5. There is basis for differentiating a joint venture from a BOT contract and its variants. This difference justifies the conclusion that a joint venture is not governed by the BOT Law and is not subject to the evaluation and approval process set out in that law. For certain types of projects, however, the applicability of the BOT Law may offer an advantage. For instance, where a project would require a franchise, it may be more beneficial to undertake the project using the BOT arrangement since under the BOT, the award of the contract to the contract to the contractor automatically entitles the contractor to a franchise.

6. Finally, while a joint venture may not be subject to the structures approval process of the BOT Law, various approvals are still required for the joint venture contract itself and each of the specific undertakings of local governments under the contract. In choosing between BOT and joint venture as a transaction structure, the parties must assess whether the structured process for BOT will take longer than the piecemeal approach for joint ventures.

*I*NTERNATIONAL *P*ROTECTION OF *W*ORKERS' *R*IGHTS AT A *C*ROSSROADS: *A* *S*OCIAL *C*LAUSE IN THE *WTO**

HANS LEO J. CACDAC**

INTRODUCTION

The Par Garment Company engages in prêt-a-porter manufacturing for export in Thailand. It produces shirts and sportswear under such brand names as Nike, Adidas, Britannia, The Gap, Fila, Champion, Old Navy, Karet Francisca, and Chicago. Its current work force comprises five hundred employees.

On 23 September 1997 the Par Garment Trade Union submitted to the company owner its demands to rectify hiring conditions in the establishment. The requests revolved around six issues including, among others, a special reward for workers, bonus payments, and office space for the trade union's operation.

On the same day Par Garment executives responded through a letter which effectively cancelled all of the worker's benefits, stating that such an "agreement document" shall last for a period of three years. Immediately after this announcement, Par Garment busing services for employees ceased. Soon after, the closure of the par Garment factory was announced.

The workers constantly gathered in front of the closed factory. Labor officials attempted to intervene, but company officials were adamant. The situation worsened when there was an attempt to assault the union leaders.

Before the establishment of the trade union, Par Garment officials had long exploited its workers by underpayment, denial of overtime wages and other legally-mandated benefits. Employees were made to work in shifts which each lasted for twelve straight hours with strict permission time to use the toilets. Women workers were sexually harassed and violated.[1]

In Indonesia, law and practice effectively prohibits the formation of organizations as alternatives to the All Indonesian Workers Union (SPSI), the single

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[1] ASIA PACIFIC WORKERS SOLIDARITY LINKS OF THAILAND, LAY-OFF INCIDENT AT PAR GARMENT CO. (Acharawadee Witprasertkul, 1997).

nationwide union structure over which the government has a great deal of influence. By law, all worker organizations wishing to engage in traditional labor union activity (e.g., negotiating collective bargaining agreements) must be part of the SPSI, thus preventing workers from establishing and joining alternative unions. Child labor is a serious problem as well. There is no evidence that the government of Indonesia enforces the existing restrictions on the employment of children.[2]

In the Mattel-owned Mabamex toy factory in Tijuana, Mexico, Delfina Rodriguez Reyes and three female co-workers were illegally detained by management personnel, interrogated for ten hours, and forced to sign resignation letters. They were accused of subversive activities, though harassment was part and parcel of a company attempt to rid itself of employees who had banded together to demand seniority rights. In March 1997, the state court ruled that because the managers had not demanded ransom for the women's release, illegal confinement had not taken place. To date, Mattel has done nothing to discipline those responsible or to compensate the four women for the abuse they suffered.[3]

The continuing expansion of the global market for goods and services is causing serious concern that unregulated competition will drive down labor standards and undermine basic worker's rights. A United Nations Development Programme Human Development Report proclaims that "[g]lobalization has its winners and its losers… a rising tide of wealth is supposed to lift all boats. But some are more seaworthy than others. The yachts and ocean liners are indeed rising in response to new opportunities, but the rafts and rowboats are taking on water – and some are sinking fast."[4] One might say workers all over the world have gone overboard and are fighting to stay afloat.

> The global economy is leaving millions of disaffected workers in its train. Inequality, unemployment, and endemic poverty have become its handmaidens. Rapid technological change and heightening international competition are fraying the job markets of the major industrialized countries. At the same time systemic pressures are curtailing every governments' ability to respond with new spending. Just when working people most need the nation-state as a buffer from the world economy, it is abandoning them.[5]

In June 1986, the United States raised the question of "worker rights" at the Preparatory Committee of GATT (General Agreement on Tariffs and Trade) for the next round of international trade negotiations to be launched later that year. The

[2] Worker Rights Review Summary – Indonesia, Case 007-CP-92 (Generalized System of Preferences Sub-committee of the Trade Policy Staff, July 1993).

[3] PROCEEDING OF THE INTERNATIONAL TRIBUNAL ON WORKERS' HUMAN RIGHTS IN VANCOUVER, BRITISH COLUMBIA, CANADA (Canadian Labour Congress an the International Centre for Human Rights and Democratic Development, eds., 1997).

[4] THE INTERNATIONAL CENTRE FOR HUMAN RIGTS AND DEMOCRATIC DEVELOPMENT, APEC'S MISSING AGENDA 6 (1997).

[5] Ethan B. Kapstein, *Workers and the World Economy*, FOREIGN AFFAIRS, May/June 1996, at 16.

American delegation requested the other parties to "consider possible ways of dealing with worker rights issued in the GATT so as to ensure that expanded trade benefits all workers in all countries."[6] Through the years, the concept of "free trade" has lost much of its mere reliance upon comparative and competitive advantage. The export of goods which are produced under exceptionally bad working conditions is "unfair" competition which will negatively affect the working conditions in countries with high labor standards, resulting in a "race to the bottom" and deterioration of working conditions in developed countries.[7]

The June 1986 initiative of the United States government failed. The subject of worker rights was not included in the Punta del Este Ministerial Declaration that launched the Uruguay Trade Round. The move was met with strong and emotional opposition from developing countries, who viewed it a a means to introduce additional trade restrictions or to deny their legitimate comparative advantage.[8]

Prior to the 1994 Ministerial Meeting of the Trade Negotiations Committee to conclude the Uruguay Round of Multilateral Trade Negotiations, held in Marrakesh Morocco, the United States and France sought agreement that the World Trade Organization (WTO) would consider the link between trade and internationally-recognized worker rights. While unsuccessful in having the relationship between trade and Negotiations Committee that they could make a request to have such an issue discussed by the Preparatory Committee of the WTO.[9]

Meanwhile, sometime in 1995 the International Confederation of Free Trade Unions (ICFTU) representing workers in Africa, Asia, the Americas and Europe, launched a campaign in 1995 to have core labor standards included in the WTO through a device called the "social clause". A "social clause" has been defined as a clause that aims at improving labor conditions by allowing sanctions to be taken against exporters who fail to observe minimum standards.[10] The "core labor standards" are those constituting the seven key conventions of the International Labour Organization, namely: Convention No. 87 (Freedom of Association and Protection and Right to Organise Convention, 1948), Convention No. 98 (The Right to Organise and Collective Bargaining Convention, 1949), Convention No. 29 (Forced Labour Convention, 1930), Convention No. 105 (Abolition of Forced Labour Convention, 1957), Convention No. 100 (Equal Remuneration, 1951). Convention

[6] Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime*, 126 INT'L. LAB REV. 565 (1987).

[7] Virginia A. Leary, *Worker's Right and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, *in* FAIR TRADE AND HARMONIZATION 177, 178 (Jagdish N. Bhagwati and Robert E. Hudec eds., 1996).

[8] Jorge F. Perez-Lopez, *The Promotion of International Labor Standards and NAFTA: Retrospect and Prospects*, 10 CONN. J. INT'L. 427, 443 (1995).

[9] *Id.* at 443-444.

[10] Van Liemt, *Minimum Labour Standards and International Trade: Would A Social Clause Work?*, 128 INT'L. LAB. REV. 433 (1989).

No. 111 (Discrimination in Employment and Occupation Convention, 1958), and Convention No. 138 (Minimum Age Convention, 1973). These core conventions were endorsed as well in the United Nations' World Social Summit on Development in Copenhagen, Denmark from 6 to 12 March 1995.

To characterize the Asian response as lukewarm would be an understatement. National consultations on the social clause in multilateral trade agreements were held in New Delhi, India from 20-22 March 1995. There was outright disapproval of the proposed linkage between workers' rights and trade. An informal labor ministers' meeting of Association of Southeast Asian Nations (ASEAN) countries held in Chiang Mai, Thailand from 27-28 April 1995 made reference to the New Delhi Declaration and likewise rejected any attempt at linking with labor standards.

The United States and France vowed to reopen discussions concerning the social clause in the first WTO Ministerial Conference in Singapore last December,1996. ASEAN nations were joined by European Union (EU) members Great Britain, Germany, and Spain and Asian power in Japan in their opposition to the linkage. Host Singapore called for a compromise on the issue, expecting fireworks to flare up.[11] In the end, the Singapore Ministerial Declaration adopted on 13 December 1996[12] succinctly pronounced.

> 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 liberation 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 in their existing collaboration.

On 12 September 1997, WTO Director-General Renato Ruggiero underscored the need for the WTO to stay away from issues "not collateral to its work."[13] For the moment, this constitutes the "final word' on the issue of labor standards and trade But advocates for a "social clause" will not stand by the wayside. A handout by a Belgian-based alliance of development and social welfare non-governmental organizations (NGOs) linked to the trade union movement suggests that core labor standards "remain an issue of contention at the WTO and will be back on the agenda at the next Ministerial Summit in Geneva in 1998."[14]

[11] Roberto Coloma, *Singapore Seeks WTO Compromise on Touchy Issues*, MANILA BULLETIN, December 8,1996.

[12] *Singapore Ministerial Declaration*, WTO Doc. 96-5316 (December 13,1996).

[13] WTO Director-General Renato Ruggiero, Address at the Conference on Globalization as a Challenge for German Business (September 12,1997) (available at <http://www.wto.org/speeches/speech.htm>).

[14] SOLIDAR, WORKER RIGHTS ARE HUMAN RIGHTS: CORE LABOUR STANDARDS, THE WTO AND DEVELOPMENT (1997).

The Philippine government's position assumes that which was adopted by the ASEAN. During the Singapore Ministerial Conference, Trade and Industry Secretary Cesar B. Bautista unequivocally proclaimed that "[h]istorically and substantively speaking, (the Philippine government does) not consider this as an issue for the WTO, but for the ILO."[15]

This paper will trace the steps of advocates for a "social clause" within the WTO framework. It places these advocates within the context of a vast expanse of modern historical attempts at international protection of workers' rights. It will also delve upon the social clause debate itself, with a discussion on the matter of linkage between international labor standards and international trade, alongside adequate enforcement mechanisms for the social clause.

For purposes of this paper, the "social clause" shall read as follows:

> The Contracting Parties agree to take steps to ensure the observance of the minimum labour standards specified by an advisory committee to be established by the WTO and the ILO, and including the (seven core conventions of the ILO).

The clause appears as phrased by the ICFTU.

Part I will traverse upon the protection given to workers' rights within the international organization framework, with a discussion on the International Labor Organization (ILO). Part II will deal with the linkage between workers' rights and world trade in unilateral and regional arrangements. Part III will discuss the contending schools of thoughts figuring in the social clause debate, i.e. free vs. fair trade advocates. Part IV will highlight the political considerations going into an otherwise economic tussle between free and fair trade advocates. Part V will go straight into the social clause debate within the WTO framework, with the 1994 Marrakesh proceedings as springboard, leading into certain venues for discussion of the debate. Part IV will raise counterpoints to address the concerns of social clause opponents. Part VII will delve upon issues involved in social clause formulation, i.e., the rights to be covered and the clause's accompanying enforcement mechanism. Part VIII will report on the proceedings of the most recent of all social clause consultations, the SALIGAN National Conference on the Social Clause. Part IX will report on developments in the Ministerial Conference of the WTO in Singapore, and the corresponding reactions of the ILO. Part X calls for further pursuit of the social clause.

[15] Excerpts From Statements Made at the Ministerial Conference of the World Trade Organization (9-13 December 1996) (on file at the International Labour Office and available at <http://w.w.w.ilo.org> under Working Party on the Social Dimensions of the Liberation of International Trade Continuation of discussion concerning the programme of work and mandate of the Working Party ' on the Social Dimensions of the Liberalization of International Trade Continuation of discussions concerning the programme of work and mandate of the Working Party (c) Ministerial Conference of the World Trade Organization).

I. WORKERS' RIGHTS IN THE INTERNATIONAL ORGANIZATIONS FRAMEWORK

A. *The International Labor Organization (ILO)*

1. EMERGENCE

The International Labor Organization (ILO) was established in 1919 by Part XIII of the Treaty of Versailles, which contained a labor charter and the ILO Constitution. There were several attempts to regulate conditions of labor by international agreement, but the idea of doing so through a permanent international organization evolved during the period of the First World War.[16]

Consultations between the British and French governments with regard to the establishment of a permanent organization to deal with international labor legislation inevitably placed such an agenda at the Peace Conference in Paris. At the Conference, a Commission of fifteen members, known as the Commission on International Labour Legislation, was appointed on 25 January 1919, to examine the question. The Commission was composed of representatives from nine countires: Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom, and the United States, under the chairmanship of Samuel Gompers, head of the American Federation of Labor (AFL). The Commission held thirty-five meetings in the first quarter of 1919, during which it considered various proposals submitted by states with respect to the constitutional powers and structure of the proposed permanent organization. At the end of its deliberations, the Commission adopted a draft Convention for an International Labor Organization. This was attached to the Report which the Commission submitted to the Supreme Council in April of 1919, and the draft Convention was subsequently incorporated into the Treaty of Versailles Part XIII.[17]

It appears surprising that the Treaty of Versailles, focusing on issues of peace after the war, included Part XIII. Yet the link between democracy and peace is often invoked, and freedom of association is an essential element of democracy. Given the situation in postwar Europe, the perception of the link between peace and labor is understandable. The Bolshevik Revolution, with its emphasis on the rights of workers, was very much of Western Europe diplomats. The Peace Conference appeared to be a logical moment for the establishment of the permanent international labor organization earlier recommended by reformers.[18]

There were four motivations behind the formation of the ILO. The initial motivation was humanitarian. The condition of workers, more and more numerous and exploited with no consideration for their health, their family lives and their

[16] *See generally*, E. OSIEKE, CONSTITUTIONAL LAW AND PRACTICE IN THE INTERNATIONAL LABOUR ORGANIZATION (1985).

[17] *Id.* at 5.

[18] Leary, *supra* note 7, at 186.

advancement, and was less and less acceptable. The second motivation was political. Without an improvement in their condition, the workers, whose numbers were ever increasing as a result of industrialization, would create social unrest, even revolution. The third motivation was economic. Because of its meritable effect on the cost of production, any industry or country adopting social reform would find itself at at a disadvantage vis-à-vis its competitors. The final motivation was world peace.[19]

The original mandate of the ILO was confined to improvement of labor conditions. The "Labor Charter" in the Italy of Versailles listed nine principles to guide the social policy of the members of the League of Nations. These included the following:

a) Labor is not a commodity.

b) The right of association should be affirmed.

c) There should be payment of an adequate wage to maintain a reasonable standard of living.

d) There should be equal pay for equal work.

e) There should be an 8-hour day or 48-hour week

i) There should be weekly day or rest at least 24 hours.

g) Child labor should be abolished.

h) There should be equitable treatment of workers in a country.

i) There should be an inspection system to ensure the enforcement of laws and wokers protection.[20]

The ILO received no competence in economic affairs although the subject matters enumerated in the Preamble of the ILO Constitution and the Labor Charter raised intricate economic questions which went far beyond the narrower sphere of labor legislation.[21]

Things were soon to change. In the 26th session of the International Labor Conference in Philadelphia in 1944, the Declaration of Philadelphia was adopted. At the time it was enacted, the emergence of the United Nations and the Bretton

[19] INTERNATIONAL LABOR ORGANIZATION, ILO HISTORY (1995)(available at <http://www.ilo.org>, last updated 22 April 1996).

[20] Eddy Lee, *The Declaration of Philadelphia: Retrospect and Prospect*, 133 INT'L. LAB. REV. 467, 468 (1994).

[21] ANTHONY ALCOCK, HISTORY OF THE INTERNATIONAL LABOUR ORGANIZATION 36 (1971).

Woods institutions focusing on world trade and finance defined framework for the post -war international political and economic system.[22] Through the Declaration of Philadelphia the ILO attempted to adapt itself to the "new world order".[23]

The Declaration of Philadelphia emphasized the role of economic and social policies, as opposed to pure labor legislation, for attaining social objectives. The objectives to be attained by the Declaration are extensive, and include full employment and rising standards of living; the extension of social security measures to provide a basic income to all in need of suchprotection and comprehensive medical care; the provision of adequate nutrition, housing and facilities for recreation and culture; the assurance of equality of educational and vocation opportunity; and provision for child welfare and maternity protection.[24]

In line with this expansion of scope and number of objectives, the range of policies considered to be within the purview of the ILO became correspondingly large. All national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective. In other words, national policies should be

[22] A different but no less useful form of international organization evolved from the Bretton Woods Conference at the expiration of World War II. They were the International Monetary Fund (IMF), the General Agreement on Tariffs and Trade (GATT) and the World Bank.

The world economy had been subject to a decade and a half of disruption. A world-wide depression (with excessive use of tariffs) was followed by a devastating war. The Bretton Woods Conference in Bretton Woods, New Hampshire was intended to correct economic imbalances of the previous two decades. The International Monetary Fund would urge alterations in government policies where there were several balance of payments dislocations. Restriction were placed on what government could do with respect to foreign exchange controls. When imbalances occurred, members could draw on various lines of credit. Those credit lines have been increased and the IMF has assumed a major role as a lender of last resort to numerous developing nations unable to service their foreign debts. Lending has been in the form of conditional loans with mandates for internal political and economic changes to adjust the economy so as to enable the nation to reduce its debtor status. The IMF has become in the view of some a world economic policeman, and the final source of loans before debtor nations turned to the potentially disastrous ultimate step, a default on international obligations.

A second part of the structure evolving from Bretton Woods was the World Bank. While the IMF was created to deal with exchange issues, the World Bank was formed as a lending legacy. Organized in three sections, the International Bank for Reconstruction and Development (IBRD) was to make loan principally for major infrastructure projects in developing nations, the International Finance Corporation (IFC) to provide loans to provide loans to private investors for projects in the developing world and the International Development Association (IDA) to provide the interest loans for the poorest of the world's communities.

A final major achievement of Bretton Woods was the establishment of the General Agreement on Tariffs and Trade. It was created to address the issue of world tariff barriers, but over the decades, as significant reduction of tariffs has been achieved. The GATT has turned its attention to negotiating the elimination of non tariff barriers. RALF H. POLMOS ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 20-21 (1995).

[23] Lee, *supra* note 21, at 468.

[24] *See Id.* at 470-71.

systematically directed towards the aims and purposes contained in the Declaration.[25]

2. STRUCTURE OF THE ILO[26]

The ILO accomplishes its work through three main bodies, all of which encompass its unique feature; its tripartite structure involving the three social partners (government, employers and workers).

At present, the ILO has 174 member States.

a. International Labor Conference – The member states of the ILO meet at the International Labor Conference in June of each year, in Geneva. Each member state is represented by two government delegates, an employer delegate and a worker delegate. They are accompanied by technical advisors who generally are cabinet ministers responsible for labor affairs in the member states.

It is the Conference which establishes and adopts international labor standards. It acts as a forum where social and labor questions of importance to the entire world are discussed. The Conference also adopts the budget of the Organization and elects the Governing Body.

The International Labor Conference held its 85th Session last June, 1997.

b. Governing Body – The Governing Body is the executive arm of the ILO and takes decisions on the implementation of ILO policy and programs. There are 14 employer members and fourteen worker members who convene three times annually. Ten of the government seats are held by major industrialized countries.[27]

[25] *Id.* at 417.

[26] *See* INTERNATIONAL LABOR ORGANIZATION, INTERNATIONAL ORGANIZATION STRUCTURE AND PROGRAMMES (1996) (available at <http://www.ilo.org>).

[27] ILO CONSTITUTION, art. 7, para. 3: " The Governing Body shall as occasion requires determine which are the Member of the Organization of chief industrial importance and shall make rules to ensure that all questions relating to the selection of the Members of chief industrial importance are considered by an impartial committee before being decided by the Governing Body. Any appeal made by Member from the declaration of the Governing Body as to which are the Members of chief industrial importance shall be decided by the Conference, but an appeal to the Conference shall not suspend the application of the declaration until such time as the Conference decides the appeal.

The key elements in the procedure for determining members of chief industrial importance may be summarized as follows: (a) any action by the Governing Body on the subject is possible only if the question has been included in its agenda as a specific item, and the Governing Body has before it a report by its officers on the question(s) to be decided; (b) any modification of the list must be preceded by advice from an impartial committee "qualified to advise on the most appropriate criteria of industrial importance and on the relative industrial importance of States assessed on the basis of such criteria; (c) the impartial committee is advisory to the officers of the Governing Body, who are called upon to make recommendation to the Governing Body; and (d) the Governing Body decides on the list of members of chief industrial importance, but any member may appeal against the declaration of the Governing Body of the Conference whose decision on the matter is final. OSIEKE, *supra* note 19, at 104.

