.g. para. 10 of the ICFTU statement in 2003 at the 5th Ministerial Meeting in Cancún. Available via the ICFTU homepage, \langle \text{www.icftu.org/displaydocument.asp?Index=991217396&Language=EN} \rangle, accessed on 20/12/10.

ICFTU, Building workers’ human rights into the global trading system, p. 43.
5.2 The Discussion Surrounding the Social Clause

5.2.1 The North-South Division

The countries most fiercely opposing a social clause are the developing countries, who argue that a social clause would diminish their comparative advantage, the low labour costs, and thereby hinder them from developing, like the western world once could develop. This reaction is clearly understandable against the background of their heavy reliance on cheap labour to compete on the world market. Their scepticism towards the good will of the developed nations may also be well founded; the GSP’s labour rights protection has often been misused and aimed at political adversaries rather than the worst labour rights violators.

5.2.2 Are the developing countries united in their opposition to the Social Clause?

There is clearly a strong opposition to a social clause in the South, but the situation is not as clear as it first may seem. The organized labour movement is found on both sides of the debate as well as NGO’s and unorganized labour. African trade unions have supported the social clause on a number of occasions and at the 1997 Congress of the ICFTU, the African Regional Organization adopted a strong statement calling for a workers’ rights clause in the WTO. This demand has been repeated and elaborated later in pan-African Conferences in 1998 and 1999. This campaign also resulted in governmental support and at the ILO Conference seven African governments supported the proposal to advance the debate on international labour standards and trade. The governments and trade unions of Asia have been the strongest opponents of a social clause but also here there are differences of opinion. For example, the Korean Confederation of Trade Unions, which estimated its total membership to 573,490 workers in some 1,226 individual unions in 1999, has supported a social clause and the Malaysian Union Congress supports some form of trade labour linkage.

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81 See above chapter 4.1.
82 ICFTU, Building workers’ human rights into the global trading system, p. 39.
83 The supporting countries were South Africa, Mauritius, Malawi, Tunisia, Madagascar, Gabon and Senegal, see ibid.
84 See the Korean Confederation of Trade Unions’ homepage on <www.kctu.org/2003/>, accessed on 04/01/10.
5.3 Is The Social Clause Justified?

5.3.1 The WTO Position

When addressing the question of a social clause, WTO officials usually recall the statement from the Singapore meeting where the countries affirmed their respect of core labour standards. They also argue that the ILO is the relevant body to address labour rights. At the Singapore meeting, the members of the WTO affirmed their respect for core labour standards, but this should in no way hinder the relationship of trade and labour rights. On the contrary, it appears to be a statement clarifying the common grounds of the WTO and the ILO. As for the designation of the ILO as the relevant organization to deal with labour rights, this is undisputed. The social clause is construed to strengthen the ILO’s authority over the core labour standards by linking the standards to the international trading regime’s major authority, the WTO. Another line of argumentation, utilized by WTO officials, is the often-used assertion that human rights and the rights of workers are best promoted by growth and development. This argument is clearly valid but ignores a number of facts. The rights enjoyed in the Western world were often won by hard struggle using exactly the means that a social clause would protect, for example trade unions.

The current era of globalization, with an increase of the international trade and financial flows, also poses different challenges for the struggle of trade unions than did the time of trade union establishment in Europe. The global competition of today’s world puts great restraints on the possibilities of conducting national union campaigns as the employer and buyer counterparts often have a great deal of geographic mobility. Another aspect is that the unions of Europe formed an important part of the democratization process in many western countries and regrettfully many unions in the developing world do not have that possibility. The most disturbing part of the later WTO argument is that it implicitly assumes that there is a contradiction between human rights norms and economic growth. However, there is no such contradiction. The trade union demand to incorporate labour rights in the WTO was addressed in 1999 by the WTO Director-General Mike Moore. He stated that the debate was destructive as it targeted globalization and trade as a bad thing, when it was in fact the catalyst for development. However, his address missed the point, the ICFTU fully agrees on the importance of international trade and there is no demand for reducing trade or shutting down the WTO. The demand is solely for the current international economic co-operation to integrate a social dimension.

88 See e.g. Hoe Lim, The Social Clause: Issues and Challenges, chapter 4.5. This issue is also further discussed below in chapter 5.4.3.
89 See Mike Moore addressing the ICFTU in 1999.
90 ICFTU, Building workers’ human rights into the global trading system, p. 5.
5.3.2 The Protectionist Argument