The remaining members are elected for three years by governments, workers, and employers respectively, taking account of regional distribution. The employers and workers elect their own representatives.

The elected members of the Governing Body at present are Bangladesh, Canada, Chile, Colombia, Congo, Egypt, Guinea, Hungary, Republic of orea, Mauritius, Nigeria, Panama, Poland, Saudi Arabia, Suriname, Swaxiland, Thailand, and Turkey. Members holding non-elective seats as States of chief industrial importance are Brazil, China, France, Germany, India, Italy, Japan, Russian Federation, United Kingdom, and the United States.

The Chairman of the 270th Session of the Governing Body last November 1997 was Mr. Ahmed El Amawy, Minister of Manpower and Immigration of Egypt. Mr. William Brett of the United Kingdowm was the worker Vice-Chairman and Mr. Jean-Jacques Oechslin of France was the employer Vice-Chairman.

c. International Labor Office - It is the permanent secretariat of the ILO and focal point for the overall activities that it prepares under the scrutiny of the Governing Body and under the leadership of a Director-General, who is elected for a five-year renewable term. The Office also constitutes a research and documentation center and a printing house issuing a broad range of specialized studies, reports and periodicals. The present Director-General is the erstwhile Belgian labor minister, Mr. Michel Hansenne. His current term of office expires in March 1999. Mr. Hansenne has announced that he will not be seeking a third five-year term.[28]

d. Regional Structure - There is an intensive regional structure to serve as a direct contact with governments, employees, and workers' organizations in a way that would be quite impossible if everything were centralized in the ILO headquarters in Geneva. There are regional offices in Africa (Addis Ababa, Ethiopia), Asia (Bangkok, Thialand), and the Americas (Lima, Peru). These offices are mainly staffed by persons belonging to the region concerned. They monitor day-to day operations of technical cooperation programs executed by the ILO. Every three of four years region conferences are held to provide for in-depth discussions of problems within the competence of the ILO in the regional concerned.[29]

3. LEGISLATIVE FUNCTION OF THE ILO

The method chosen by the ILO to establish a certain degree of harmonization of conditions of labor is the adoption of international labor "Conventions" by the annual International Labor Conference, to be accepted by states through ratification. Non-binding "Recommendations" are adopted containing more detailed standards.

[28] ILO Press Release, *Proposal for a Declaration of Fundamental Rights to be discussed,* November 6, 1997 (available at <http://www.ilo.org, last updated 28 November 1997>).

[29] OIEKE, *supra* note 16, at 124.

The basic difference between Conventions and Recommendations is that a Convention is designed to be ratified like an international treaty, and a ratifying member State undertakes to discharge certain legal obligations; and there is regular international supervision in the way in which these obligations are observed. A Recommendation, on the other hand, give rise to no binding obligations but provides guidelines for national policies and action. It is normally used to deal with subjects which are not suitable for the formulation of precise obligations where, for instance, the diversity of national conditions prevents the establishment of rules which can be universally and fully accepted.[30]

At its very first session in 1919, the International Labor Conference adopted six Conventions and 6 Recommendations. As of July 1997, 181 Conventions and 188 Recommendations had been adopted by the organization's 174 member States.[31]

In framing Conventions and Recommendations, the International Labor Conference is enjoined to have due regard to countries in which climactic conditions, imperfect development of industrial organization, or other special circumstances make industrial conditions between countries substantially different.[32] Developing countries have emphasized the need for flexibility in ILO instruments, observing that a large number of Conventions were adopted without their participation and without account of the specific problems of their countries.[33] The Declaration of Philadelphia, however, mandates that while the manner of application of its principles " must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilized world.[34]

4. THE SEVEN CORE CONVENTIONS

In May 1995 a campaign to achieve universal ratification of seven core Conventions was launched by the ILO. Suffice it to say that consolidation of these seven core Conventions should not come as a surprise to the faithful who have

[30] *Id.* at 145.

[31] ILO Press Release, *ILO Meeting to address concerns of workers, employers and governments over globalization, economic uncertainty,* December 9, 1997 (available at <http://www.ilo.org>).

[32] ILO CONSTITUTION, art. 19, para. 3.

[33] J.M. Servais, *Flexibility and Rigidity in International Labour Standards,* 125 INT'L. LAB REV. 193, 194 (1986). Servais points out that flexibility and rigidity come into play in the implementation level as well. Confidence in the supervisory machinery of the ILO and the ensuing cooperation by Members is a fundamental reason for success in the implementation of international labor standards. The need for deeper study on the plight of informal sector workers in developing countries was likewise underscored.

[34] Declaration Concerning the Aims and Purposes of the International Labor Organization (Declaration of Philadephia), May 10, 1944, art. V on file at the International Labour Office and available at <http://www.ilo.org>.

monitored treatment of ILO legislation.[35] Considering the proposed social clause as worded makes explicit reference to these seven core Conventions, brief summaries of these conventions are in order.[36]

a. Freedom of Association and protection of the Right to Organise, Convention No. 87 (1948)

(1) Aims of the standard. The right, freely exercised, of workers and employers, without distinction, to organize for furthering and defending their interests.

(2) Summary of the provisions Workers and employers, without distinction whatsoever, have the right to establish and to join organizations of their own choosing with a view to furthering and defending their respective interests.

Such organizations have the right to draw up their own constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes. Public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise of this right.

The organizations shall not be liable to be dissolved or suspended by administrative authority.

Organizations have the right to the establish and join federations and confederations which shall enjoy the same rights and guarantees. The Convention also provides for the right to affiliate with international organizations.

The acquisition of legal personality by all these organizations shall not be subject to restrictive conditions.

In exercising the rights provided for in the Convention, employers and workers and their respective organizations shall respect the law of the land. The law of the land and the way in which it is applied, however, shall not impair the guarantees provided for in the Convention.

b. Right to Organise and Collective Bargaining, Convention No. 98 (1949)

(1) Aim of the standard. Protection of workers who are exercising the right to organize; non-interference between workers' and employers organizations; promotion of voluntary collective bargaining.

[35] Consider, for instance, C. WILFRED JENKS, HUMAN RIGHTS AND INTERNATIONAL LABOUR STANDARDS (1960) and INTERNATIONAL LABOR ORGANIZATION SUMMARIES OF INTERNATIONAL LABOUR STANDARDS (1988).

[36] The summaries outlined hereunder were lifted from INTERNATIONAL LABOR ORGANIZATION, SUMMARIES OF INTERNATIONAL LABOUR STANDARDS (1988).

(2) Summary of the provisions. Workers shall enjoy adequate protection against acts of anti-union discrimination. They shall be protected more particularly against refusal to employ them by reason of their trade union membership and against dismissal or any other prejudice by reason of union membership or participation in trade union activities.

Workers' and employers' organizations shall enjoy protection against acts of interference by each other. This protection is extended in particular against acts designed to promote the domination, the financing or the control of workers' organizations by employers or employers' organizations.

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organize as defined by the Convention.

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the development and utilisation of voluntary collective bargaining to regulate terms and conditions of employment.

c. Forced Labour, Convention No. 29 (1930)

(1) Aim of the standard. Suppression of forced labour.

(2) Summary of the provisions. The fundamental commitment made by States ratifying the Convention is to suppress the use of forced or compulsory labour in all its forms in the shortest possible time.

A general definition of forced or compulsory labour is given, but the Convention does not apply to five categories of work or compulsory service, subject to certain conditions and guarantees. The five categories are: compulsory military service, certain civic obligations, prison labour, work exacted in cases of emergency, and minor communal services.

The illegal exaction of forced or compulsory labour shall be punishable as a penal offence.

d. Abolition of Forced Labour, convention No. 105 (1957)

(1) Aims of the standard. Prohibition of the recourse to forced or compulsory labour in any form for certain purposes.

(2) Summary of the provisions. Under the Convention, States undertake to suppress any form of forced or compulsory labor in five defined cases, namely:

(a) as a means of political coercion or education or as punishment for holding or expressing political

views or views ideologically opposed to the established political, social or economic system;

(b) as a method of mobilizing and using labour for purposes of economic development;

(c) as a means of labour discipline;

(d) as a punishment for having participated in strikes

(e) as a means of racial, social, national or religious discrimination.

e. Equal Remuneration, Convention No. 100 (1951)

(1) Aim of the standard. Equal remuneration for men and women for work of equal value.

(2) Summary of the provisions. States having ratified the Convention shall promote and, in so far as is consistent with the methods in operation for determining rates of remuneration, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

The Convention shall apply to basic wages or salaries and to any additional emoluments whatsoever, payable directly or indirectly, in cash or in kind, by the employer to the worker and arising out of his or her employment. The Convention defines equal remuneration for work of equal value as remuneration established without discrimination based on sex.

This principle may be applied by means of national laws or regulations, legal machinery for wage determination, collective agreements or a combination of these various means. One of the means specified for assisting in giving effect to the Convention is the objective appraisal of jobs on the basis of the work to be performed.

The convention provides that governments shall co-operate with employers' and workers' organizations for the purpose of giving effect to its provisions.

f. Discrimination in Employment and Occupation, Convention No. 111 (1958)

(1) Aim of the standard To promote equality of opportunity and treatment in respect of employment and occupation.

(2) summary of the provisions The Conventions assigns to each State which ratifies it the fundamental aim of promoting equality of opportunity and treatment by declaring and pursuing a national policy aimed at eliminating all forms of discrimination in respect of employment and occupation.

Discrimination is defined as any distinction, exclusion or preference based on race, colour, sex, religion, political opinion, national extraction or social origin (or any other motive determined by the State concerned) which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The scope of the Convention covers access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Member States having ratified this convention, undertake to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with this policy, and to enact legislation and promote educational programmes which favour its acceptance and implementation in co-operation with employers' and workers' organizations. This policy shall be pursued and observed in respect of employment under the direct control of a national authority, and of vocational guidance and training, and placement services under the direction of such an authority.

g. Minimum Age, Convention No. 138 (1973)

(1) Aim of the standard. The abolition of child labour. The minimum age for admission to employment or work shall not be less than the age of completion of compulsory schooling (normally not less than 15 years).

(2) Summary of the provisions. The ratifying State undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.

The minimum age to be specified in conformity with the Convention shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years. Developing countries may initially specify a minimum age of 14 years.

The minimum age shall not be less than 18 years or 16 years under certain conditions for any type of employment or work which is likely to jeopardize the health, safety or morals of young persons.

> The Convention provides that limited categories of employment or work may be excluded from its application where special and substantial problems of application arise.
>
> The Convention does not apply to work done in schools for general, vocational or technical education or in other training institutions.
>
> Young persons of 13 to 15 years of age or at least 15 years of age who have not yet finished their compulsory schooling may be permitted to carry out light work of certain types and under certain conditions to be determined.
>
> Exceptions may be authorized in individual cases for such purposes as participation in artistic performances. Organisations of employers and workers, where such exist, shall be consulted regarding the abovementioned measures.

5. ILO ENFORCEMENT MECHANISMS

ILO enforcement mechanisms entail non-contentious and contentious procedures.[37]

a) Non-contentious procedures - To this first classification of ILO enforcement mechanisms belongs the normal reporting systems on ILO Conventions and Recommendations. During the interval between the 1926 and 1927 Session of the International Labor Conference, the Governing Body established a Committee of Experts (COE), whose main function is to examine and evaluate the reports submitted by Members of the ILO on ratified and unratified Conventions.[38] The Committee of Experts consists of 19 legal experts appointed in their personal capacity by the Governing Body, on the proposal of the Director-General. The members are drawn from all parts of the world and are appointed for an initial period of three years, with the possibility of a three-year extension.[39]

[37] See OSIEKE, *supra* note 16, at 169-235. *See also* Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System To Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L. L. 361 (1995).

[38] ILO CONSTITUTION, art. 22. "Annual reports on ratified Conventions. Each of the Members agrees to make an annual report to the International Labor Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request." After 1977, government reports dealing with certain particularly important Conventions, such as those regarding human rights, would continue to be requested every two years, while for other Conventions reports would be requested only at four-year intervals. Distinctions were also made between general reports and detailed reports with different time lags for the submission of each category. Although the Governing Body may, at its discretion, decide that detailed reports should be requested at shorter intervals, there is no doubt that significant delays have been introduced in the timetable regarding control of application of Conventions. Efrén Córdova, *Some reflections on the Overproduction of International Labor Standards*, 14 COMP. LAB. L.J. 138, 148-49 (1993).

[39] OSIEKE, *supra* note 16, at 173.

Other functions of the Committee of Experts include examining and evaluating measures taken to bring newly adopted Conventions before competent authorities for the enactment of legislation, and the action taken by these authorities.[40]

The conclusions of the Committee of Experts are in the form of comments which may either be in the form of observations or direct requests. Observations are used by the Committee to draw the attention of a reporting member to serious or longstanding failure to comply with such member's obligations. These observations are published in the Report of the Committee which is sent to the Conference for consideration. Direct requests, on the other hand, are sent directly to member States and are not published in the Report of the Committee. These are often used to obtain clarification from members concerning their reports, or for matters or questions of a technical nature.[41]

The famous Article 7 of the Standing Orders to the Conference at the time when the Committee of Experts was established likewise mandated the Conference to appoint a Committee to examine the reports submitted to the Conference by the Committee of Experts. This Conference Committee is normally composed of government, employers' and workers' representatives submitted to the Conference by the Committee of Experts.[42]

The Conference Committee normally begins its work with a general discussion in which it reviews a number of broad issues relating to the ratification and application of ILO and the compliance by member States in general with their constitutional obligations. The Report of the Conference Committee is submitted to the Conference. which discusses it in one or more plenary sittings. If adopted by the Conference, the Report is dispatched to governments with an indication of points which they should take into accounts in the preparation of their next reports to the ILO.[43]

There are various ancilliary measures aside from recourse to the Committee to Experts and the Conference Committee on Application of Conventions and Recommendations. Ad hoc surveys through a Study Group or ILO missions have sometimes been carried out in special cases. This procedure is supplemented by "quiet diplomacy" and "direct contacts".[44] "Direct contacts" means simply that when a government encounters difficult problems in applying ratified Conventions, the International Labor Office, at the request of the government or with its consent, sends an official, or, in some cases, an individual expert, to discuss the problems with the government and to help it arrive at a solution. Since its institution in 1969,

[40] *Id.*

[41] OSIEKE, *supra* note 16, at 174.

[42] *Id.*, at 175.

[43] OSIEKE, *supra* note 16, at 175.

[44] Nicolas Valticos, *The Future of International Labour Standards*, 118 INT'L. LAB. REV. 679, 692 (1979).

this system has been highly successful and is often used by governments to resolve problems in order to avoid public criticism.[45] The ILO also undertakes technical assistance programs in cooperation with its social partners. In the Philippines, for instance, ILO technical assistance intervention includes assistance to boost the productivity of enterprises, with emphasis on enterprises with backward linkages to community-based livelihood initiatives.[46] These ancillary measures are done with a view to ensuring the greater implementation of international labor standards.[47]

b) Contentious procedures - Questions or disputes relating to the ILO Constitution and ILO Conventions are assigned to the International Court of Justice.[48] But there is no provision in the ILO Constitution on action to be taken with the ILO to implement the decision of the ICJ.

However, the nature of the action to be taken will depend on the circumstances of each case. If the question or dispute had arisen between two member States and had been referred to the International Court of Justice by one of them under the contentious procedure of the Court, then the decision of the Court will give rise to binding obligations for the two member States, which will then take the necessary action to implement the decision. If, they fail to do so, the Governing Body and/or the International Labor Conference would appear to be free to call upon the member or members concerned to adopt the necessary measures to give effect to the decision. If the two member States are also members of the United Nations, and one of them refuses to perform the obligations incumbent upon it under the judgment rendered by the Court, the other party may refer the matter to the Security Council of the United Nations which may, if it deem necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

If the question or dispute had been referred to the International Court of Justice in the form of a request for an Advisory Opinion, the member States shall not be bound by the conclusions or recommendations of the Court, but here again the Governing Body and or the Conference appears to be free to call upon the parties to take the necessary measures to give effect to the opinion of the Court.

In all these cases, if it is apparent from the decision of the Court that a member State is in breach of a Convention which it has ratified appropriate action may be initiated against it in the form of a representation or a complaint under the relevant procedures or provisions of the ILO Constitution. Such an action could also be taken against a member State whose refusal to give effect to an interpretation

[45] Lee Swepston, *Human Rights Procedures of the International Labor Organization*, GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 74, 77 (1984).

[46] Gert A. Gust, *The ILO and the Philippines: An Overview and Outlook*, THE CHALLENGES OF LABOUR AND SOCIAL DEVELOPMENT 127, 139 (Galman ed. 1993).

[47] OSIEKE, *supra* note 16, at 182.

[48] ILO CONSTITUTION, art. 37.

given by the International Labor Office amounts to a breach of the Convention concerned if it is a party to it.[49]

Article 24 of the ILO Constitution also provides for the procedure in filing *representations*: " In the event of any representation being made to the International Labour Office by an industrial association or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit." A representation may thus be filed only against a state that has ratified the convention concerned.

There is no restriction on which "industrial associations" may file representations, and the determination of what constitutes an industrial association is made by the ILO. They may be local or national organizations, or regional or international federations, and they need have no direct or indirect connection with the subject of the complaint.[50]

On 8 April 1932, the Governing Body adopted special Standing Orders which, as amended on 5 February 1938, laid down the procedure for dealing with representations. This procedure remained in force until March 1980, when the Governing Body adopted new Standing Orders laying down the procedure for the examination of representations.[51]

The Standing Orders provide that when a representation is made to the International Labor Office under Article 24, the Director-General should acknowledge receipt and inform the government against which it is made. He should also immediately bring the representation before the officers of the Governing Body, who are required to report to the Governing Body on the receivability of the representation. A representation is not receivable unless (i) it is communicated to the International Labor Office in writing; (ii) it emanates from an industrial association of employers or workers; (iii) it makes reference to Article 24 of the ILO Constitution; (iv) it concerns a Member of the ILO; (v) it refers to a Convention to which the Member against which it is made is a party; and (vi) it indicates in what respect is alleged that the Member against which it is made has failed to secure the effective observance within its jurisdiction of the said Convention.[52]

The means of investigation of a representation are as follows:

> After representation has been declared receivable with regard to form, a special Committee of the Governing Body examines the substance of the representation itself. In effect, the committee decides whether a prima

[49] OSIEKE, *supra* note 16, at 184-85.

[50] Swepston, *supra* note 45, at 80.

[51] OSIEKE, *supra* note 16, at 211.

[52] *Id.*, at 212.

facie case has been made out, that the facts as stated by the complaining organization would, if not contradicted, constitute a violation of the convention. This is the reason that as much documentation of the allegations as possible should be included with the representation.

If it decides to continue the examination of the representation, the committee may then communicate with the filing organization asking for any additional information it may wish to submit, and with the government concerned. The government is asked to comment on the allegations. When all the information from both parties has been received, or if no reply is received within the time limits set, the committee makes its recommendation to the Governing Body.

The Governing Body decides whether or not it accepts the government's explanations, if any, of the allegations. If the Governing Body decides in favor of the government, the procedure is closed, and the allegations and replies may be published. If the Governing Body decides that the government's explanations are not satisfactory, it may decide to publish the representation and the government's reply, along with its own discussion of the case.[53]

According to Article 25, "[i]f no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it." Publication of the finding constitutes the final decision, although it is also possible for the Governing Body to decide that a case should subsequently be handled under the *complaints* procedure under Article 26.

The questions raised in the representation are normally followed up by the regular supervisory machinery, the Committee of Experts, and the Conference Committee on the Application of Conventions and Recommendations. Even if the Governing Body is satisfied, these committees may raise questions that they feel require further examination.[54]

The *complaints* procedure also requires that it be based on obligations of an ILO Convention that the country has ratified. Under Article 26, the complaint procedure may be instituted by governments, delegates to the International Labor Conference, and the Governing Body on its own motion.

There are no formal requirements as to form and language of a complaint, though it must originate from a government Member, a Conference delegate, or the Governing Body, and it must refer to a Convention ratified by the state against which it is made.[55]

[53] Swepston, *supra* note 45, at 81.

[54] *Id.*, at 82.

[55] ILO CONSTITUTION, art. 26.

The means of investigation of a complaint are as follows:

When the Governing Body begins to consider a complaint, it forwards the complaint to the government for its comments. It then normally establishes a Commission of Inquiry, although this is technically a matter of discretion. A Commission of Inquiry has almost invariably been formed to investigate a receivable complaint.

Commission of Inquiry are free to set their own rules and procedures, but certain practice have gradually become established. First, written submissions have been requested from both parties and submissions from each party are usually communicated to the other for information and comments. A Commission may also request information from other governments (under article 27 of the Constitution) or from nongovernmental organizations. Commissions of Inquiry have decided to hear representatives of the parties and witnesses presented by them and have summoned witnesses themselves. They have also conducted on-site visits to the countries concerned.[56]

Once the accumulation of evidence is complete, the Commission arrives at a conclusion and may make recommendations to the parties. The Commission "shall prepare a report embodying its finding on all questions of act relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken."[57] A recommendation, for instance, may suggest changes in national legislation or practical measures to give effect to a convention's provisions. A recommendation may even address broader questions, such as the necessity of ending a state of emergency in order to promote civil liberties.[58]

The Commission Report is communicated to the Governing Body and published in the *Official Bulletin* of the ILO. In most cases, the Committee of Experts and the Conference Committee on the Application of Conventions and Recommendations will continue to examine the application of the Conventions concerned, with reference to the findings of the Commission of Inquiry, as is done in connection with representations.[59]

Article 29 (2) reads: "Each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice. "Under Sec.31," [t]he decision of the International Court of Justice in regard to be final."

[56] Swepston, *supra* note 45, at 83-84.

[57] ILO CONSTITUTION, art. 28.

[58] Swepston, *supra* note 45, at 84.

[59] *Id.*

Also, Article 33 provides that if a government does not implement the recommendations of the Commission of Inquiry (or of the International Court of Justice) within the time specified, "the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith."

Under Article 34, a government that has been found to be in violation of a Convention by a Commission of Inquiry may request the Governing Body to constitute another Commission of Inquiry to verify that the government has complied with the recommendations to it. Again, no action under this provision has yet been instituted.[60]

c) Special Procedures on Freedom of Association. Freedom of association has a unique place among the basic human rights and freedoms which are concerned with the ILO. The Preamble of the ILO Constitution expressly recognized "the principle of freedom of association" and the Declaration of Philadelphia reaffirmed that "freedom of expression and of association are essential to sustained progress", and declared them as among the fundamental principles on which the ILO is based.[61]

Several ILO Conventions deal with the freedom of association. The most important of these are the Freedom of Association and the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98). These Conventions have been reinforced by several other instruments including the Consultation (Industrial and National Levels) Recommendation.,1960 (No.113), the Convention (No.135) and Recommendation (No. 143) adopted in 1971 concerning the protection and facilities to be afforded to Workers' Representatives in the Undertaking, the Convention concerning Protection of the Right of Organize and Procedures for Determining Conditions of Employment, 1978 (No. 151), and the Convention (No.154) and Recommendation (No. 163) of 1981 concerning the Promotion of Collective Bargaining.[62]

A special machinery set up to deal with the promotion of freedom of association was set up in 1950-51 pursuant to an agreement concluded with the United Nations Economic and Social Council provides for intervention by two bodies: the Fact-Finding and Conciliation Commission on Freedom of Association, and the Freedom of Association Committee of the Governing Body.[63]

The Committee on Fredom of Association is presently composed of nine members appointed by the Governing Body – three from each of its three groups – and it meets three times a year in Geneva. The principal task of the Committee is to deal with complaints from governments or employers' or workers' organizations

[60] *Id.*, at 85.

[61] OSIEKE, *supra* note 16, at 177.

[62] *Id.*, at 177-78.

[63] E.S.C. Res. 277 (X), U.N. ESCOR, 10th Sess. (1950).

concerning infringement of trade union rights. In considering these complaints, the Committee follows a procedure similar to that applied in a court of law.[64]

The Fact-Finding and Conciliation Commission is normally composed of nine highly qualified dependent persons appointed by the Governing Body of the International Labor Office. It is the function of the Commission to examine cases of alleged infringements of trade union rights which may be referred to it by the Governing Body or the International Labor Conference. The Commission is essentially a fact-finding body, but it is authorized to discuss situations referred to it for investigation with the government concerned with a view to securing the adjustment of difficulties by agreement.[65]

If a state is not a member of the ILO but is a member of the United Nations, a compliant concerning it may be referred to the Commission by the Economic and Social Council (ECOSOC).[66]

d) Special Surveys on Discrimination in Employment. In 1974, the ILO Governing body adopted arrangements under which requests for special surveys of the situation in individual countries with regard to discrimination could be considered. While not a complaint procedure *per se*, it does share some of the features of the complaint procedures based on the ILO Constitution. No such special survey has been instituted, although the procedure remains in place.[67] Surveys are based on criteria such as those laid down in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

No procedures have yet been set forth for carrying out surveys, so it may only be supposed that some or all of the methods ILO bodies have used in examining other kinds of complaints would be used – submission of documentation from interested parties, hearing of witnesses, and visits to the country concerned. Equally, no standards have been set for the form of decisions or recommendations to be reached, or for any oversight that might be exercised thereafter.[68]

[64] OSIEKE, *supra* note 16, at 178.

[65] *Id.*, at 180.

[66] Swepston, *supra* note 45, at 88.

[67] *Id.*, at 90.

[68] *Id.*

e) In summary, the following table[69] may prove useful:

Kind of Complaint	*Subject Necessary*	*Ratification the Procedure?*	*Who Begins*	*Who Investigates?*
ARTICLE 24 "Representation	ANY ILO CONVENTION	YES	ANY WORKERS' OR EMPLOYERS' ORG.	ILO Governing Body
ARTICLE 26 "Complaint"	ANY ILO CONVENTION	YES	1. STATE THAT HAS RATIFIED SAME CONVENTION 2. DELEGATE TO THE INTERNATIONAL LABOR CONFERENCE 3. ILO GOVERNING BODY	Commission of Inquiry
Special Procedures for Freedom of Association	FREEDOM OF ASSOCIATION	NO	1. WORKERS' OR EMPLOYERS' ORG. CONCERNED	1. Committee on Freedom of Association
			2. ILO BODIES, STATE, CONCERNED ECOSOC	2. Fact-Finding and Conciliation Commission
Special Surveys on discrimination	DISCRIMINATION IN EMPLOYMENT	NO	1. STATE CONCERNED 2. ANOTHER STATE CONCERNED 3. WORKERS' OR EMPLOYERS' ORG CONCERNED	Special panel of experts or International Labor Office

6. LINKAGE WITH WORLD TRADE

The link between international competitiveness and labor conditions was in the forefront at the time of the founding of the ILO. the chairman of a Committee on International Labor Treaties in France spoke of the issue in 1917: "In questions such as hours of work, the regulation of dangerous trades, the prohibition of certain work for women and children, international competition may for a long time favor those countries which do not accept the highest standards of human conditions, to the serious detriment of more generous nations.[70]

The Preamble of the ILO Constitution expressly refers to the link between the condition of workers and harmonization of labor conditions. It reads: "Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries..."

[69] *Id.*, at 79.

[70] Leary, *supra* note 7, at 186.

Be that as it may, the founders of the ILO did not conjure an entity that would be the framer of the whole social and labor policy of member States. But the Declaration of Philadelphia went beyond this area and sought to push the ILO toward economic and financial practices and measures and international trade.[71]

Paragraph II of the Declaration of Philadelphia proclaimed that "lasting peace can be established only if it is based on social justice," and affirmed the following principles with regard to the ILO's role in the international economic realm:

> (a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;
>
> (b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;
>
> (c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;
>
> (d) it is a responsibility of the International Labour Organization to examine and consider all international economic and financial policies and measures in the light of this fundamental objective;
>
> (e) in discharging the tasks entrusted to it the International Labor Organization, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate.

A fundamental belief in the thinking of those who formulated the Declaration of Philadelphia was that the blind interplay of economic forces could not provide for the attaintment of social objectives.[72]

> It is also relevant to note in this connection that, formulated on the eve of the termination of hostilities, the challenge of post-war reconstruction loomed large in the minds of the Declaration's authors. Reconstruction in the context of resource in war-torn economies and the disarray in world trade, transportation and financial systems placed a premium on deliberate economic planning and management. This fact also accounts for the great emphasis on international economic and financial policies in the Declaration since these were perceived as critical elements for post-war economic recovery and social progress.[73]

The draft text of the Declaration with respect to international economic and financial policies met with significant opposition. As a consequence, the draft, which

[71] Córdova, *supra* note 38, at 140.

[72] Lee, *supra* note 20, at 472.

[73] *Id.*, at 473.

spoke of the responsibility of the ILO to "scrutinize all economic and financial policies and measures" in the light of the social objective, was amended. The adopted text replaced the word "scrutinize" with the weaker formulation of "examine and consider."[74]

Despite its emphasis on condition of work which could have some impact upon economic state of affairs, however, the ILO has not promoted the inclusion of a social clause in trade agreements. It has been unable to take a forthright institutional stand.[75]

> Three Directors-General have discussed the concept of a social clause in annual reports to the ILO Conference: Wilfred Jenks in 1973, Francis Blanchard in 1988, and Michael Hansenne in 1994. The Governing Body has also discussed the issue at various periods. As early as 1973, it considered the question of linking trade and workers' rights and came to no conclusion – except to discontinue discussion for the time being. It again discussed the subject extensively in 1990 with the same lack of further action.[76]

The ILO's enforcement authority is severely limited, and its power to apply sanctions negligible.[77] The ILO's work has centered on urging the adoption of international labor and human rights standards, advising governments on their implementation, monitoring their observance, and recommending ways to cure violations. Realization of ILO standards is dependent upon diplomacy and active state support.[78]

> The most likely reason for ILO reticence is the lack of agreement among ILO constituencies regarding the linkage. Unlike other UN inter-governmental organizations, the ILO is tripartite – composed of representatives of workers' and employers' organizations as well as government. It has been difficult – indeed, impossible thus far – for these three constituencies to agree on a common ILO approach to social clauses. In an article in *Le Monde* in 1993, Blanchard pointed out that all efforts in the past to open the debate on the social clause either in the ILO Governing Body or at the annual Conference had failed before the 'lukewarm attitude of governments, the declared hostility of employer representatives and the ambiguity expressed by trade union representatives[.][79]

[74] *Id.*, at 475.

[75] Leary, *supra* note 7, at 188.

[76] *Id.* at 189.

[77] GOTE HANSSON, SICIAL CLAUSES AND INTERNATIONAL TRADE 21-22 (1983).

[78] Note, *In Pursuit of the Missing Link: International Worker rights and International Trade?*, 27 COLUM. J. TRANSNAT'L. L. 443, 448 (1989). To this critique of ILO enforcement mechanism, it has been argued in defense of such measures that the absence of a punitive element may be more advantageous, considering the difficulty in applying sanctions against a State. What is more important is to secure the effective application and implementation of institutional decisions rather than to apply sanctions against States. OSIEKE, *supra* note 16, at 195.

[79] Leary, *supra* note 7, at 189.

Writing since time immemorial are replete with a formulation and articulation of the idea that human beings are inherently entitled to certain fundamental rights and freedoms. There was an attempt at regulation of human rights on a global scale prior to 1945,[80] but all these, whether morally or politically motivated, represented small exceptions to the basic principle that human rights were normally a domestic affair of nation-states.[81]

The new international organization established after the Second World War in 1945, named the United Nations, was a venue for ritualization of a general concern for individual dignity in world affairs. The Holocaust and Japanese atrocities appalled moral sensitivities and caused moral outrage.[82] With these in mind, the nations of the world decided that the promotion of human rights and fundamental freedoms should be one of the United Nations's principal purposes. Out of the U.N. system, an International Bill of Rights, consisting of Article 55 of the U.N. Charter,[83] the 1948 Universal Declaration of Human Rights, and the two U.N. Convenants on Civil and Political Rights and Economic, Social and Cultural Rights, emerged. This was the normative foundation of the core regime on international human rights, supplemented by functional regimes on, among others, international labor protection sourced from ILO legislation.[84]

The Universal Declaration of Human Rights contains provisions relating to protection of workers' rights.[85] There are provisions on the prohibition of slavery and the slave trade,[86] guarantees pertaining to the right to freedom of peaceful

[80] There were historical antecedents of two types. The first was based on moral opprobrium. Examples were the progressive outlawing of slavery, the slave trade, and slavery-like practices, which occurred throughout the nineteenth and twentieth centuries; the progressive protection of humane values in warfare, which started with the first Geneva Convention for the protection of sick and wounded in land warfare in 1864 ... and sporadic diplomatic intervention by some great powers to protect those being abused in foreign states (Britain and France occasionally took moral interest in the cause of various people in the Turkish empire) ... The second type of human rights measure was based, at least to considerable degree, on state self-interest. The minority treaties of the inter-war period, for example, attempted (rather unsuccessfully) to implement the collective human rights of certain minorities in certain European states because of the contribution of minority problems to the outbreak of World war I. State interest in avoiding the practical problem of war was the primary factor producing those treaties. DAVID P. FORSYTHE, THE INTERNATIONALIZATION OF HUMAN RIGHTS 15 (1995).

[81] *Id.*, at 16.

[82] *Id.*, at 35.

[83] U.N. CHARTER art. 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote ... c. universal respect for, and observance of, human rights and fundamental freedoms for all."

[84] FORSYTHE, *supra* note 80, at 35.

[85] It has been suggested that the standards set by the Declaration, although initially only recommendatory and non-binding, have attained binding character through wide acceptance by nations as having normative effect. Alternatively, it has been suggested that the Declaration is legally binding on all U.N. members as an authoritative interpretation of the general human rights commitments contained in the Charter. In any event, the Declaration is frequently invoked as if it were legally binding, both by nations and by primvate individuals and group. Richard B. Bilder, *An Overview of International Human Rights Law*, GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 10 (1984).

[86] G. A. Res. 217A (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810, art. 4 (1948).

assembly and association,[87] social security,[88] free choice of employment and just and favorable conditions of work,[89] equal pay for equal work,[90] just and favorable renumeration,[91] right to rest and leisure,[92] a standard of living adequate for health and well-being,[93] right to education,[94] and participation in the cultural life of the community.[95]

Then there is the Covenant on Economic, Social and Cultural Rights.[96] Its salient provisions on worker guarantees secure equal rights of men and women,[97] the right to work and to just and favorable conditions of work,[98] the right to form trade unions,[99] right to social security,[100] rights to protection and assistance to the family,[101] right to an adequate standard of living,[102] right to health,[103] and right to education.[104] There are lamentations, however, about how the current "progressive realization" standard[105] used to assess implementation renders economic, social, and cultural rights under the Covenant difficult to monitor.[106]

[87] *Id.* art. 20 (1).

[88] *Id.* art. 22.

[89] *Id.* art. 23 (1).

[90] *Id.* art. 23 (2).

[91] *Id.* art. 23 (3).

[92] *Id.* art. 24.

[93] *Id.* art. 25 (1).

[94] *Id.* art. 26.

[95] *Id.* art. 27.

[96] U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966). It was adopted and opened for signature, ratification, and accession by the General Assembly on 16 December 1966. By virtue of Art. 27 thereof, which states, *inter alia*, that "(The Covenant) shall enter into force three months after the date of the deposit with the Secretary General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession", it entered into force on 3 January 1976.

[97] *Id.* art. 3.

[98] *Id.* arts. 6 and 7.

[99] *Id.* art. 8.

[100] *Id.* art. 9.

[101] *Id.* art. 10.

[102] *Id.* art. 11.

[103] *Id.* art. 12.

[104] *Id.* arts. 13 and 14.

[105] "Each State Party to the present Covenant undertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." *Id.* art. 2 (1).

[106] Audrey R. Chapman, *A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 65 (1996).

> Evaluating progressive realization within the context of the maximum of available resources' considerably complicates the methodological requirements. Under this formulation, monitoring requires generating operational standards based, not only on the 'maximum available resources,' but also on what it means to be achieving progressively the full realization of the rights.' The progressive realization benchmark assumes that valid expectation and concomitant obligations of states parties under the Covenant are not uniform or universal, but instead, relative to levels of development and available resources. This necessitates the development of a multiplicity of performance standards for each enumerated right in relationship to the varied social, developmental, and resource contexts of specific countries.[107]
>
> Monitoring the progressive realization, social and cultural rights is extremely complicated and requires an enormous amount of good-quality data. The list of data requested by the reporting guidelines for specific articles of the Covenant sometimes continues for several pages, and the guidelines stipulate that much of this data be disaggregated into relevant categories, including gender, race, region, socioeconomic group, linguistic group, and urban/rural divisions.[108]

In the alternative, a "violations approach" towards evaluating compliance with the Covenant has been suggested. It might be argued that the identification of violations in order to end and rectify abuses constitutes a higher priority that promotes progressive realization. The monitoring of human rights is not an academic exercise, but rather one intended to be a means of reducing the human suffering that results from serious violations of international standards.[109]

On May 30 1946 an Agreement was signed between the United Nations and the ILO whereby "[t]he United Nation recognizes the International Labour Organization as a specialized agency responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein." It was approved by the General Assembly of the United Nations on 14 December 1946 and by the International Labour Conference on 2 October 1946. It came into force on 14 December 1946.[110] As it appears, there is a substantial degree of "preemption" by the ILO framework insofar as matters covered by its Conventions and Recommendations are concerned, if these overlap with principles embodied in the U.N. Declaration of Human Rights and the Covenant on Economic, Social and Cultural Rights.

[107] *Id. at* 31.

[108] *Id.* at 33.

[109] *Id.* at 37.

[110] An extract of the agreement appears in INTERNATIONAL LABOR ORGANIZATION, THE INTERNATIONAL LABOUR CODE 26 (1951).

C. *International Commodity Agreements*[111]

A number of international trade agreements concerning trade in basic commodities contain provisions on worker conditions in signatory States. Fair labor standards were first incorporated into the First International Tin Agreement in 1954, in the Third International Sugar Agreement in 1968 (forerunners 1954 and 1958 did not contain such clauses), the Second International Cocoa Agreement in 1975 (forerunner 1972 without the clause), and the First International Natural Rubber Agreement in 1979.[112] In the case of the First Natural Rubber Agreement, the fair labor standards clause was formulated within the framework of the Integrated Programme for Commodities of the United Nations Conference on Trade and Development (UNCTAD).[113]

These fair labor standards clauses as currently in effect are as follows:

> a) Sixth International Tin Agreement, Article 45 (1982): " Members declared that, in order to avoid depression of living standards and the introduction of unfair competitive conditions in world trade, they will seek to ensure fair labour standards in the tin industry.
>
> b) International Sugar Agreement, Article 28 (1987): " Members shall ensure that fair labour standards are maintained in their respective industries and, as far as possible, shall endeavour to improve the living of agricultural and industrial workers in the various branches of sugar production and of growers of sugar cane and sugar beet."
>
> c) International Natural Rubber Agreement, Article 53 (1987): "Members declare that they will endeavour to maintain labour standards designed to improve the standards of living of workers in their respective natural rubber sectors."
>
> d) International Cocoa Agreement, Article 49 (1993): "Member declare that, in order to raise the levels of living populations and provide full employment, they will endeavor to maintain fair labour standards and working conditions in the various branches of cocoa production in the countries concerned, consistent with their stage of development, as regards both agricultural and industrial workers employed therein."[114]

[111] International commodity agreements can take a variety of forms, but essentially they involve (either separately or in combination) the operation of a system of export quotas (as in the coffee agreement) an international buffer stock which operates within a range of prices (as in the tin agreement), or a multilateral long-term contract which stipulates a minimum price at which importing countries agree to buy specified quantities and a maximum price at which producing countries agree to export a stated amount (as originally in the wheat agreement). Gerald M. Meier, *UNCTAD Proposals For International Economic Reform*, cited in JOHN H. JACKSON ET AL, LEGA PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1176 (1995).

[112] Ulrich Kullman, *"Fair Labour Standards" in International Commodity Agreements*, J. WORLD TRADE L. 527, 532 (November-December 1980).

[113] *Id.* at 527.

[114] Paul Waer, *Social Clauses in International Trade: The Debate in the European Union*, 30 J. WORLD TRADE L. 24, 27-28 (1996).

An analysis of these clauses in commodity agreements states that a common element of all clauses is:

> the definition of the material field of application, which is partially completed by a specification of the personal field of application. whereas in the tin and natural rubber agreements only the tin industry and the natural rubber sectors are mentioned in a general manner, in the sugar and cocoa agreements, for the sake of clarification, the agricultural and industrial workers in the various branches of the sugar or cocoa production are referred to: furthermore, in the sugar agreement there is mention of sugar cane and sugar beet growers.
>
> With the exception of the sugar agreement all clauses are explicitly conceived as declaration of intent of the contracting parties ("countries declare that...") and with little desire to be binding, expressed by wording such as "seek to ensure" (tin) or "endeavour to maintain" (cocoa, natural rubber). Furthermore, all clauses are of a general and global character; they limit themselves to a general reference to fair working conditions without quoting any concrete provisions or preventive regulations (provisions on work, health, or environment) or referring to existing international agreements, as proposed in other sectors, e.g., the proposal concerning the insertion of a social clause into the General Agreement on Tariffs and Trade (GATT).[115]

It was observed that such vague formulations cast doubt upon the enforceability of these clauses. Insofar as implementation mechanisms are concerned, the violation of fair labor standards in these commodity agreements entails at most a grievance procedure before the council in question. Likewise, something short of practicability contrary to the fundamental purposes of the commodity agreements, *i.e.*, the protection of workers in developing countries against exploitation and inhuman working conditions and the improvement of purchasing power by a better salary structure. The real beneficiaries of these fair labor standards clauses seem to be the highly developed industrialized countries, who are only too willing to provide for "sweeteners" so that developing nations are brought to participate in such commodity agreements.[116]

D. *The Bretton Woods Institutions*

1. EMERGENCE

At the core of international of economic relations is a group of international and multilateral agreements which can be termed the "Bretton Woods system."[117] Sometime in July 1944, the United Nations Conference on Money and Finance was held in Bretton Woods, New Hampshire, as a direct response to the dismal experience of the 1920s and 1930s.

[115] Kullman, *supra* note 112, at 533.

[116] *Id.* at 533-535.

[117] JACKSON ET AL., *supra* note 111, at 278.