The main argument raised against the social clause is the assertion that the clause would be used by developed countries to protect their own industries at the expense of developing countries. This claim often rests on the assumption that the social clause is an attempt to impose an international minimum wage or other substantive labour rights that would be impossible for the developing countries to enforce. However, the ICFTU proposal does not contain any reference to a minimum wage or other fixed, substantive labour rights. Instead a social clause should be used to enforce enabling rights that can be used by workers to protect their own interests. The ICFTU argues that the exact formulation of the minimum wage or other similar rights should never be done in an international setting, but in the respective countries and thus taking into account the specific situation of each country. The workers in poor countries will through organisation be able to get a fair share of the profits instead of being oppressed by employers, governments and/or pressured by TNCs into minimizing their demands into a sub-market level. Even if the misunderstandings concerning the contents of the social clause are clarified, the question remains: Could the social clause proposed by the ICFTU be used for protectionist reasons? It can be argued that the fear of protectionist usage is exaggerated for a number of reasons. Firstly, the rights that are to be protected are human rights set forth in the basic human rights conventions and these rights can be protected or violated in both poor and rich countries. The rights are not dependant on a certain level of development. Secondly, the ILO has vast experience of supervising labour standards and it is beyond doubt that the Advisory Body would act impartially when judging cases. Thirdly, the punitive functions would only be set into motion after the ILO have consulted the concerned government and given technical assistance. In the end the whole point of constructing a multilateral social clause is to formalize the system of enforcing labour law protection into an open and transparent process that avoids arbitrary and unilateral action. This has much in common with the WTO that seeks to regulate international trade to ensure open and fair competition. To regulate labour standards in a similar way should only be a natural step in this process. Despite the argumentation above, the fear of the developing countries must be taken seriously. They argue that the real obstacle to their development of fair labour standards is in fact their difficult economic position and that this situation can best be ameliorated if the developing countries lift tariffs and cut down on agricultural subsidies. This argument is definitely valid, even though economic development not alone creates better labour conditions. There is a certain amount of hypocrisy on behalf of the developed countries when demanding better labour standards whilst at the same time not fully opening up their markets and giving the developing countries a real opportunity to achieve economic growth. The ICFTU proposal is combined with a number of additional measures to make international trade more equitable. Nevertheless; there are also good reasons for arguing that a better protection of the human rights of workers on global scale would actually in itself be beneficial to the development of the countries of the South.

91 ICFTU, *Building workers’ human rights into the global trading system*, p. 34.
6 Conclusion

The link between trade and labour law has formed a part of the labour rights discussions since the creation of international labour standards. The fact that poor labour conditions in one country, due to international trade, has direct effect for the standards in another country was well-known already at the time of the creation of the ILO. For the trade union movement, this effect has been crudely evident from the moment of its creation up until today. When a global uniform trading system with legally enforceable rule was created, the international trade union movement, a number of countries, NGO’s and other actors, regarded the inclusion of labour standards as a natural step in the process of regulating international trade. There was a widespread fear that the increase of trade that had followed globalization would put heavy pressure on the human rights of workers. The fears of the social clause proponents seem to have come true. Despite the global growth that has characterized the recent years, the enormous growth of Export Processing Zones (EPZs) and the appalling labour conditions of millions of workers demonstrate that an increase in international trade and economic growth does not automatically transform into better labour conditions. Hence, the ILO has not been able to combat this development. This has fostered the creation and strengthening of numerous uni- and bilateral social clause mechanisms. However, if the ILO-system can be described as fair, honest and impartial but powerless, many of the unilateral sanctions can be said to have demonstrated the reverse characteristics as they often have been powerful but unfair, dishonest and partial.

As for the actual outlook of a social clause being implemented into the WTO in near future, the chances are small. Despite this negative view, there are also positive signs. The labour rights question is now clearly identified as a human rights issue, which gives it legitimacy in all parts of the international community.

To conclude, the realisation of a social clause, as proposed by the ICFTU, would mean a strengthening of the powers of the ILO and an acknowledgment by the WTO that the human rights of workers form part of the international trading system. A social clause would also mean a firm statement by the governments of the WTO that these rights are to be respected and not violated for commercial gains. Thus, the effectiveness of trade sanctions as a tool to enforce human rights is debatable but the alternatives to a social clause are unilateral sanctions that lack impartiality and therefore easily can be used for protectionist purposes.
Bibliography

ILO Instruments

- Declaration of Philadelphia, 1944.
- ILO Constitution, 1919.
- ILO Convention concerning Forced or Compulsory Labour, No. 29, 1930.
- ILO Convention concerning the Principles of the Right to Organise and to Bargain Collectively, No. 98, 1949.

WTO Instruments

- General Agreement on Trade and Tariffs, 1947.
- General Agreement on Trade in Services, 1994.

EU Instruments

- Council Regulation 3281/94.

UN Instruments

- International Covenant on Civil and Political Rights, United Nations General Assembly resolution 2200A (XXI), 16 December 1966, 999 UNTS 171.

Organisations Web pages

- The ILO homepage available at <www.ilo.org>
- The WTO homepage available at <www.wto.org>
- The UN homepage available at <www.un.org>
- The Gateway to the European Union available at <europa.eu.int>
**ILO Publications**

**Monographs**

**Collective Works**

**Periodicals**
Other Sources