In those years countries were forced off the gold standard which had been restored after First World War with exchange rates that soon proved unrealistic. Sterling, in particular, was overvalued and when the pound left the gold standard in 1931 other countries scrambled in their haste to devalue, giving rise to competitive devaluations. Most countries also took protectionist measures to safeguard their domestic industry. As a result, trade collapsed: between 1929 and 1932 the value of world trade fell by over 60 per cent.

In the early 1940s, during the Second World War, two original thinkers, John Maynard Keynes of the United Kingdom Treasury, produced almost simultaneous plans for a radically new monetary system which would stabilize exchange rates and promote free trade. A permanent international institution would have to be responsible for that system, instead of ad hoc arrangements concluded in irregular conferences of the leading countries. The projected international institution was shaped to provide financial assistance to countries with balance of payment problems. It was hoped that this would prevent countries reaching for the weapon of protectionism or competitive devaluation when periodic imbalances occurred.[118]

Unemployment was heavy. The international monetary system collapsed. Unilateral national policies created world economic chaos. The objectives going to Bretton Woods were clear: full employment, maintain stable currencies with agreed procedures for adjustment, and fashion new institutions of global monetary and economic governance, with clear objectives and with changes in global policies engineered through a broad international consensus.[119]

Final negotiations took place in a late Victorian resort hotel which stands to this very day. Only three weeks earlier the allied troops landed in Normandy, France and there was a strong political desire to cooperate and set aside the narrow prewar nationalism.[120] Agreement was reached within the scheduled three weeks on the statutes of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD – later called the World Bank). Transcending the establishment of these two institutions, however, was the creation of the over-all Bretton Woods system, which assembled the four pillars of multilateralism:

a) The IMF: to maintain global monetary stability, primarily through the mechanism of fixed but adjustable exchange rates;

[118] AGE F.P. BAKKER, INTERNATIONAL FINANCIAL INSTITUTIONS 11 (1996). There is evidence to show that the stance of ILO economists coincided with Keynesian thought. From an early stage, they also advocated international cooperation between leading central banks to raise prices to a parity with the international level of money costs of production. They achieved parallels with Keyne's exhortation to establish a world policy and response which overrode national financial constraints. See A.M. Endres and Grant Fleming, *International Economic Policy in the Interwar Years: the Special Contribution of ILO Economists*, 135 INT'L. LAB. REV. 207 (1996).

[119] UNITED NATIONS, A VISION OF HOPE: THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS 207 (1995).

[120] BAKKER, *supra* note 118, at 12.

b) the IBRD: to reconstruct the war-torn economies of Europe and Japan and to stimulate the growth potential of the less developed regions in the Third World;

c) the International Trade Organization (ITO): to stabilize international commodity prices and to manage a liberal trading regime; and

d) the United Nations: to maintain peace between nations as well as to encourage social and human and development within nations.[121]

The Articles of Agreement for the IMF and the IBRD were drafted at Bretton Woods. Operations commenced in 1946. The draft International Trade Organization (ITO) charter was finalized by 1948.

2. THE IMF AND THE WORLD BANK

The principal function of the IMF is to supervise the international monetary system. Its most important role is that of manager of an orderly, predictable, and stable international monetary system with open borders, providing the framework for balanced growth of world trade and the economies of the member countries.[122] It grants credit subject to the fulfillment of certain policy conditions. This principle of *conditionality* is significant because it is the key to access of the Fund's resources. In addition, intact drawing entitlements with high conditionaly is considered as a seal of approval for easy access to private and official loans beyond Fund resources. But bleak observations are indispensable: it is said that conditionality tends to keep developing countries in dependency instead of promoting self-reliant development; it excludes alternative balance of payments policies.[123]

The IBRD was originally set up as an international bank which would concentrate on financing the reconstruction of the European economies weakened by the war. Its range of operations gradually shifted to the developing countries when Marshall aid generated a steady flow of capital to Europe without involvement of the bank. It is more commonly-known as the World Bank, and the term "World Bank group" refers to it and its sister institutions, namely the International Finance Corporations (IFC) and the International Development Association (IDA). The main object of these institutions is to promote economic and social progress that provide credit and loans, and offer economic and technical advice to the public any private sector in developing countries.[124]

The famous (or infamous) structural adjustment program (SAP) grew out of the World Bank system. Under the SAP general purpose, loans are granted with the aim of improving the way the economy functions with a large structural balance

[121] UNITED NATIONS, *supra* note 119, at 207.

[122] BAKKER, supra note 118, at 15.

[123] Gerster, *The IMF and Basic Needs Conditionality*, 16 J. WORLD TRADE L. 497 (1982), cited in FOLSOM, ET AL, *supra* note 22, at 929-30.

[124] BAKKER, *supra* note 118, at 44.

of payments deficit, and support adjustments which should lead to a sustainable balance of payments position in the longer term. They are often granted in conjuction with the IMF loan, because of the close links with the IMF adjustment programs. In all, a shift has taken place at the World Bank away from the financing of specific projects – investment in production capacity and infrastructure – towards non-project linked programs which are meant not only to keep the developing companies running but also to help improve their economic system.[125] An image of "political insensitivity" arose, for instance, out of prioritization of military expenditures over education and health measures during periods of required adjustment, and food subsidies to the poor have been slashed in preference to cutting tax and interest rate subsidies to powerful landlords and industrialists. The social and human costs of the adjustment programs have been unnecessarily high and the World Bank alongside the IMF have been blamed for the consequences. The original Keynesian vision saw a World Bank as an institution for expansion of global growth and employment levels, rather than as an intrument for deflationary policies imposed as a condition in its structural adjustment loans.[126]

3. THE ITO AND THE GATT

In late 1945, the United States Department of State invited a number of other nations to enter into multinational negotiations for the reduction of tariffs. At about the same time, the United Nations was beginning its work and the U.N. Economic and Social Council (ECOSOC) was established. At the first ECOSOC meeting in February 1946, the United States introduced a resolution, which was adopted, calling for the convening of a United Nations Conference on Trade and Employment with the purpose of drafting a charter for an international trade organization. The first preparatory committee for this effort convened in the fall of 1946 in London, to consider a " Suggested Charter for an International Trade Organization." drafted by the United States government. Following this meeting, a drafting sub-committee met Lake Success, New York early in 1947 and then the full preparatory conference convened again in Geneva from April – October , 1947. At this conference, the multilateral tariff negotiations were conducted, in addition to the continuing work on a draft for an ITO which was to be concluded at the Havana conference during the early part of 1948.[127]

The General Agreement on Tariffs and Trade (GATT) was drafted at the Geneva conference, simultaneously with the tariff negotiation and the work on the ITO charter. The basic idea for the General Agreement was that it would be an agreement to embody the results of the tariff negotiations, but that it would also include some of the general protective clauses which would prevent evasion of the tariff commitments. It was not contemplated that the GATT would be an organization.[128]

[125] *Id.* at 50.

[126] UNITED NATIONS, *supra* note 119, at 212, 216.

[127] JACKSON ET AL., *supra* note 111, at 294.

[128] *Id.*

The Havana Charter, which established the ITO, was an agreement of much broader shape. On a substantive level, the Havana Charter comprised, in addition to the provisions reproduced in the General Agreement, chapters relating to employment and economic activity, economic development and reconstruction, restrictive trade policies, as well as agreements on primary products.[129] It was, however, doomed for oblivion. After the draft was completed, other countries waited to see if the United States – the strongest economy having emerged from the Second World War largely unscathed – would accept the ITO. The Charter was submitted before the U.S. Congress several times, but by the late 1940s, the enthusiasm of international cooperation that prevailed immediately after World War II faded, and the composition of Congress had shifted to a stance less liberal on trade matters and less internationally oriented.[130] Many members of Congress at the time were opposed to the Truman administration and used the legislation relating to the ITO as an opportunity o thrawt the government. The effective eliminated the ITO from ITO from the international countries.[131]

Article 7 of the Havana Charter clearly provided that the "Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory."

A Protocol of Provisional Application (PPA) was signed in late 1947 by the 22 original members of the GATT. It is through this protocol that the General Agreement is applied.[132]

It goes without saying that there is a dearth of worker-related provisions in the GATT, despite the fact that part of its Preamble still recognizes the fact that "relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living (and) ensuring full employment... "The general articles of the Agreement comprised the basic trade policy commitments of the contracting parties. These articles were designed generally to prevent nations from pursuing "beggar-thy-neighbor" or highly protectionist policies which would be self-defeating if emulated by other nations. " Tariff schedules" constituted a substantial part of the obligations contained in the Agreement. The remaining GATT obligations were designed to reinforce the basic tariff obligation, *i.e.*, to prevent evasion of the tariff obligation by the use of other non-tariff barriers that would inhibit imports. The principal exception to this statement would be all-important

[129] Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM.J.TRANSNAT'L L. 123, 126 (1995).

[130] JACKSON ET AL., *supra* note 111, at 295.

[131] BAKKER, *supra* note 118, at 9.

[132] JACKSON ET AL., *supra* note 111, at 295.

obligation contained in Art. I, the "Most Favored Nation" (MFN) cause.[133] Alongside, MFN, another important important GATT obligation would be the national treatment obligation under Article III.[134]

The GATT's sole provision which observes a direct nexus between international trade and workers' rights is Article XX (e), which allows a country to ban imports of prison labor. Apparently, this provision arguably reflected the international consensus on worker rights at the time it was drafted. In 1947, the only human rights conventions existing where those on slavery and forced labor.[135]

A part from this, there is no other mention nor reference to workers' rights. But there are indirect references:

a) Escape Clause-An escape clause is a general term referring to provisions allowing the modification or rescission of negotiated trade liberation measures.[136] The GATT's escape clause is lodged in Article XIX. It specifies standards that are supposed to be met before safeguard measures can be imposed. There are measures that do not interfere directly in trade but they nevertheless, serve to aid firms or workers harmed by import competition. Subsidies to firms to adapt their product mix to changing competitive conditions or aid workers for retraining stand as supplements to traditional safeguard measures.[137]

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[133] *Id.* at 298. "With respect to customs duties and charges of any kind imposed on or in connection with the importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation ... 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 or destined for the territories of all other contracting parties." The text of the general agreement, as negotiated in 1947 may be found in the United Nations Treaty Series at 55 U.N.T.S. 1867.

[134] GATT 1947, supra note 144, art. III(1) (2) and (4): "1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imprted into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1 ...

... 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their interal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

[135] JACKSON ET AL., *supra* note 111, at 1007-1008.

[136] *Id.* at 604.

[137] *Id.* at 597.

The United States Department of Labor, for instance, pursuant to the GATT and U.S. escape clause legislation,[138] administers a program of trade-related adjustment assistance to workers. In 1992, it expended some $42.7 million for assistance to workers, while certifying approximately 50,000 workers as eligible for benefits under the program.[139] Under Sec. 222 of the Trade Act of 1974, worker adjustment assistance criteria paralleled the Sec. 201 escape clause "injury' requirment through a showing that a significant number or proportion of workers were totally or partially separated with sales or production or both decreased absolutely.

And as usual " increased imports" must have constituted as an important cause of the "injury" to the workers.

b) Article XXII-Article XXIII is the basic dispute settlement system in the GATT. In order to prevail under the terms of Article XXIII, a complainant must show that either: (i) benefits accruing to it under the General Agreement are being nullified or impaired; or (ii) attainment of an objective of the General Agreement is being impeded. In addition, the complainant must show that such nullification or impairment is a result of: (i) a breach of obligation by the respondent contracting party; (ii) *the application of any measure by the respondent contracting party, whether it conflicts with the General Agreement or not*; or (iii) the existence of any other situation.

From the strict reading of the law, one could argue for a fertile ground for an action against a GATT contracting party tolerating or promoting trade of goods made in violation of workers' rights, whether it conflicts with the GATT or not. But the opportunity is more apparent than real. There have been only three dispute settlement reports adopted that have recognized a claim of nonviolation nullification or impairment. All these cases have involved mechanisms still strongly entwined with trade. The famous Oilseeds case,[140] for instance, involved impairment of zero tariff bindings for oilseeds in favor of the U.S. due to subsidy schemes which operated to protect European Community producers of oilseeds completely from the movement of the prices of imports. Chile complained when Australia changed its policy on subsidizing fertilizers so as to remove the subsidy on the type of fertilizer that Chile had been exporting to Australia, while maintaining it on the type of fertilizer produced domestically. Chile aimed that this action nullified or impaired the tariff concession on fertilizer that it had obtained from Australia, and the working party agreed.[141] Lastly, Norway successfully brought a complaint protesting a German change in tariff rates on products that had formerly been treated the same, with the result that relatively higher tariffs were imposed on the Norwegian product

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[138] Trade Act of 1974 §§ 201-204

[139] JACKSON ET AL., *supra* note 111, at 660.

[140] EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins, 37th Supp. BISD 86 (1991), Panel Report Adopted 25 January 1990.

[141] The Australian Subsidy on Ammonium Sulphate, II BISD 188 (1952), cited in JACKSON ET AL., *supra* note 111, at 362 n. 1.

compared to competing products from other countries.[142] No action has been put forward involving goods produced in violation of workers' rights and made to compete in a global scale. During a 1953 GATT debate, the U.S. took the position that Article XXIII could be invoked in cases of unfair labor standards, but the U.S. has never invoked the GATT for this purpose.[143]

II. THE LINKAGE: WORKERS' RIGHT IN UNILATERAL AND REGIONAL ARRANGEMENTS

A. History

It is said that the concern to establish links between international trade and labor standards is probably as old as the standards themselves. Jacques Necker, the banker and finance minister under Louis XVI, wrote in 1788 that if a country were to abolish the weekly day of rest, it would undoubtedly gain an advantage, provided it was the only one to do so, if others acted likewise, the situation would be as before.[144]

Nineteenth-century Europe saw atrocious working conditions for workers in all its industrializing countries. Labor law reformers in Europe ran up against the concern that the enactment of domestic laws prohibiting child labor or shortening hours of work would result in a competitive disadvantage in relation to other countries with lower standards. Their response was to urge the adoption of treaties establishing common labor standards which would be hopefully ratified by all European industrialized countries, as well as the establishment of an international organization to supervise the treaties.[145]

The first suggestion on the possibility of regulating conditions of labor through international agreements was made by Robert Owen in 1818, when he presented to the plenipotentiaries of the Conference of the European Powers at Aix-la-Chapelle, a Memorial in which he argued that reform in the conditions of labor would be in the interests of all classes of society.[146]

In 1833, Charles Frederick Hindley, a member of the British Parliament, proposed an international treaty on hours of work as a means of promoting such legislation in England. He has been referred to as the founder of the idea of international labor legislation and as having a clear insight into the interdependence between nations that were created by foreign trade and international comptetition.[147]

[142] Treatment by Germany of Imports of Sardines, 1st Supp. BISD 53 (1953), panel report adopted 31 October 1952.

[143] Steve Charnovitz, *Fair Labor Standards and International Trade*, 20 J. WORLD TRADE L. 61, 73 n. 54 (1986).

[144] J.M. Servais, *The Social Clause in Trade Agreements; Wishful Thinking or an Instrument of Social Progress?*, 128 INT'L. LAB. REV. 423 (1989).

[145] Leary, *supra* note 7, at 183.

[146] OSIEKE, *supra* note 16, at 4, 6 (1985).

[147] Leary, *supra* note 7, at 184.

In a latter half of the nineteenth-century a series of European congresses, promoted by different organizations of labor leaders, socialists, reformers, professors, and economists, took up the issue of labor laws reform, with many pointing out that labor reform was not solely a national issue. The main concerns of these congresses related to child labor, hours of work, weekly rest for children and adult female workers, and occupational safety and health issues.[148]

Two unsuccessful efforts to organize international labor conferences took place in 1888 and 1890. The Swiss government issued invitations to thirteen European states to attend an international labor congress in 1889. The invitations were withdrawn when Germany decided to organize a similar conference in 1890. The latter apparently failed by considering too many aspects of the condition of workers, many of which were highly controversial and by inadequate preparation.[149]

The seeds for the eventual adoption of international labor conventions and an international labor organization were immediately laid in 1897. Delegates representing worker in 14 countries met at an International Congress on Labor Protection in Zurich in 1897 and urged the Swiss government to invite other governments to set up a labor office. Also, in 1897, a conference of professors, economists, and politicians in Brussels discussed various issues relating to labor legislation in the European countries and set up a committee to establish an international association for labor protection aiming, *inter alia* at the adoption of international labor legislation. Studies of International Association for Labor Legislation were adopted in Paris in 1900 and an International Labor Office was opened in Basel in 1901.[150]

In the Pre-World War I period, a number of bilateral agreements were also negotiated dealing with common conditions of work. For instance, a Franco-Italian treaty of 1904 required Italy to regulate working conditions in line with conditions in France, and gave Italian workers in France the same treatment as domestic workers regarding compensation for industrial accidents and pensions. By 1914, 28 bilateral agreements were negotiated between European countries, mainly relating to treatment of migrant workers.[151]

International fair labor standards began its modern history at the international labor conference in Bern of 1906, which adopted a treaty to prohibit the manufacture, import, or sale of matches containing white phosphorus.[152]

In 1913, another conference in Bern adopted two new conventions, one relating to hours of work for minor and women, and the other relating to prohibition of night work for minors. Events overtook these developments when war broke out.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 184-85.

[151] HANSSON, *supra* note 77, at 12.

[152] Charnovits, *supra* note 143, at 62.

The diplomatic conventions at which the conventions were to be signed never took place.[153]

At the end of the first world war in 1919, the Peace Conference appointed a Commission to draw up proposal on labor for inclusion in the Treaty of Versailes. One part of the Treaty, the Covenant of the League of Nations, stated that members "will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial nations extend."[154] Another part of the Treaty laid the groundwork for the International Labor Organization (ILO).

B. Unilateral Arrangements

More than any country in the world, the United States has firmly established the link between workers' rights and international trade in its national legislation. Promotion of respect for international labor standards has been an explicit part or United States trade and economic policies for over decades. Legislation authorizing participation in the GATT Tokyo Round (1973-1979) of multilateral trade negotiations called on U.S. negotiators to promote the concept of international fair labor standards. Nearly a dozen pieces of international trade and economic legislation enacted by the United States in the 1980s and 1990s include the concept of promotion of international labor standards.[155] Such pieces of legislation embody "worker rights programs" in relation to world trade. Four of these programs stand out.[156]

The first consists of preferential trade access arrangement established in connection with the Generalized System of Preferences.[157] The GSP is a program that grants duty-free treatment to specified products that are imposed from more than 140 designated developing countries and territories. Its premise is that the creation of trade opportunities for developing countries is an effective, cost-efficient

[153] Leary, *supra* note 7, at 185.

[154] Charnovitz, *supra* note 143, at 63.

[155] Perez-Lopez, *supra* note 8, at 429. It bears nothing, however, that the most fully developed models of labor standards within multi state systems are the longstanding regimes of *domestic* labor law *within federally* structured nation states ... The first and most obvious is the model of national or multistate uniformity, exemplified by United States legislation on collective bargaining and pensions... The second model in United States federalism imposes nationwide minimum standards, but allows several states to provide greater labor protection ... The third model (would be) programs which offer federal financial incentives for heightened state standards in order to preempt the race to the bottom among states ... a fourth model has prevailed: state regulatory primacy, that is, complete non-intervention by the federal government ... The fifth model is characterized by explicit cooperative initiatives among groups of states, such as regional economic development programs ... A final model is individual states' unilateral "tit for tat" penalties (in the form of taxes or import restraints) against siter states whose lax labor standards threaten to induce a downward regulatory spiral among the several states. Mark Barenberg, *Law and Labor in the New Global Economy: Through the Lens of United States Federalism*, 33 COLUM. J. TRANSNAT'L. L. 445, 441-52 (1995).

[156] *See* Philip Alston, *Labor Rights in U.S. Trade Law: "Aggressive Unilateralism"?*, 15 HUM. RTS. Q. 1 (1993).

[157] *Id.* at 3.

way of encouraging broad-based economic development and a key means of sustaining the momentum behind economic reform and liberation. The program achieves these ends by making it easier for exporters from developing countries to compete in the U.S. market with exporters from industrialized nations.[158]

Under Sec. 502, Title V of the United States Trade Act of 1974, a criteria was set out for designing countries as GSP beneficiaries. The President could designate as beneficiaries certain developing countries provided they did not meet certain mandatory exclusionary criteria and after taking into account a number of discretionary factors. Among these, under Sec. 502 (b) (7), the President shall not designate any country a beneficiary developing country "if such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country." Sec. 504 (b) authorized the President to withdraw or suspend the designation of any country as a beneficiary country if, after designation, it is determined that, because of changed circumstances, the country no longer met the mandatory criteria. Sec 502 (a) (4) defines " internationally recognized worker rights" to include: (A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

The second program is the Caribbean Basin Initiative of President Ronald Reagan, implemented under the Caribbean Basic Economic Recovery Act.[159] It was the first statute to condition eligibility for trade preferences on foreign compliance with labor standards criteria. The centerpiece of the legislation was the unilateral provision of duty-free treatment of a wide range of U.S. imports from beneficiary countries for a twelve-year period.

The Andean Trade Preference Act of 1991[160] grants duty-free treatment to eligible articles from beneficiary countries in the Andean region. Mandatory and discretionary country eligibility criteria track in the Caribbean Basin Economic Recovery Expansion Act.

The Oveseas Private Investment Corporation (OPIC) was created to insure U.S. investment in foreign countries against losses due to political turmoil or nationalization.[161] OPIC is not permitted to participate in a project unless the government of the country concerned is "taking steps to adopt and implement laws that extend internationally worker rights " to its workers.

[158] USTR Web Site, last updated 27 March 1996.

[159] 19 U.S.C. §§ 2702-2706 (1990).

[160] TITLE II, MISCELLANEOUS FOREIGN AFFAIRS ACT OF 1991, Pub. L. No. 102-182, 105 Stat. 1233 (1991).

[161] 22 U.S.C.A. §§ 21921-2200 (1985).

The Multilateral Investment Guarantee Agency (MIGA)[162] provided for United States participation in a multilateral insurance program for international investment similar to that of OPIC, wherein U.S. representatives are required to press for labor rights guarantees as a condition of approval of any such insurance.

Such a program[163] was subject to review annually, supposedly prohibiting foreign aid that contributes to the violation of worker rights.

C. Regional Arrangements

1. NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA): NORTH AMERICAN AGREEMENT ON LABOR COOPERTION

Signed in August 1992, the North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico came into force on 1 January 1993 after having successfully passed its most critical test – the vote in the United States House of Representatives which opened the way to ratification by the United States Senate. It drew world attention for its symbolic significance: as agreement on the GATT Uruguay Round wavered in the balance, this vote was seen as an advance sign of whether the world would opt for more trade or protectionism.[164] There was controversy regarding NAFTA's potential effects on the labor market in the United States. In theory, U.S. workers could be injured by three distinct but related factors: the flight of U.S. firms to Mexico, competition from imports to the United States, and regulatory competition. These factors could result in lower wages, the loss of U.S. jobs, or reduced levels of regulatory protection for the United States workforce.[165]

In response to such concerns, then candidate Bill Clinton committed himself to negotiating supplemental labor and environmental agreements with Canada and Mexico before the treaty was submitted to Congress for ratification. The two Supplemental Agreement, which were signed on 13 August 1993, were thus critical for gaining approval of NAFTA.

This agreement, whose official title is the North American Agreement on Labor Cooperation (NAALC), recalls in its preamble that the parties to the NAFTA have resolved to: a) create an expanded and secure market for the goods and services produced in their territories; b) enhance the competitiveness of their firms in global markets; c) crate new employment opportunities and improve working conditions and living standards in their respective territories; and d) protect, enhance and enforce basic workers' rights.

[162] 28 I.L.M. 1237.

[163] 22 U.S.C.A. SS 2151-2296 (1993).

[164] NAFTA *Comes Into Force — With a Glimmer of a Social Clause*, 133 INTL. LAB. REV. 113 (1994).

[165] Rozwood and Walker, *Side Agreements, Sidesteps, and Sideshows: Protecting Labor from Free Trade in North America*, 34 HARVARD INTL. L. J. 333 (1993).

Annex 1 of the NAALC enumerates the guiding principles that the Parties are committed to promote subject to their own domestic law (without establishing common minimum standards for their domestic law). The three States are thus committed to applying their own labor laws in a transparent way and to guaranteeing that workers and employers have access to appropriate tribunals which will consider any complaints and ensure a fair and equitable hearing. There is also provision for workers and employers to cooperate and regularly exchange information and statistical data with a view to improving knowledge of each other's institutions and social legislation and promoting innovation, productivity, and quality.[166]

It is clear that the main virtue of the NAALC is to discourage "social dampening and counteract the tendency to adopt the lowest common denominator in labor and environmental standards. In that sense, a social clause operates within the NAFTA framework by virtue of the NAALC, though there is no reference to minimum common or international standards, but to standards defined under national legislation in the respective countries.

> The length of the procedure should be noted: over two years may elapse before trade sanctions are enforced. Such sanctions are, in fact, subject to three conditions: there must have been a persistent failure to enforce the existing social provisions; there must be a similar law in the complainant country; and the dispute must concern the production of goods or services traded between the Parties. In addition, sanctions are only possible in the areas of child labor, minimum wages, and occupational safety and health.[167]

2. BEYOND THE SOCIAL CLAUSE: THE EUROPEAN COMMUNITY

a. Primary Law

The emergence of a European Union was largely triggered by the two major wars in this century. The carnage of the Second World War confirmed that the treaty system that dominated western foreign policy prior to the First World War had failed. Efforts at reform of the international organizations. Although these international organizations, due to the nature of world politics at the time, were certainly European-centered. European leaders felt a need for specific unity to deal with the specific growth and development needs of non-Communist Europe. From the very beginning of what is now the E, there was a consensus among national leaders and constituents that the devastation caused by World War II could be avoided by an economic alliance that would held rebuild economies of Western Europe and link the nations in such a way that war would not be a viable option.[168]

[166] NAFTA Comes Into Force — with a Glimmer of a Social Clause, *supra* note 14, at 115.

[167] *Id.* at 118.

[168] Craig Jackson, *Social Policy Harmonization and Worker Rights in the European Union: a model For North America?*, 21 N.C.M. INT'L. L. & COM. REG. 1 (1995).

In any event, the EU is no longer understood as a purely economic and customs union, but that it is considered possible for the Community to exert an influence on the labor system, which has so far been regard as a strict national matter.[169]

Under the Treaty of Rome, or the treaty establishing the European Community, "labor legislation" only occurs expressly in Article 118, paragraph 1. Apart from that the term used is "social policy." which comprises both labor law and social law. The Treaty contains a number of general principles which have a direct effect on labor law or can at least have indirect consequences for labor law. Particular importance should be attached to the principle of the free movement of workers.[170] Freedom of movement means that all rules which provide for different treatment of employees, based on their nationality, with regard to employment, remuneration and other working conditions must be abolished.

Another general principle of the EEC Treaty which is important for labor law is the prohibition of discrimination laid down in Article 6. All discrimination on the grounds of nationality is prohibited.

Finally, Article 119, EEC Treaty, refers to the principle of equal renumeration for men and women.

b. Secondary Community Law

To produce uniformity of law, the EC may enact a regulation, a generally and directly applicable legal instrument akin to a U.S. federal and Philippine national statute, binding in its entirely on all Member States and their citizens, pre-emptive of conflicting member states' laws, and enforceable by, *inter alia*, member states and their citizens against each other. Virtually nothing in the labor or social policy field has been enacted in this way, and this is likely to persist for the foreseeable future.

The predominant instrument of EC legislation in the labor sphere, as in most other areas, is the directive. A directive establishes a uniform, EC-wide policy regarding legislative, but permits the member states to utilize divergent means to accomplish those ends. EC labor directives usually minimum standards which the member states are free to exceed. In addition, labor directives often either constrain the means by which the Member States may meet the EC-mandate or they specify a series of alternative means, at least one of which must be adopted.[171] Examples of

[169] Baron von Maydell, The Impact of the EEC on Labor Law, 68 CHICAGO-KENT LAW REV. 1401 (1993).

[170] Treaty Establishing the European Economic Community, arts. 48-51[hereinafter EEC Treaty].

[171] Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 CHICAGO-KEN LAW REV. 1427 (1993).

EC labor directives include the 1975 directive on collective redundancies,[172] the 1977 directive on transfers of operations,[173] and the 1980 directive on insolvencies.[174]

c. Social Policy

In 1989, European lawmakers attempted to enact a Community Charter Fundamental Social Rights of Workers (known as the "Social Charter"). The Social Charter contained a lists of "Fundamental Social Rights of Workers, " which included occupational health and safety protections, guarantees for the right to organize and bargain collectively, right to adequate social welfare benefits, workplace consultation and participation rights, and protection for children, older workers, and the disabled. Eleven of the twelve Member States approved the Social Charter – all but the United Kingdom. As a result, the eleven states that ratified the Social Charter have treated it as a mandate for the European Commission to formulate directives for the protection of labor and promotion of collective bargaining.[175]

In 1992 at Maastricht, eleven of the twelve EU Member States agreed to a Protocol on Social Policy. In the negotiations leading up to the Maastricht Agreement, there were considerable pressures to enlarge the EEC Treaty's social policy provisions. Due to the United Kingdom's continued opposition, however, there was no unanimous agreement. Instead, provisions based on the previous Social Charter were annexed as a Social Agreement accepted by all except the U.K., and these eleven Member States were authorized by the Protocol on Social Policy to utilize the mechanism of the EEC for the purpose of implementing that Agreement. This U.K. "opt-out" means that the Social Policy proposal which the U.K. government is unwilling to accept may be agreed among the other member states and become binding on all except the U.K.[176]

The Maastricht Protocol, also known as the Social Agreement, made a number of changes in the manner in which labor directives are implemented. Most significantly, it provided that labor directives can be implemented through collective bargaining agreements as well as through legislation and administrative regulation. In addition, the 1992 Maastricht Protocol on Social Policy expanded the legislative capacity of the EU. It set out a series on which the EU could legislate on the basis of majority voting, rather than unanimity which had previously been required. These areas include the health and safety protection, working conditions, workers' information and consultation rights, and equality men and women.[177]

[172] Council Directive, 75/129, 1975 O.JK. (L 48) 29, *as amended by* Council Directive 92/56, 1992 O.M. (L245) 3.

[173] Council Directive, 75/187, 1977 O.M. (l 61) 26.

[174] Council Directive, 80/987, 1980 O.M. (L283) 23, *as amended by* Council Directive 87/164, 1987 O.M. (66) 11.

[175] Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L. L. 987 (1995).

[176] *Id.* at 1002.

[177] *Id.* at 1003.

Article 2 (6) of the Social Agreement, makes it clear that the most collective labor rights are excluded from majority voting. It states that "the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs." Thus, unanimous voting was retained for directives in the area of job security, representation, and collective defense of workers' interests. To date, the EU has not attempted to legislate or harmonize in the field of collective bargaining law.[178]

d. Corporate Codes of Conduct

It has been observed that in the past ten years general resistance to linking human and labor rights to international business practices has begun to break down. A major development in the American business scene has been the emergence of U.S. based firms which have developed codes of conducts on worker rights and working conditions for foreign subsidiaries and suppliers.[179]

Codes of conduct for labor rights are taking shape as part of a broader movement of corporate social responsibility. The premise of corporate social responsibility movement is that corporations, because they are the dominant institution of the planet, must squarely face and address the social and environmental problems that afflict humankind.[180] There are two main types of external codes: those created in multilateral government settings (eg. United Nations and the Organization fro Economic Cooperation and Development [OECD]) and those developed by either governments or non-governmental organizations (NGOs) that are offered to companies for acceptance either through outright adoption or through a pledge to comply with their terms.[181]

One writer has gone to the extent of announcing a "second human rights revolution," involving human rights responsibilities not of governments, but of private multinational corporations, which in many ways can be more powerful than the most national governments.[182]

[178] *Id.* For a more recent article on the EC Social Charter, see Dowling, Jr., *From the Social Charter to the Social Action Program 1995-97: European Union Employment Law Comes Alive*, 29 CORNELL INTL. L. J. 43 (1996).

[179] Compa and Hinchliffe-Darricarrere, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L. L. 663 (1995). Also, *see Working party on the social dimensions of the liberalization of international trade, overview of global developments and office activities concerning codes of conduct, social labeling and other private sector initiatives addressing labour issues*, ILO Doc. GB. 273/WP/SDL/1 (27erd Session, November 1998).

[180] Hawken and McDonough, *Seven Steps to Doing Good Business, Inc.* Nov. 1993, at 79-80.

[181] Compa and Hinchcliffe-Darricarrere, *supra* note 179, at 669.

[182] Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INTL. L.J. 1963 (1996).

III. FREE VS. FAIR TRADE

The link between compliance with international labor standards and international trade must first be ascertained before the social clause debate commences. The linkage, out of theoretical and practical necessity, must be found to exist before a social clause may be firmly put in place. Conversely, the establishment of a link does not necessarily entail the enactment of a social clause.

Theoretically, unrestricted trade creates an international division of labor that efficiently allocates the world's resources, thereby increasing total output and raising standards of living everywhere. Ideal conditions rarely exist in reality, of course. Perfect competition is not common, and the transfer of resources from one industry to another does not always take place smoothly or quickly. Yet the evidence shows that trade does bring growth and prosperity. Better forms of governmental intervention than trade restrictions are available to ensure fairness and prevent abuses of free trade by other countries. Political measures to protect local interests and deprive the world of the benefits of specialization and trade.[183]

The dream of unrestricted trade is widely held as an aspiration by so-called "free traders." They preach the gospel of comparative and competitive advantage and its dominating role in the global economy.[184] It is then not difficult to understand that free traders believe that agreements would imply a fixing of standards between countries, which is incompatible with market principles. Because regulatory diversity is one dimension of comparative advantage, to argue against diversity is to argue against the rationale of trade itself.[185]

"Fair traders' maintain that optimal social protection requires political negotiation and standard-setting and cannot be entirely left to market forces. They point out that the increased mobility of capital and the freedom for firms to locate their fixed investments almost anywhere in the world puts countries under pressure to lower their labor standards, which could lead to "social dumping"[186] " Social

[183] BERRY, CONKLING and RAY, THE GLOBAL ECONOMY 366 (1993).

[184] The theory of comparative advantage was developed by David Ricardo to clarify the nature of an efficient allocation of resources among a country's traded goods producing sectors – its import-competing and its exporting sectors. A well-known extension of Ricardo's analysis is usually associated with the Swedish economists Heckscher and Ohlin. Ricardo had considered only one factor of production, labor. The hecksher-Ohlin model recast the concept of comparative advantage to allow for more than primary factor. The purpose of this reformulation was to show that differences in comparative costs across industries could arise from differences in the factor intensities of the industries concerned. The theory of competitive advantage has been depicted as a fundamental challenge to the classical theory of comparative advantage, but the dichotomy is false, and the argument that competitive advantage should be seen as a replacement for the concept of comparative advantage is mistaken. The two theories should be properly viewed as complements to one another and should not be seen as competitors for the minds of policy-makers. Warr, Comparative and competitive Advantage, 8 ASIAN-PACIFIC ECONOMIC LITERATURE 1 (1994).

[185] Erika De Wet, *Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on tariffs and Trade/World trade Organization*, 17 HUM.RTS. Q. 443, 446 (1995).

[186] *Id.* at 447.

dumping" entails the violation of worker rights driven by the desire to succeed in international trade. Certain developing and newly-industrialized states suppress labor unions and depress labor conditions in order to support effective exports sectors and/or attract foreign investment.[187] The likelihood of social dumping increases as the economic ties between the social dumper and the recipient become closer. As economies become closer and more interdependent, countries become more sensitive to partners' economic weaknesses, and such weaknesses can be a problem for sectors of the stronger economy because of the market and labor access available between the two countries. A free trade and investment arrangement between two countries is one which involves such a close economic relationship.[188]

The impact of social dumping manifest itself at minimum in three ways: (1) displacement of high-cost produces by low-cost producers from low-wage, low-cost countries; (2) firms in high-wage countries who are free to relocate but instead use their bargaining power to exert downward pressure on the current workforce's wage and working conditions; and (3) individual states pursuing a low-wage and anti-union labor market strategy to remain or become more economical cooperative.[189]

Likewise, it is evident that international trade is the medium through which violations of worker rights cause injury to competing states. International competition tends to harmonize labor conditions and wages; artificial depression in one states leads to declining labor conditions and wages throughout the world.[190]

If the free market analysis should prevail, it would be impossible for any government to pull up labor standards without leading to inefficiency and reduced growth. Of course, this thesis can be rebutted by showing that it is based on the inaccurate assumptions of perfect competition. The more interesting line of inquiry is whether an economy with high growth but no labor standards would end up with better labor conditions, in the long run, than a comparable economy which tried to push them up along the way.[191]

Interwined with the fair trade justification are two other concepts: the "undeserved benefit" and "human rights" justification. Strongly associated with the laws on trade preferences (e.g. GSP and OPIC), the "undeserved benefit" justification subsumes two principles: (1) that trade is not an end in itself, and that its function is to improve the living standards of workers as well as of consumers and manufacturers; and (2) that by extending benefits to oppressive regimes and by importing or even giving preferential treatment to goods produced by suppressed

[187] Note, *supra* note 78.

[188] Jackson, *supra* note 168, at 9.

[189] Note, *Labor Standards in the European Union: The Effects on Multinationals*, 18 HOUS. J. INT'L. L. 497 (1996).

[190] De Wet, *supra* note 185, at 452-53.

[191] Charnovitz, *supra* note 144.

workers, there is in effect support for the suppression of worker rights. Hence, in certain countries where worker rights are suppressed, the only groups that substantially benefit from foreign and investment are the national elites and multinational corporations.[192]

The human rights justification implores the basic human dignity of those comprising the working class. Labor is not and should never be a commodity.

Accordingly, fair traders aver that acceptable labor practices have to be addressed within an international framework by means of international labor standards. Labor standards cannot be regarded as an issue exclusively dealt with by national policy makers any longer. The fact that the mobility of capital puts countries under pressure to lower their standards also implies that the power of nation-states to regulate their industry is reduced and that their autonomy and sovereignty over these matters are being reduced.[193]

Ironically, the argument of fair springs from the very core of free trade, *i.e.* the removal of tariff barriers to free trade. From the firm belief manifested in the agreement Establishing the World Trade Organization regarding the desire to enter into "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 relation," one of the more illuminating theories with regard to the linkage between international labor standard and international trade easily leads to the "requirement of logical consistency":

> From the global and abstract point of view there is no relevant distinction between a tariff on imported goods to protect domestic producers from foreign produced competing goods, on the one hand, and a subsidy to domestic producers which achieves the same result and/or objective. Once the logic of the project of eliminating tariffs is accepted, the subsidies project cannot be avoided.[194]

No distinction should be made as to positive and negative subsidies. If governments cannot fund out of general tax revenues a particular labor standards requirement, then the failure of governments to impose any such particular labor standards requirement (governmental non-action) may just as well be viewed as a subsidy from the point of view of competing producers in other jurisdictions who are bound by such (costly) requirements.[195]

[192] De Wet, *supra* note 185, at 454.

[193] *Id.* at 448.

[194] Brian Langille, *General Reflections on the Relationship of Trade and Labor (Or: Fair Trade Is Free Trade's Destiny)*, FAIR TRADE AND HARMONIZATION 235 (Jagdish N. Bhagwati and Robert E. Hudec eds., 1996).

[195] *Id.*

Of equal significance is the reality of "capital's threat of exit":

> In the international economy domestic producers are increasingly subject to foreign competition and a number of new economic forces. Investment, services, ideas, and other factors of production have become increasingly mobile... We now have a world in which most but not all factors of production are highly mobile. In the modern world, capital is relatively mobile, and labor immobile. In this world, capital has now obtained their threat of exit, labor has not.[196]

Also, the international community has already become significantly more sophisticated than such positions would lead one to expect. Many forms of linkage are now recognized to be not only appropriate but inevitable. The World Bank, the International Monetary Fund and the United Nations Development Program have all adopted measures of one kind or another which recognize that human rights performance ought to be a factor in their respective decision-making.[197]

IV. POLITICS OF LABOR LAW

Any discussion of the "threat of exit" concept eventually leads to the foundation of labor law and labor law advocacy in the Philippine jurisdictional setting. Labor law, of course, makes no mistake about its nature: even in the light of the constitutional notion of "shared responsibility," labor legislation enacted in the name of the State's power seeks to strike a balance between labor and management relations because of the inherent "inequality of bargaining power" between these two economic forces. An old Supreme Court case, *Sanchez v. Harry Lyons Construction Corporated*,[198] cited in the introductory comments in a leading textbook in Labor Law, [199] is exact in exposition:

> In the matter of employment bargaining, there is no doubt that the employer stands on higher footing than the employee. First of all, there is greater supply than demand for labor. Secondly, the need for employment by labor comes from vital, and even desperate, necessity. Consequently the law must protect labor, at least, to the extent of raising him to equal footing in bargaining relations with capital and to shield him for abuses brought about by the necessity for survival. It is safe to presume, therefore, that an employee or laborer who waives in advance any benefit granted him by law does so certainly not in his interest or through generosity but under the forceful intimidation of urgent need, and hence, he could not have so acted freely and voluntarily.

[196] *Id.* at 236.

[197] Alston, *supra* note 156.

[198] 40 O.G. 605 (1950).

[199] AZUCENA I., THE LABOR CODE 20 (1996 ed.).

The provision of the Civil Code which describe the nature of labor-management relations, is no happy accident:

> The relations between capital and labor are not merely contractual. Therefore, such contracts are subject to the special laws on labor unions, collective bargaining, strikes and lockouts, closed shop, wages, working conditions, hours of labor and similar subjects.[200]

Hence, it is heavily assumed in the realm of labor law and labor law advocacy that the market, while primary and self-supportive, is grossly inadequate when left unregulated. Labor law steps in to provide for a two-fold response. First there is the *procedural* response. The basis of this response is straightforward: If the object is to secure justice in productive relations, and the reason that justice will not be secured is because basic contract law grants absolute freedom *to* and *of* contract, *then* the answer is redress this inequality of bargaining power by permitting labor to bargain collectively and thus increase its bargaining power. The essence of collective bargaining is to remove legal obstacles to collective action to compel the employer to deal with the union as the collective representative of the employees. The accepted wisdom concerning collective bargaining is still left to the parties to determine through the exercise of their now slightly restructured bargaining power relationship. The employer's freedom to contract with whom it wishes is taken away and it is compelled to bargain with the collective representative. But the employer's freedom of contract is maintained. [201] Under Philippine labor law, Article 211 (B) clearly states that it is the policy of the State "(t)o encourage a truly democratic method of regulating relations between the employers and employees by means of agreements *freely entered into through collective bargaining*."

There is also the substantive response. If the perceived problem is that basic contract law analyzes the employment relationship is a contractual one, and because of the "inequality of bargaining power" employees in general would not receive a just bargain, then the appropriate response is simply to rewrite that bargain by means of direct legislative action. Hence, minimum labor standards involving, *inter alia*, minimum wages, hours of work, occupational health and safety night differential, overtime and premium pay have been set to at least regulate (in contrast to violate) the parties' freedom *of* contract.

Labor law presents a more openly political matter. Unlike civil and criminal law, for example, no persuasive or intelligible account of labor law can present it as a triumph of progress, a steady movement onward and upward. It can be understood only as struggle – and at least partially as a class struggle. Without labor law, a student of the law may very easily have an entirely unreflective view of the law. Truly, *it is through labor law that one attains critical powers and a good understanding of the role of law in modern society.*[202]

[200] Civil Code of the Philippines, art. 1700 (1950).

[201] Langille, *supra* note 194, at 242.

[202] McLeod, *The Importance of Traditional Labor Law in the Legal Curriculum*, J. LEGAL EDUC. 123 (1993).

A security of labor law would be unusual if it did not even descend into the troublesome matter of the working class and the rich. For labor law also gives a meaningful account of pluralism as it operates in practice; *it shows society as consisting of sectors with at least occasionally conflicting interests rather than as a noble neo-Athenian democracy striving for the common good, or a concentration of wealth-maximizers debating "policy arguments'" with one another in search of win-win solutions.* Even if the zero-sum nature of labor conflict is often muted by the pervasive rhetoric of "industrial peace," it is understood that this peace sometimes had a cost, and that this cost is not shared but imposed on determinate societal groups. And unlike the equivalents from torts and contracts, for example, these groups are not abstract and fluid entities like "plaintiffs" and "consumers" but real and concrete human beings. [203] This inevitably leads to what is the most important aspect of labor law: it involves the average working man and woman, only wishing to earn his or her day's wage to survive and save for the future security. These are human beings whose dignity holds the key towards commercial success or macro-economic gain.

The reason that opponents of labor law who preach the religion of distorted *laissez-faire* are driven to distraction by those invoking the phrase "inequality of bargaining power" is that they believe the phrase to be uttered or put forward as a meaningful one *within economic theory.*

> Of course, if the phrase "inequality of bargaining power," insofar as it goes beyond market-defect analysis, is meant as a comment *within* economic theory, it is a form of nonsense. The point is, however, that it is not meant to be an observation from within economic theory, but rather a comment *about* neoclassical economic theory. It is rather like another famous slogan: " Property is theft." When Proudhon offered this suggestion he did not set out to make a comment which was meaningful *within* property law. If a first-year property law student says "Property is theft" meaning it as a statement within property law theory, then the student has obviously made some serious conceptual errors and is headed for a poor grade. It is not possible for property to be theft *within* the theory. But the whole point of Proudhon's comment, and a large part of the point about "inequality of bargaining power" (insofar as it goes beyond market-defect analysis), is to make a critical comment external to property or contract law.

Hence, free traders who would rather leave things to the free hand of the market and insist on macroeconomic and enterprise level theory terribly disassociate themselves from the very essence of labor law. Pushing for rights of live human beings who are under risk of being exploited and marginalized goes beyond mere economic theory. It must delve into political, social, cultural, and moral concerns.

In addition, it is noteworthy that the agreements during the Uruguay Round and at Marrakesh recognized the relationship of intellectual property, services and the environment to trade. This makes it difficult to argue that trade-related labor standards have no place in trade agreements. Pandora's Box has been opened.[204]

[203] *Id.* at 128.

V. THE SOCIAL CLAUSE DEBATE

A. Marrakesh

During discussion at Marrakesh in April 1994, the United Sates and France plus a few other countries argued forcefully for an explicit recognition of the relationship of labor standards (and environmental concerns) in the Final Act of the Conference. In the event, the developing countries argued more effectively against any explicit recognition of the link of labor standards and trade. The only concession made by the opponents of the link was the acceptance of the following reference in the Concluding Remarks of the Chairman of the Trade Negotiations Committee:

> In the statement which they made in the course of this meeting, Ministers representing a number of participating delegations stressed the importance they attach to their requests for an examination of the relationship between the trading system and internationally recognized labour standards.[205]

The impact of this mention was diluted by the inclusion in the same statement of a lengthy litany of requests for the examination of the relationship of other issues to trade: immigration policies, competition policy, rules on export financing, restrictive business practices, investment, regionalism, financial and monetary matters, debt and commodity markets, company law, compensation for erosion of preferences, political stability, alleviation of poverty, unilateral and extra-territorial measures. The failure to adopt a significant decision at Marrakesh concerning labor standards did not foreclose consideration of the issue by the WTO. The Preparatory Committee set up to establish the WTO will discuss suggestions for the inclusion of additional items in the agenda of the WTO's work program and it appears likely that this will include issues of labor standards and trade.[206]

B. International Labour Conference

1. UNITED STATES

Addressing the 81st International Conference in June 1994, U.S. Secretary of Labor Robert Reich was one of the speakers who joined the debate on the integration of labor standards and trade agendas. Secretary Reich argued that time was ripe for making progress on developing an international position on labor standards.

> We have advanced beyond the conceptual gridlock that plagued the international community for so long. Few are willing to argue

[204] Leary, *supra* note 7, at 200-201.

[205] *Id.* at 199.

[206] *Id.* at 199-200.

> openly for that labour standards, however egregious, are strictly internal affairs. Nor today are there many advocates, for the opposite extreme that argues that standards must be identical in every nation to those attained in the most advanced economies. We have achieved that essential prerequisite for consensus – a consensus to look to the idle ground.[207]

With regard to the response of the international community to policies that affront the set of standards that has been agreed to, Secretary Reich laid out three principles:

> First, it is clearly preferable for any intervention to be authorized and implemented multilaterally, in order to increase the odds that intervention will be effective.
>
> Second, there should be a menu of potential responses to labour standard abuses, varying both in nature and the severity of their effects. This range could include technical assistance to clear the path to improvement, so-called "sunshine" provisions in order to highlight abuses, perhaps ineligibility for international grant and loan programmes, and targeted trade measures.
>
> The third principle, which gives force to the two, is pragmatism. The purpose of any intervention must be to bring about change in the offending nations. Scrupulous assessment and analysis, at each stage, must inform the international community's efforts to improve labour standards. And we must not lose sight of the fact that trade itself- by opening an economy to external influences and empowering a wider range of internal interests – can, on occasion, be a catalyst for progressive change.[208]

In other words, Secretary Reich invokes the two-step process previously invoked in this study: his proposed attainment of "consensus" means no other than realizing that in this day age, a link between international labor standards and world lies imminent, and his proposed "intervention" is none other than the social clause itself. "Consensus" and "intervention" are tied together by multilateral action. Multilateral action, of course, is carefully preceded by putting the matter of linkage and the social clause on the table.

2. ILO

The Director-General Michel Hansenne stressed in his report to the Conference that the ILO as an institution had a role to play in shaping the international debate on this subject.

> More than a few of our constituents are preoccupied by the increasingly obvious social consequences of the global economy

[207] Perez-Lopez, *supra* note 8, at 446.

[208] *Id.* at 447-48.

> of international competition, and above all of the speed with which productive activities can be shifted among countries. Can the ILO limit itself to pointing to the long-term regulatory effects of its standards? Can it simply turn its back on the problem without losing all credibility, considering that it was conceived as an instruments for social regulation in international trade and is the only tripartite organization which brings together the major players in the globalization of the economy? [209]

At the inclusion of the 81st International Labour Conference, responding to the many interventions on the theme of labor standards and economic integration, ILO Director-General Hansenne stated that he would propose to the Governing Body the creation of a working group to provide a more in-depth analysis of the relationship between labor standards and trade. The Governing Body of the ILO decided on 25 June 1994 to set up a working party to "discuss all relevant aspects of the social dimensions of the liberation of international trade" and called for the Director-General to produce a working paper on this topic for the November 1994 meeting of the Governing Body.[210]

3. DIRECTOR-GENERAL'S WORKING PAPER

The Working Paper produced by the Director-General[211] and presented by the International Labour Office for discussion by the Governing Body was entitled *The Social Dimension of the Liberalization of World Trade.* It constituted a informative watershed in the debate over linkage and the social clause. The ILO Governing Body of 56 persons –28 representing governments, 14 representing the employers, and 14 representing the workers – were collectively enlightened about the issues for the first time. Not to be missed was the fact that the International Labour Conference – larger than most plenary organs of most international organizations, with four representatives of each of the Members of whom two shall be Government delegates and the other shall be delegates represented respectively by employers and the workpeople of each of the Members – had a comprehensive study of the subject at hand.

The Paper begins with a statement that the term "social clause" had been deliberately avoided in setting up a Working Party since

> all associate it with the idea of imposing a certain uniform basis of social protection as a condition of participating in the multilateral trade system. The approach taken during the debate at the Conference and that of the Director-General's report on which it was based are different: the question they raise is not

[209] *Defending Values, Promoting Change – Social Justice in a Global Economy: An ILO Agenda, in* INT'L. LAB. OFFICE, REPORT OF THE DIRECTOR-GENERAL TO THE 81st INTERNATIONAL LABOUR CONFERENCE 56-57 (1994).

[210] ILO GOVERNING BODY, QUESTIONS ARISING OUT OF THE 81ST SESSION OF THE INTERNATIONAL LABOUR CONFERENCE, Doc. GB.260/3/7 (June 1994).

[211] *The Social Dimensions of the Liberalization of World Trade,* ILO Doc. GB.261/WP/SLD/1 (1994) (hereinafter *Working Paper*).

> whether it is appropriate and possible to impose a certain minimum social protection on everyone but what conditions are likely to enable the persons concerned to enjoy an equitable share of the benefits resulting form the liberalization of international trade each country designing in its own way the content of social protection that would be most appropriate to the conditions of each country.[212]

The Working Paper rejects the concept of equalization of social costs and points out that, while trade liberalization presupposes a minimum of social harmonization, equalization of wages and social protection should not be sought as an end in itself. Rather, the extent of social protection should correspond to the particularities of each country and should "as far as possible" reflect the free choice of *social partners* is the emphasis on the importance of freedom of association of workers in the determination of social policies. The office paper points out that nearly all the Member States of the ILO are or will be members of the GATT.

> Unless it proceeds from a certain schizophrenia, this membership of both organizations means that the States concerned endeavour in good faith to take account in each of these organizations of the objectives and obligations they had undertaken in the other. Once this observation has been made, the logical next step is to attempt to define the content of the social dimension that the community of these States may legitimately introduce in the trade system to guarantee the possibility (and not the content) of social progress from two different standpoints.[213]

The Working Paper then proceeds to discuss possible means by which social dimensions might be included in the GATT/WTO. It refers to the difficulty in incorporating a social dimension in GATT which would involve a major new amendment of the texts. Such amendment would be unlikely given the recent substantial modifications of the international trade system and the need for a near universal consensus. The better procedure would appear to be the incorporation of the social dimension in the existing GATT order:

> (1) perhaps by considering that abnormally low social conditions might be considered a subsidy under Article Xvi of the GATT;
>
> (2) perhaps by extending the general exceptions provided for any Contracting Party by Article XX of the GATT to include worker's rights which have a direct bearing on human dignity; and
>
> (3) perhaps through the nullification and impairment clauses of Article XXIII.
>
> • • •

[212] *Id.* at Par. 5.

[213] *Id.* at Par. 25.

> It would be interesting to explore further, in consultation with the competent services of the GATT, the possibility of applying it (Article XXIII) to the rules of the game in the social field, on which a consensus may be reached, by including compliance with relevant ILO Conventions among the obligations attaching to membership of the GATT and the WTO... (T)he limited amendment necessary to establish the content of the 'rules of the game' by which the Contracting Parties would be bound in the social field, could be accompanied by a sufficiently flexible structure for collaboration between the WTO and the ILO aimed at affording the most appropriate response for violations of specified ILO standards.[214]

The Working Paper suggests that if a new provision were to be incorporated in the Agreement stipulating that membership in the WTO *ipso jure* subjects the party obligations resulting from specific ILO conventions, "the establishment of a violation of these Conventions would make it possible to undertake the measures aimed at remedying it "since a violation of an obligation specifically laid down in the Agreement creates a presumption that a benefit has been nullified or impaired.[215]

Reformers in the 19th century saw international conventions establishing common labor standards and an international organization to monitor those standards, as the solution to the problem of working conditions and international competitiveness. There are now over 170 labor conventions adopted by the International Labour Conferences and the ILO has an admired monitoring system to supervise the application of the Conventions, but the problem of labor standards and international trade has not been resolved; it remains an international concern. While progress has obviously been made in the improvement of labor conditions in the 150 years since the relation between labor conditions and international competitiveness was first discussed, it is also obvious that the setting up of the ILO and the adoption of 175 international labor conventions is not the solution of difficulties in the condition of labor which was once thought. Thus, the continued call for further linkages between trade and workers' right.[216]

Francis Blanchard, former ILO Director-General,writing in the French newspaper *Le Monde* in June 1993, pointed out that, for far too many countries, membership in the ILO simply saves their conscience. He noted that the scandal of child labor, slavery, and exploitation of workers – situations which shock the conscience – still continue and cited the failings of industrial countries as well as developing countries; the few ILO conventions ratified by the United States, the refusal of the United Kingdom to accept the social dimension of the European Community and the need the for Japan to raise its labor law and practice to the same levels as that of its Western partners. He concluded by urging the ILO, in

[214] *Id.* at Par. 37.

[215] *Id.* at Par. 36.

[216] Leary, *supra* note 7, at 197.

consultation with the GATT, to go beyond its present procedures and promote the social clause.[217]

The demand for a social clause in trade agreements is , in some sense, a result of frustrations that the efforts of the ILO have not been more successful. The limitations of the ILO effort to promote social justice, however, may be due less to deficiencies in that organization than to the failure of other international initiatives such as the UN development programs, the IMF structural adjustment programs, and trade liberalization efforts to include a social justice dimension in their programs.[218]

Most recently, Director-General Hansenne, in a speech during the Wilton Park Conference in Sussex, struck a fair balance between those who push for the social clause and those who are avowed against it. ILO and WTO Member States, he said, "must not only refrain from artificially maintaining inferior social conditions in order to gain an unfair comparative advantage in international competition, but, much more positively they must also endeavour in good faith to distribute the fruits of the liberalization of trade within their societies equitably. " He warned, "If international agreement cannot be reached on a few rules of the game, some players will make their own rules. Unilateral trade sanctions by powerful individual countries or trading blocs, restrictions on development aid or financial flows, and consumer boycotts will be hard to void. The risk of renewed protectionism cannot be discounted."[219]

Finally, he observed that while "fears and suspicions have by no means been quelled ... I am reasonably optimistic that it will be possible to agree on a number of common rules, even though these common rules may be a far cry form the kind of clause originally proposed."

Director-General Hansenne sadly reported that the ILO Working Party on the social dimensions of the liberalization of world trade has been unable to reach consensus on whether a "social clause" in trade agreements would be desirable. However, he added that the deliberations "have succeeded in clarifying and defining the terms of the debate."[220] An ICFTU release from its Economic and Social Committee reveals that at the March 1995 meeting of the Working Party, the Workers' Group had been ready to accept a compromise under which they would forego raising the subject of trade sanctions for the time being. However, the proposed compromise was rejected, leaving the Workers' Group free to retain their original position in the debate.[221]

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[217] *Id.*

[218] *Id.*

[219] ILO Press Release, ILO Director-General urges parallel commitment to labour standards and trade liberalization <available at http://www.ilo.org., last updated March 1996>.

[220] *Id.*

[221] *Workers' Rights and International Trade in the Run-up to the First WTO Ministerial Meeting*, Agenda Item 3, International Confederation of Free Trade Unions Economic and Social Committee, 107EB/7 (27 November 1995).

C. U.P.-SOLAIR-ILO-Friedrich Ebert Social Clause Conference

A two-day Tripartite Workshop Conference on the social clause was held at Sulo Hotel, Quezon City from 14-15 July 1994. The activity was sponsored by the International Labour Organization, Friedrich Ebert Stiftung and the U.P. School of Labor and Industrial Relations (U.P.-SOLAIR). Representatives of Philippine business, government, and labor voiced out their positions with regard to the social clause and the underlying issue of linkage.

In summarizing the results of the conference, it was reported in the ensuing monograph pertaining to the workshop that labor, industry, and government have yet to resolve the issue of the inclusion of a social clause on trade.

> During those two days, representatives of each sector presented diametrically opposed positions on the implications of the social clause on trade, and in the long-run (sic), on the country's economic development. It is heartening to note, however, that there is a consensus on the need to study in greater depth the implications of the social clause on trade and economic development.[222]

1. BUSINESS

Two persons represented the side of Philippine business: Atty. Ancheta K. Tan and Mr. Aniano G. Bagabaldo, President and Vice-President of the Employers' Confederation of the Philippines (ECOP), respectively.

Atty. Tan outlined the objections of the business community with regard to the social clause and a downright denial of any linkage. First, he points out that developing countries should not be punished for their comparative advantage, i.e., lower labor costs. "(W)hy should we be punished for this when the industrialized countries are not being punished for having advantages on capital and technological mastery?" Second, the imposition of the social clause runs opposed to the trend to liberalize trade. Third, the social clause entails a "one-way transaction." "For example, if the United States violates certain minimum wage laws by using Mexicans in the production of fertilizers, which we need, do you think we will ask the United States to be sanctioned considering that we need those imports to our country?"[223] Finally, the social clause is a way of forcing ratification of certain conventions of the ILO. Atty. Tan concluded:

> So, from the point of view of business, the social clause is something that, perhaps, should not be pursued at the present time because we do not have a level playing field ... We will do our own work to police or to supervise the compliance with

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[222] *Foreword* to THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND THE SOCIAL CLAUSE: IMPLICATIONS FOR BUSINESS AND LABOR at ii (1994) (hereinafter *Sulo Symposium*).

[223] *Id.* at 20.

> labor standards. Let the World Trade Organization do its bit as far as trade agreements are concerned. But do not link the two ... we are supposed to make trade freer, but we cannot do that if we are going to tie the hands of the other party by compliance with certain labor standards.[224]

Mr. Bagabaldo stressed the capacity of the ECOP to "police (its) own members and see to it that (members) comply with the minimum labor standards."[225]

2. GOVERNMENT

Undersecretary for Labor Relations Bienvenido Laguesma of the Deparment of Labor and Employment (DOLE) delivered the government's position. He stated that while the Philippine government is committed to the upliftment of labor standards, universal labor standards should pertain only to minimum and basic standards.

> Above these, there should be a flexible range which allows for different applications to accommodate the peculiar conditions of each country. Universality should not be simplified to mean absolute uniformity. Standards should not be applied so rigidly as to exact the same degree of compliance from countries with different levels of development.[226]

Undersecretary Laguesma summarizes the main objections held by developing countries against the social clause:

> 1. It can be used by developed countries as a guise for denying or restricting them trade and market access. It so, it thus becomes a non-tariff protectionist barrier to trade, which is inconsistent with globalization.
>
> 2. Developed countries appear to define fair competition as absolute leveling of the playing field.
>
> The same standards are rigidly applied to all countries, regardless of economic performance. The result is to undermine the competitiveness of developing countries by taking away their comparative advantages and eroding economies of scale. To this extent it is anti-trade. And because it artificially forces the costs of production and services in developing countries, to rise it will restrict rather than expand employment opportunities. In this sense, it is also anti-labor.
>
> 3. In the guise of fair competition, an enforced linkage can operate as a form of social exclusion in an international level.

[224] *Id.* at 20-21.

[225] *Id.* at 24.

[226] *Id.* at 43.

> Whether a linkage between trade and labor standards is going to be forged in the near future, it would do well for the Philippines to improve its trading position by assuring a balanced program for development. With respect to labor, policy directions will likely focus on the following:
>
> 1. Enhancement of workers' collective and individual rights;
>
> 2. Greater emphasis on the human development component in training and employment;
>
> 3. Affirmative action with respect to workers engaged in more vulnerable and less secure forms of employment arrangements;
>
> 4. Rationalization of measures that relate to labor mobility; and
>
> 5. Continuing technical cooperation with respect to programs.
>
> This, of course, is not an exhaustive enumeration. What is important is that each should be pursued within the context of enhancing the participation of the Philippines in regional and inter-regional trading arrangements. Only through this can it expect to assume a competitive role in the global community.[227]

3. UNIONS

Mr. Cedric Bagtas, Assistant General Secretary of the Trade Union Congress of the Philippines (TUCP), amusing disclaimer ("I will not present a scholarly paper") and all, downplayed any reference to absolute harmonization of wages worldwide, stressing that low labor costs are not the object of the social clause, but rather to free the worker from repressive and exploitative conditions. His most notable point, however, was his position that the social clause will seek to sanction countries with oppressive labor conditions. These countries, according to him, should not effectively neutralize the Philippine government's genuine efforts to improve basic and living conditions. The implication of Mr. Bagtas's assertion is that issues of social dumping and "race to the bottom" are grave concerns of the developing world as well.

Mr. Antonio Asper of the Federation of Free Workers (FFW) likewise gave terse and effective commentary. He proposed a progressive compliance clause in the social clause, so that a positive incentive is proposed in the form of extending a higher degree of trade preferences to GSP-beneficiary countries observing a set of minimum labor standards, citing this as a better incentive for countries to comply with the social clause.

[227] *Id.* at 48.

Another proposal by Mr. Asper links the social clause debate with issues of national concern, such as the foreign debt.

> What I propose to do next is to try to develop a framework for critiquing the proposed social clause according to our national interest. The social clause should not only benefit workers or particular sections of the workforce. Its advocacy should also promote our national interest and help resolve some of our pressing national problems.
>
> The social clause should lead to "leveling the playing field," such that weaker countries who are disadvantaged by the stronger ones in trade and investments will have chance to compete on more or less equal terms. Countries like ours, for example, who are mired in foreign indebtedness should not be expected to substantially improve our social and labour standards to an extent that these conform to internationally or multilaterally agreed upon measurements. When a country like ours must appropriate 30% or 33% of its national budget to pay our foreign creditors, that amount is thereby denied us to improve our social and labor standards. In this instance, debt remission linked to improving labour and social standards could be made to apply.[228]

Mr. Asper noted that adequate worker adjustment assistance should coexist with social clause implementation. He stated that "(w)orkers in developed countries have at least the cushion of unemployment insurance to fall back to ... Some form of retributive, restitutive or distributive justice will have to be factored in finding the proper balance of things."[229] He also highlighted the malpractices of multinational corporations, which should be regulated by international standards. The social clause should also be linked to this unresolved issue. For that matter, Mr. Asper argued for a link to more appropriate and just transfer of technology or to the use of intellectual property rights and piracy as well as to the free flow not only of trade in services but including overseas contract labor. This "relinking" is indeed an interesting aspect of Mr. Asper's views.

D. New Delhi Social Clause National Consultation

From 20-22 March 1995, a National Consultation on the social clause in multilateral trade agreements was held in New Delhi. Various sectors in India took part and were unequivocal in their rejection of the proposal. While the discussions in the report pertained to only one country, the points raised thereat constitute "poster points" for those who would want an ideal consolidation of all arguments against the social clause. And besides, India is one country where just about all key sectors run opposed to the clause.

[228] *Id.* at 39.

[229] *Id.* at 39-40.

After an intensive debate, the consultation brought out the following points:

> 1. There was unanimous agreement that the Social Clause as part of the WTO is motivated by protectionist intentions ...
>
> 2. It was noted that the Social Clause as proposed by governments of developed countries in no way reflect the concern for the working and oppressed people of the world. It has to be viewed in the broader context of an unequal and unfair international trade regime foisted through GATT/WTO and through the Structural Adjustment programmes of the World Bank and IMF combine.
>
> 3. The dominance of WTO/World Bank/IMF is taking place concomitantly with the weakening of the UN system. In this scenario, national governments including the Indian government are increasingly willing to accept the conditionalities disregarding the obligations they are party to, under the UN system, particularly the ILO and Human Rights Conventions.
>
> 4. It was noted with alarm that violation of rights of labour, women, child, human and environmental rights had intensified with globalization and Neo-Liberal Economic Policies.
>
> 5. It was agreed that a Social Clause cannot be a substitute for a Social Policy that ensures the rights of working people and communities.
>
> 6. There were essentially two responses to the linkage of labour, environmental and human rights standards to the Multilateral Trade Agreements. One view was that since these linkages are part of a larger exploitative international order, it is to be rejected outright. But at the same time, it was noted that the struggle for labour, environmental standards and against child labour must be intensified.
>
> 7. The other view suggested that given the criminal track record of the state, the Social Clause in Multilateral Trade Agreements could provide a bargaining position and strategic use of international pressure to enforce labour/women/child rights. In this view too, it was expressed that the internal struggle for protection had to be intensified.
>
> 8. The Consultation very strongly brought out the need to forge alliances and linkages of victims and working people at the national/regional and international level, to counter the increasing onslaught of the neo-liberal global regime.[230]

[230] *Outright Rejection or Strategic Use?*, Report of the Proceedings of the National Consultation on Social Clause in Multilateral Trade Agreements in New Delhi 19 (1995).

The following Action Plan was adopted by the consultation as a follow up measure:

> 1. To disseminate widely information regarding the WTO and the Social Clause and to initiate discussion among the workers, both in the organized and unorganized sectors.
>
> 2. To develop linkages among all these affected by the current Multilateral Trade Agreement and Economic Policies.
>
> 3. To enter into dialogue with NGOs and Trade Unions in developed countries with a view to bridge the differences in opinion regarding the Social Clause.
>
> 4. To hold a second consultation in Bangalore, later in that year, to work out further positioning and strategies.[231]

While the plan action of the consultation called for more debate and consultations, opting for outright rejection (in contrast to strategic use) certainly constitutes an extreme a position on the negative side.

E. ASEAN Labor Ministers

An informal ASEAN Labor Ministers' Meeting in Chiang Mai, Thailand, was held from 27-28 April 1995. In that meeting, the ministers noted the decision of the ILO Governing Body Working Party to suspend any further discussion of the link between international trade and social standards through a sanctions-based social clause mechanism.[232]

The ASEAN Labor Ministers opposed any linkage of international trade with the enforcement of labor standards. Such a linkage would have detrimental effects on the competitive advantage of the developing countries and their socio-economic well-being.[233]

The ministers renewed their call on the ILO to undertake a review of outdated labor standards as a follow up of the discussion of the ILO Governing Body. The review should take into account the evolving social and economic conditions of both the developing and developed countries. They also expressed support for efforts to improve the effectiveness of the ILO standards supervisory mechanism.[234]

[231] *Id.* at 19-20.

[232] Statement of the ASEAN Labour Ministers, Chiang Mai, Thailand (1995).

[233] *Id.*

[234] *Id.*

VI. COUNTERPOINTS

While this paper does not resolve to contend with every argument thrown against the advocates of the social clause, four such arguments need to be tackled.

A. Sovereignty

A sovereign state, its powers vested in the government, wields ultimate authority over its subjects and may act as it sees fit within its borders.[235] The only external limits to a state's internal discretion are treaty obligations and customary international law.[236] Hence, should the social clause be incorporated into the WTO Charter and/or the agreements annexed thereto, no intervention on state sovereignty occurs.

One writer even opined that unilateral measures can be justified under the principle of permissible retorsion, i.e., a state's withdrawal of benefits or bilateral assistance from another state's policies, if those policies undermine the first states' humanitarian or political goals.[237]

The pursuit of international labor rights raises new questions about the relation between human rights obligations and sovereignty. Labor rights are not among the "basic rights of the human person," the protection of which is an obligation *erga omnes*.[238] Therefore, the injury caused to a state's inhabitants by that state's violations of labor rights does not constitute an injury to a second state. Devoid of injury, and hence *locus standi*, a second stand would be prohibited from taking retaliatory measures to effectuate a change in the first state's policies. Such measures would constitute coercive intervention, not retorsion. However, violations of labor rights do cause tangible economic injury to second states, thereby providing the economically injured second state with the necessary *locus standi*. Coercive measures taken by a second state to redress its economic injuries through improved observance of labor rights by the first state would constitute permissible retorsion. According to this analysis, the "fair trade" justification for enforcing international labor standards via trade-related sanctions does not violate the notion of sovereignty. Furthermore, because the economic impact of labor rights violations may be tangibly felt by the second state's inhabitants, the political obstacles to retaliatory measures to promote human rights should be lessened.[239]

[235] L. OPPEHEIM, INTERNATIONAL LAW 286-88 (8th ed. 1955).

[236] *Id.* at 288 n. 1.

[237] Note, *supra* note 78, at 459.

[238] *See* Barcelona Traction, Light and Power Co. (Belgium v. Spain), 1970 I.C.J. 3 (Second Phase) (Feb. 5, 1970).

[239] Note, *supra* note 78, at 458-59.

B. Protectionism

"Protectionism" and "fair trade" are so often used to characterize the same policies that the two words sometimes seem synonymous. However, protectionist policies can usually be distinguished from policies which promote free trade. In the case of international fair labor standards, for example, protectionist measures would set standards that would effectively prevent the import of specific goods from specific countries. In contrast, labor standards promoting fair trade would focus on distortions in a country's labor market cause by anti-labor policies and actions.[240] It has been argued that the campaign for a social clause or the faithful observance of international labor standards in world trade could help to stem the tide of protectionism, rather than swell it.

> The basis for such a paradoxical claim is the fact that the conditions of international trade have radically changed since the 1950s and 1960s. The unusually long demand recession in the West, which started around five years ago, has interacted with a number of structural changes in the labour market – increased supply of youths and women, rapid mechanization and falling demand for labour within manufacturing, increased fear of inflation among governments, and rapid expansion of productive capacity in textiles, clothing, shoes and electronics in some low-wage countries. These factors have contributed to a situation of chronic overcapacity and unemployment in which protectionist sentiments have risen to such a level that they cannot be ignored ... Protectionism has a natural tendency to spread: when you have restricted imports of steel, you must also sooner or later restrict imports of everything that contains steel components, such as cars, ships, and household appliances, in order to put local producers at a disadvantage vis-à-vis their international competitors. As experience from the 1930s shows, it is difficult to break a protectionist spiral once you are caught up in it.[241]

To accuse a country of protectionist intent is difficult, for the reason that intent is a state of mind. It is possible, however, to detect protectionist intent to one's actions. Hence, a purely protectionist purpose would entail requiring exporters to produce proof of having paid a certain minimum wage before any goods were imported from them. This would force a number of low-wage countries to raise their prices, at least in the short run. After a while it can be assumed that at least some of the wage increase would find its way back to the producing firms through taxes, subsidies and exchange rate manipulations, but the end result would in all likelihood be a reduction in trade and rise in prices in the markets of industrialized countries.[242]

[240] *Id.* at 459.

[241] Gus Edgren, *Fair Labour Standards and Trade Liberalization*, 118 INT'L. LAB. REV. 523 (1979).

[242] *Id.* at 524-525.

If the main purpose was to assure workers in developing countries of a fair share of the fruits of industrial progress, standards would have to be more flexible and some discretionary judgment would be involved in deciding whether the legitimate demands of workers were being frustrated.[243]

C. Selective Protection

Arguments against a social clause often state that it is unfair and discriminatory to aim labor standards at the trade sector and not other sectors such as the small-scale agrarian sector. One might suggest that export-related trade sanctions should be a first-step in addressing the broader issue of international labor norms and human rights. The first step in redressing violations of labor norms and human rights would be to stop or prevent any direct involvement in the violations.[244]

D. Absolute Standards

The cry for a set of standards which consider stages of economic development was a major point in the Philippine government's position laid down by Undersecretary Laguesma in the Sulu Hotel Symposium. Even the relatively rigid Convention-setting approach of the ILO has recognized differences in economic development of countries in such basic rights relating to freedom of association and collective bargaining, forced labor, discrimination in employment and child labor. Even antiquated documents such as the 1948 draft of the Havana Charter proposed a sweeping declaration of a set of minimum labor standards in the field of world trade.

VII. CLAUSE FORMULATION

A. International Labor Standards

A compromise between the advocates and the opponents of labor standards in trade agreements could be possible, when both are against protectionism and in favor of improved working conditions in the countries concerned. One could agree to an essential minimum standards package to which all countries can subscribe, without exception.[245] The enumeration of measures which establish a certain set of basic workers' rights could provide bases for selecting those which should comprise this package.

1. TRADE PREFERENCES LAW

"Internationally recognized workers' rights" have been specified in U.S. legislation and also in the Annual State Department Reports on Human Rights. In

[243] *Id.*

[244] De Wet, *supra* note 185, at 452.

[245] *Id.*

the latter, internationally recognized workers' rights are considered to be those defined in section 502 (a) of the Trade Act of 1974 (as amended), namely: (1) the right of association; (2) the right to organize and bargain collectively; (3) prohibition on the use of forced or compulsory labor; (4) a minimum age for the employment of children; and (5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

U.S. legislation on the Caribbean Basin Initiative is even more general, providing that in determining whether to grant duty-free treatment to the country concerned, the President may take into account the extent to which workers are afforded "reasonable workplace conditions and enjoy the right to organize and bargain collectively."

2. NAALC

The North American Agreement on Labor Cooperation (NAALC) outlined "guiding principles" that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law. They indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures, and practices that protect the rights and interests of their respective workforces. These areas are the following: (1) freedom of association and protection of the right to organize; (2) the right to bargain collectively; (3) the right to strike; (4) prohibition of forced labor; (5) labor protection for children and young persons; (6) minimum employment standards; (7) elimination of employment discrimination; (8) equal pay for women and men; (9) prevention of occupational injuries and illnesses; (10) compensation in cases of occupational injuries and illnesses; and (12) protection of migrant workers.[246]

Parties may resort to the dispute settlement mechanism only insofar as a persistent pattern of failure occurs in areas of occupational safety and health, child labor or minimum wage technical labor standards.[247]

3. SURVEY OF INTERNATIONAL DOCUMENTS

International and regional human rights charters are one source of international labor rights and standards. Conventions and recommendations of the ILO are another. There are also common labor laws among democratic countries. Together, these sources shape a consensus on general principles, if not always on application, of basic labor rights and standards. They include; a) the right of association, and the conjoined rights to form trade unions and bargain collectively with employers, as well as to participate in civil and political affairs of a society; b) free choice of employment, with absolute prohibitions on the use of forced or compulsory labor; c) prohibitions on child labor, and limitations on youth labor; d)

[246] Annex 1, North American Agreement on Labor Cooperation, 32 I.L.M. 1499 (1994).

[247] *Id.* at art. 27 (1).

non-discrimination in employment; and e) adequate wages, limits on working hours, health care and other features of social security, and occupational safety and health protection.[248]

4. ILO CONVENTIONS

The standards most often mentioned in this regard – and explicitly demanded by the ICFTU, World Confederation of Labor (WCL) and European Trade Union Confederation (ETUC) – are the rights to freedom of association and collective bargaining,[249] the prevention of forced labour,[250] prohibition of discrimination,[251] and the introduction of a minimum age.[252] Various advocates also call for standards on occupational safety and health,[253] as well as minimum wage fixing.[254] Most of these Conventions could be regarded as having a certain degree of universality – a necessary element of an international social clause – as they are well-ratified. By the end of 1992, Convention No. 87 had been ratified by 102 (of approximately 165 members), Convention No. 98 by 116, Convention No. 29 by 129, Convention No. 105 by 111, and Convention Nos. 100, 114, and 111 by 111 members.[255]

5. CODES OF CORPORATE CONDUCT

a. Levi Strauss

Titled "Business Partner Terms of Engagement and guidelines for Country Selection," the Levi Strauss code of conduct is a two-art instrument which distinguishes it from other corporate codes of conduct. The first part, the "terms of engagement," covers environmental requirements, ethical, health and safety standards, legal requirements and employment practice guidelines to the extent that they are issues that are substantially controllable by individual business partners.[256]

The "employment practices" section of the terms of engagement is the only one of the terms of guidelines itself broken down in greater detail, addressing six specific types of employment conditions to be regulated: wages and benefits, working hours, child labor, prison labor/forced labor, discrimination and disciplinary practices (namely, "corporal punishment or other forms of mental or physical coercion"). The Levi Strauss code does not include the right to form and

[248] Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 LAW & POL'L IN INT'L. BUS. 165 (1993).

[249] Covered by Convention Nos. 87 and 98.

[250] Covered by Convention No 29 and 105.

[251] Covered by Convention Nos. 100 and 111.

[252] Covered by Convention No. 138.

[253] Covered by Convention No. 155.

[254] Covered by Convention No. 131.

[255] De Wet, *supra* note 185, at 453.

[256] Compa and Hinchcliffe-Darricarrere, *supra* note 179, at 677.

join trade unions and the right to bargain collectively, norms otherwise contained in every international human rights instrument that addresses labor concerns.[257]

b. Reebok

Reebok Corp. has developed an innovative human rights advocacy program. It issued a code of conduct for international labor rights called the "Reebok Human Rights Production Standards." The Reebok code addresses seven defined areas of labor rights: non-discrimination, working hours/overtime, forced or compulsory labor, fair wages, child labor, freedom of association and safe and healthy work environment. In contrast to the Levi Strauss code, which omits any reference to trade union organizing or bargaining rights, Reebok's worker rights code declares that it will seek business partners that share its commitment to the right of employees to establish and join organizations of their own choosing.[258]

6. NETHERLANDS NATIONAL ADVISORY COUNCIL FOR DEVELOPMENT COOPERATION (NACDC)

Sometime in early 80s, the Dutch Minister of Development Cooperation requested the Netherlands National Advisory Council for Development Cooperation to give its views regarding the advisability of incorporating a provision concerning minimum labor standards into international agreements on economic cooperation and trade policy. The resulting report is a thorough discussion of the issue of the linkage of trade and international standards and is particularly useful in the effort to determine what rights might constitute minimum international standards.

The report defines minimum labor standards in an "absolute sense," as those which "all countries ought to introduce and observe under all circumstances" and in addition, points out that there are minimum standards "in a relative sense which develop more or less in line with economic growth".[259] The Advisory Council had recourse to ILO standards to define the content of "minimum internationally recognized labor standards," concluding that the standards in eight ILO conventions – two conventions on freedom of association; two conventions on forced labor; and conventions on discrimination in employment, equal remuneration, employment policy, and minimum age for employment – constituted a minimum package of international labor standards that might be incorporated in international agreements.

In reaching this conclusion, the council applied three criteria: (1) social criterion, (2) political and legal criterion, and (3) economic criterion. The social criterion limited the choice to standards related to basic human needs and human rights. The second, the political and legal criterion, related to the degree of

[257] *Id.*

[258] *Id.* at 681.

[259] National Advisory Council for Development Cooperation, *Recommendation on Minimum International Labor Standards* (Ministry of Foreign Affairs, Plein 23, The Hague, Netherlands, Nov. 1984). Leary, *supra* note 7, gives an excellent summary cited hereunder.

international acceptance of standard. The Council checked whether the relevant convention was ratified by a geographically and economically diverse group of states. The final, economic criterion was applied to ensure that the standard would not impose economic hardship or impair economic development. Applying these criteria, the Council arrived at the decision that the standards in the eight ILO conventions previously mentioned constituted the minimum package of international labor standards.

The Council also recommended that this minimum package of labor standards should be included in international agreements only if certain conditions were met: (1) the agreement itself must first contribute to the conditions needed to facilitate observance of minimum international labor standards; (2) it must provide for a satisfactory procedure for the settlement of disputes by an independent body; and (3) the enforcement of minimum international labor standards must be based on reciprocity, *i.e.* it must not be used by countries which not themselves accepted the standards. It should be noted that the ILO suggestions for incorporating reference to certain labor standards in the GATT would meet these criteria.[260]

B. Application of International Labor Standards

One writer observed[261] that the era of international labor regulation in the post-trading bloc world assumes *four approaches to transnational regulation* – each one possessing particular strengths and weaknesses and each one embodying a unique theory of the role of domestic labor regulation.[262]

The first approach, called *preemptive legislation*, are those international labor standards which are directly applicable to citizens of member states. These regulations set uniform rules for certain labor rights and have priority over conflicting national legislation. Thus, they are a form of unified transnational labor legislation. The *reglements* (regulations) of the EU are a perfect example of this type of approach.

The other approach is known as *harmonization*. Harmonization involves structured incentives and pressures created by rules which induce member states to bring separate labor laws into conformity. Harmonization occurs directly, through a standard which sets general policy, and indirectly through collateral domestic regulations which the member state must enact to conform with general policy. It is a strategy of regulation that is based both upon the short-term acceptance of differences in regulatory regimes and the assumption that, over time, these differences will fade and there will emerge a set of norms, rules and procedures.[263] A classic example of this kind of approach would be the directives issued by the

[260] Leary, *supra* note 7, at 219.

[261] Van Wezel Stone, *supra* note 176.

[262] *Id.* at 998.

[263] *Id.* at 999.

European Commission under the EU legislative framework. Directives differ from regulations in two important ways: they can be addressed to any one Member State and do not have to be directed at all Members of the Community; and they are binding as to the end to be achieved while leaving some choice as to form and method open to the Member States.[264]

> Because the differences between countries' labor standards were quantitative rather than qualitative, it has been possible to devise a single set of minimal terms which all member countries are required to adopt. Once a unified set of minimal sets is mandated, each country can adjust its own terms upward or downward to comply with the mandate. It has been feasible to develop transnational labor standards for individual labor rights within the EU, and to make them mandatory by means of EU-level legislation.
>
> However, when it comes to transnational regulation of collective labor relations, neither harmonization nor preemptive legislation is likely to be a simple expedient. In the area of collective bargaining, each country's own institutions, customs, and labor relations practices have given rise to labor organizations, employer organizations, and labor relations professionals who have a vested stake in the continuation of their own national system ... Hence, for collective labor rights, both harmonization and preemption may be slow to develop.[265]

In choosing between preemptive legislation and harmonization, a distinction may be made between unconditional rights and rights that are necessarily conditioned on a country's level of development, such as minimum working age, minimum wage levels, limits on working hours and decent standards of working conditions. Unconditional or "absolute" standards may be realized through preemptive legislation. These standards, based on the NACDC list of basic labor standards, may be the following: right of association, freedom from forced labor, non-discrimination in employment, and anti-child labor. On the other hand, "relative" standards may be brought within the ambit of harmonization efforts. These relative standards may include limits on working hours, decent working conditions, and minimum wage levels.

The third approach, *cross-border monitoring and enforcement*, permits one country to enforce another country's laws in a multilateral tribunal. The NAALC exemplifies this kind of approach. It states that no country is required to alter its labor standards in any way, and only addresses the enforcement of each country's existing labor laws. These are what have been characterized as "glimmer" social clauses.[266] "Glimmer" social clauses may be applied to other international labor standards not covered under preemptive legislation and harmonization.

[264] CRAIG AND DE BURCA, EC LAW 99 (1996).

[265] Van Wezel Stone, *supra* note 175, at 1005-1006.

[266] *NAFTA comes into force – with a glimmer of a social clause, supra* note 164.

The fourth approach, *extra-territorial jurisdiction*, permits one country to enforce its own labor laws against another country in its own tribunal. From the standpoint of its most fervent practitioner, the United States, this means applying U.S. labor law to labor disputes that occur beyond U.S. boundaries, or to parties who are not U.S. citizens. Extra-territorial jurisdiction is becoming an increasingly important feature of American labor law.[267] For being highly unilateral in character, use of this approach should be discouraged.

The four models can be compared along two dimensions. The first two approaches are *integrative*, seeking to unify labor norms and labor standards. In comparison, the last two are *interpenetrative*, seeking to enforce cross-border norms on a one-time, situation-specific basis.[268]

The models can also be distinguished according to their respective implementation requirements. Two of the models – preemptive legislation and cross-border enforcement – are *multilateral* in the sense that they rely for their implementation on actions by several countries jointly implementing a particular labor standard. Neither preemptive legislation nor cross-border enforcement can occur unless two or more nations decide to apply a particular labor regulation. In contrast, the other two models – harmonization and extraterritorial jurisdiction – are *unilateral* in the sense that they can be implemented by the unilateral action of one country. Extraterritorial jurisdiction is the ultimate unilateral form of transnational regulation; it is one country imposing its own, unilaterally-devised domestic labor standards on another country. Harmonization is also unilateral in its implementation – it requires that each country alter its own domestic laws in order to "approximate" the laws of other nations.[269]

The following diagram would be helpful:

FOUR MODELS OF TRANSNATIONAL LABOR REGULATION[270]

APPROACHES	MULTILATERAL IMPLEMENTAION	UNILATERAL IMPLEMENTATION
INTEGRATIVE	PREEMPTIVE LEGISLATION	HARMONIZATION
INTERPENETRATIVE	CROSS-BORDER ENFORCEMENT	EXTRA-TERRITORIAL JURISDICTION

C. *Penalties/Inducements*

What sanctions are available to a violator of the social clause? What forms of inducement may be established? There are a variety of options. It must be stressed at

[267] Van Wezel Stone, *supra* note 175, at 1011. Cases such as E.E.O.C. v. Arabian Americal Oil co., 499 U.S. 244 (1991) and Labor Union Of Pico Korea, Ltd. v. Pico Prods., Inc., 968 Fd.2d 191 (2d Cir. 1992) lead the charge.

[268] *Id.* at 1019.

[269] *Id.* at 1019-20.

[270] *Id.* at 1020.

the outset that the possibility of executing a settlement agreement with the violating State remains a highly viable option. With regard to a violation of any such agreement, the following options may again come into play.

a) *Countervailing duties.* If artificial suppression of labor standards is to be considered as a negative subsidy, then the most logical and GATT-oriented approach would be to impose countervailing duties pursuant to Article VI of the Agreement. A countervailing duty is a tariff placed on certain imports to offset production or commercial advantages conferred by the government of the exporting country. But to classify workers rights violations as subsidies remains highly debatable, especially among opponents of the social clause.

b) *Import prohibitions.* Several laws that prohibit imports made out of prison labor are already in operation. Other proposals never prospered. In 1944, for example, Uruguay attempted to have labor standards included in the United Nations Charter. It proposed that governments should reject the goods and products of countries which obtain the lower cost of the same at the expense of the right, the health and the liberty of the working masses.[271]

c) *Anti-dumping duties.* Several countries have provided for anti-dumping duties to combat social dumping. Austria, for instance, authorized penalty duties of up to one-third of the statutory rates on good produced by labor working excessive hours. In 1931 Argentina's President decreed that duties could be increased when lower wages or forced labor in foreign countries threatened Argentine production.[272]

d) *Bargaining incentives.* Former U.S. President Eisenhower once adopted a policy that withheld reductions in tariffs on products made by workers receiving wages which are substandard in the exporting country. This type of special treatment could be afforded to products from exporters who or exporting countries which observe workers' rights.[273]

e) *Preferential treatment.* In consonance with the suggestion made by Mr. Asper of the FFW, countries which effectively enforce international workers' rights may be preferred among those in trade preferential programs of developed countries.

f) *Simultaneous technical assistance and cooperation.* If some form of sanction should be imposed upon an offending country, it must be complemented by a coherent program of technical cooperation designed to improve the situation that had been criticized and to bring it into line with international labor standards as well. The criticized State would be required to endorse this cooperation program. Otherwise, sources of financing would have to be found before making public the conclusions on the case. The objectives that the country had agreed to pursue should,

[271] Charnovitz, *supra* note 6, at 576.

[272] *Id.*

[273] *Id.*

of course, provide a frame of reference for all technical assistance given to it. For instance, specifications for subcontractors should give these standards the same weight as financial and technical performance standards. Appropriate measures should be taken to ensure that they are also borne in mind in the preparation and evaluation of other economic projects. Workers' and employers' organizations should likewise be closely associated in the definition and implementation of these programs and the related economic and social policies.[274] In this regard, a Social Fund could be instituted to fund this technical cooperation program, akin to the European Social Fund under Art. 123 and following of the Treaty of Rome.

g) *GATT reliefs.* Article 22 of the Dispute Settlement Understanding arising out of the Uruguay round Clearly outlines the reliefs which may be obtained after a violation has been determined. The most preferred remedy is to have the violating party to fully implement a recommendation to bring a measure into conformity with the covered agreements. More drastic measures such as compensation and suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time.[275] In the event that suspension of concession should be deemed the only alternative, the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment.[276]

Commentary has been hurled against the use of import restrictions or suspension of GATT concessions on violators of the social clause:

> Limiting imports of goods from a country that violates certain labour rights is likely to be seen as an unfriendly act. This is an important reason why governments may be reluctant to lodge complaints against each other. Since to do so may also lead to retaliation, States may be particularly reluctant to get involved in trade sanctions. They have no desire to be seen acting in an unfriendly manner. Their own trade is likely to suffer and in other ways too they are vulnerable to retaliation, especially if their neighbour is a powerful economy.
>
> Trade sanctions will have a greater impact on those countries that rely heavily on exports for growth (usually small countries). Countries that follow an import substitution path would feel the effects to a lesser degree.
>
> Small (developing) countries thus appear to have several reasons to think twice before giving their wholehearted support to a multilaterally operated social clause. When they have acute

[274] Servais, *supra* note 144, at 432.

[275] Dispute Settlement Understanding at Par. 1 (hereinafter DSU).

[276] *Id.* at par. 3(a).

> balance-of-payments problems (as many of them have) and are therefore able to import only the bare necessities, the idea of joining multilaterally organized trade sanctions becomes almost unthinkable.[277]

D. Enforcement

One of the most crucial questions in the social clause debate has been the manner in which the clause shall be enforced.

1. THE STIRLING MODEL

American lawyer Patricia Stirling proposed a WTO-based structure which could accommodate social clause disputes.[278] While Ms. Stirling's discussion was based upon respect for basic human rights, her proposal is a genuine shot in the arm for the need and potential for having a sound enforcement mechanism in the world trade framework.

Ms. Stirling suggests the formation of a human rights arm of the WTO called the Human Rights Body (HRB). The HRB would be similar to the Dispute Settlement Body (DSB) of the WTO now in place. Like the DSB, membership in the HRB would be automatic for all current members of the WTO. This body would include a standing committee, called the Human Rights Committee (HRC), of approximately twelve individuals who would be representatives of members of the WTO. Each representative would serve a two-year tenure, with membership revolving among all WTO members. If possible, various areas of the world would be consistently represented on the committee, *i.e.*, three from Europe, three from Asia, three from the Americas, three from Africa.[279]

The HRC would be responsible for receiving reports of denial or abuse of any of the core human rights by any member of the WTO. Such reports may be received from other WTO members, individuals or non-governmental organizations. The HRC would then investigate the matter. If it determines that there is insufficient evidence of abuse or denial, the HRC may then either dismiss the action or request further information from the individual, member or organization submitting the report. In doing so, the HRC must determine the validity of the reports.[280]

Should the HRC find that there is sufficient evidence to warrant further investigation, it may then order the establishment of an investigative panel. No member of this panel may be of the same nationality as that of the member accused or the reporting individual, member or organization. Membership on the panel

[277] Van Liemt, *supra* note 10, at 444.

[278] The model was presented in *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U.J. INT'L. L. & POL'L 1 (1996).

[279] *Id.* at 40.

[280] *Id.*

should be equally comprised of trade experts as well as human rights experts. The panel would review all evidence, as well as permit the accused member the opportunity to demonstrate that it has not committed any violation. This last provision, however, should not be interpreted as placing the burden of proof of innocence on the accused member. Rather, it would provide the right to due process, *i.e.*, notification and the right to be heard.[281]

Once the panel had fully investigated the report, it must then submit its conclusions to the HRC. The panel must include its determination as to the existence of abuse and its recommendation as to action to be taken by the HRB. Such recommendations may be either (1) dismissal, due to lack of evidence of a violation, or (2) the institution of sanctions, based on a violation.[282]

The HRC would adopt the panel report within thirty days unless any party involved wishes to appeal. Appeal would be available to either the accused member in the event of a recommendation for sanctions, or to the reporting individuals, member of organization in the event of a dismissal.[283]

To facilitate appeal, a separate appellate body would be created. This appellate body would be comprised of twelve representatives of all WTO member with a revolving membership as with the HRC. The members of the appellate body, however, may not be of the same nationality as those of the panel members nor the accused member, reporting individual, member or organization, thus, providing greater neutrality. The appellate body must issue its decision within thirty days of the request for appeal. The HRC must immediately adopt the appellate body's report. Only with a unanimous vote may the HRC block the appellate body's findings.[284]

In the event that a report is a adopted containing a recommendation for sanctions, the HRC would then be responsible for notifying all members of the WTO. Such notification would include a complete report of the panel's findings, as well as a schedule for the immediate multilateral institution of sanctions against the member in violation. As human rights violations and safety of those whose rights are being violated are involved, time is of the essence. Ideally, the entire procedure from receipt of reports to institution of sanctions should take no more than twelve weeks even with the inclusion of an appeal.[285]

2. THE EHRENBERG MODEL

Another American lawyer, Yale-educated Daniel S. Ehrenberg, proposed an enforcement mechanism which entangles the executive function of the ILO with the WTO dispute settlement system.[286]

[281] *Id.* at 40-41.

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] *Id.* at 42.

[286] Ehrenberg, *supra* note 37.

Any member state of the ILO or GATT/WTO or any authentic employers' or workers' association would be able to file a complaint and initiate the enforcement process. The process would begin by screening the complaint for admissibility. An admissible complaint would trigger the determination phase and the establishment of a joint ILO-GATT/WTO Dispute Panel.[287]

An admissible complaint would have to meet the following criteria. First, it would be in writing and addressed to the International Labour Office or the GATT/WTO Secretariat. Second, it would be filed by either a member state of the ILO or GATT/WTO or a bona fide employers' or workers' association. If the complaint was filed by an association, the association would have to identify itself and include information sufficient to establish its authenticity. Third, the complaint would concern activities in a member state of the ILO or GATT/WTO. Fourth, it would allege that a consistent pattern of gross and reliably confirmed standards violations committed by the implicating state in the production of goods entering the international trading system. Some documentary evidence would be required. Moreover, to meet this criterion, the complaint would specify how the state has failed to secure effective observance of labor standards within its jurisdiction. Finally, the complaint would identify the specific industry or sector in which the violations occur and the products implicated. These admissibility criteria are modeled on those used by the ILO.[288] GATT/WTO panelists would come from the current list of governmental and nongovernmental panelists. Structuring the panel in this manner would ensure impartiality, independence, and objectivity.[289]

In the case of an interstate complaint, the states would be given the opportunity to agree on the panelists drawn from ILO and GATT/WTO pools that each organization has made available. If the states could not agree, either party could ask ILO or GATT/WTO Director-General to appoint the remaining panel members. The Directors-General, in selecting the remaining panelists, would consult with both parties but make the final determination themselves. when a complaint was initiated by an employers' or workers' association, the ILO and GATT/WTO Directors-General would appoint the panelists. Employers' and workers' groups would not have any input into the choice of panelists because, unlike states, these groups are not members of either organization. Moreover, their initiation of a complaint is made not on their own behalf, but on behalf of the ILO-GATT/WTO joint enforcement regime.[290]

[287] *Id.* at 408.

[288] The ILO Governing body evaluates the receivability of a representation. To be receivable, a representation must meet the following six conditions: it must 1) be communicated to the Office in writing, 2) come from an industrial association of workers or employers, 3) specifically refer to article 24 of the ILO Constitution, 4) concern a member state of the ILO, 5) refer to an ILO Convention of which the member state is a party, and 6) specify the manner in which the member state has failed to secure effective observance within its jurisdiction of the Convention.

[289] Ehrenberg, *supra* note 37, at 409

[290] *Id.* at 409-410.

The Dispute Panel would assess the complaint and prepare a report of its findings on all relevant questions. The report would include what the Dispute Panel deemed to be a reasonable period of time for compliance, recommendations and programs to help achieve compliance (*i.e.*, technical assistance programs and certification procedures), and possible countermeasures.[291]

The Dispute Panel would arrive at its conclusions after engaging ina quasi-judicial inquiry giving all parties the opportunity to prepare submissions, while ensuring that the resolution of the matter occurred expeditiously. The determination phase would proceed according to a fixed timetable for presentation and deliberations, developed in consultation with the parties within a week of the panel's formation. Normally, the complainant would be the first to provide written submission for the panel, and all other parties would then have the same opportunity. The respondent party would receive a copy of the complainant's submission and have twenty days to prepare its submission and respond to the complainant's allegations.[292]

After receiving the submissions, the panel would hold oral hearings during which each side would present its arguments and answer questions with the other party present. A second round of written submissions and oral hearings would then follow. During this investigatory stage, the panel could examine witnesses, who would appear at the request of either the parties or the panel. It could also seek information and technical advice from outside experts, use the reports of the Committee of Experts and other international bodies, and conduct on-the-spot investigations. States that bordered on or had significant trade relations with the country involved in the complaint would be asked to provide any relevant information to the Dispute Panel regardless of whether they were directly involved in the complaint. All of these proceedings would be private and strictly confidential.[293]

Employer's and workers' associations would not present submissions and oral arguments directly to the Dispute Panel. Rather, a joint committee of GATT/WTO and ILO officials with expertise in dispute resolution procedures, appointed by the Directors-General of the ILO and the GATT /WTO, would prepare the case in consultation with the original complainant. The task of this joint committee would be to uphold the interest of both the ILO and GATT/WTO in upholding established international labor standards. The Dispute Panel could accept written submissions from the original complainants and could even allow them to appear before the panel as witnesses, but the original complainants would have no standing before the panel. Taking responsibility for the complaint from the worker's or employers' organization would allow the joint enforcement regime to fulfill its mission of preventing violations of standards without requiring states to offend nonstate actors in international law. This shift in responsibility would make the

[291] *Id.* at 410.

[292] *Id.*

[293] *Id.*

enforcement regime more palatable to all states. Moreover, this procedure would depoliticize the process and give it legitimacy.[294]

After completion of the inquiry, panel deliberation would culminate in the drafting of a three-section report. The first section would describe the disputants' arguments and include the panel's findings of fact. Disputants would preview this section and make comments before completion of the final report. The second section of the report would state whether a violation of standards occurred and, if so, the industry, sector and products implicated. The third section would suggest a reasonable period of time for compliance, programs to aid in compliance (i.e. technical assistance programs and certification procedures), and possible countermeasures. The determination phase, from establishment of a panel to completion of this final report, would normally not exceed nine months and would never take longer than twelve months. Aggrieved parties would thus achieve redness in an expedient yet fair manner.[295]

The Dispute Panel report would be circulated to all Council and Governing Body members and would be available to any member state of the ILO and reports. That is, the first two sections of the Dispute Panel report would automatically be adopted unless a consensus of either the Council or GB decided otherwise. At the meeting following the report's presentation, either the Council or the GB could by consensus, decide to withhold adoption, delay consideration, or reject the report. If this rejection were to occur, the dispute process would be completed and no violation would have been found to exist. Furthermore, no subsequent actions would be necessary.[296]

Any contracting parties having concerns about the panel report would be required to circulate a detailed, written objection to all GB or Council members at least ten days before the meeting of either body at which the panel report was to be considered. The disputant would have a right to participate in the GB or council deliberations, and their views be recorded. The entire dispute settlement process, form the filling complaint to the decision on the Dispute Panel report, should not exceed eighteen months.[297]

If the report were adopted, the implicated state would have up to three months to appeal the determination of the joint ILO-GATT/WTO enforcement to the ICJ, which would either, affirm, reverse, or modify the Dispute Panel's findings and conclusions. The decision of the ICJ would be final. During this three-month period, the implicated state would also have the opportunity to develop a technical cooperation program with the ILO that was specifically regarded to eliminating forced or child labor. The ILO Director-General and the appropriate state official

[294] *Id.* at 410-11.

[295] *Id.* at 411.

[296] *Id.*

[297] *Id.*

would have to approve this program within six months of the adoption of the Dispute Panel report. [298]

The offending state's technical cooperation program would incorporate a timetable for compliance with an evaluation of the state's progress at each of a number of interim phases during the program's implementation. While the technical cooperation program allow for some flexibility, states would no longer than two years from the adoption of the panel report before the ILO/GATT/WTO regime required either full compliance or implementation of an export ban on all products made in violation of international labor standards.[299]

Besides developing a technical cooperation program, the GB and the Council, with the assistance of officials from the International Labour Office and the GATT/WTO Secretariat, would jointly develop a remediation plan. This plan would require the violating state to take specific actions necessary to comply with the adopted report's ruling. This joint ILO-GATT/WTO remediation committee would formulate a timetable for economic sanctions. It would also oversee compliance monitoring of the violating state. The committee would use the third section of the Dispute Panel report as the starting point for the development of this remediation plan and timetable and could either accept or alter the Dispute Panel's recommendations. It would be required to complete its plan and timetable within two months.[300]

Once devised, the remediation committee would submit its plan to the GB and the Council, which would adopt the plan automatically unless a consensus of either group rejected it as formulated. If either group did reject the plan, the committee would revise it. If the Council or GB rejected the plan second time, a third plan would then be formulated by the two Directors-General and the chairs of the GB and the Council. This special unit would seek input from all interested states but would make the final determination as to the content of the remediation plan. The unit would be required to complete this plan within two months. This third plan would be automatically adopted and would require neither submission to, nor approval from, the GB or the Council.[301]

Compliance would normally occur within one year of the adopton of the Dispute Panel's report and would never take longer than two years. If violations are continued beyond the period of time designated in the remediation plan for full compliance, countermeasures would be instituted. The ILO-GATT/WTO enforcement regime would initially ban any products made in violation of the standards. If a product implicated in the Dispute Panel report is later certified as actually being produced by a legal labor source, it would be permitted to enter the international trading system. However, if after an additional period specified in

[298] *Id.* at 411-412.

[299] *Id.* at 410-11.

[300] *Id.*

[301] *Id.*

the remediation plan, the violating state had still not stopped producing export goods made in violation of standards, wider trade sanctions or bans would be installed and would intensify over time until the violations were eradicated.[302]

The ILO-GATT/WTO enforcement regime would also develop and implement a certification procedure for identifying any products implicated in the adopted Dispute Panel report that were not actually made in violation of standards. The joint ILO-GATT/WTO remediation committee would approve the mechanics of this certification procedure and would include it in the remediation plan. Failing the implementation of a certification procedure, all implicated products could be banned as soon as the period for compliance had expired. To be effective, this certification would require mandatory inspection by a joint team of International Labour Office and GATT/WTO Secretariat employees. The team would periodically and without prior warning enter and inspect all facilities where implicated products were made, including facilities of subcontractors and other intermediate procedures. Only those certified as being produced without violation of standards to the satisfaction of procedures agreed to in the remediation plan would be authorized for export.[303]

The ILO and GATT/WTO, through the joint ILO-GATT/WTO remediation committee, would periodically review the progress of the violating state. The committee would meet every three months to discuss the violating state's progress towards compliance with the Dispute Panel's rulings and remediation plan, relying in part on mandatory reports from the violating state detailing the steps it had taken. If the violating state had entered into a technical cooperation program, the ILO would be required to report on the progress that had been achieved. If a certification procedure had been implemented, then the remediation committee would also examine reports on the status of that procedure, including reports by the inspection team. In addition, the remediation committee could seek information and hear witnesses from any other pertinent sources in order to evaluate compliance. Member states of the ILO or GATT/WTO and employers' and workers' organizations could also furnish information. Furthermore, the remediation committee or a surveillance team composed of the International Labour Office and GATT/WTO Secretariat employees, with the permission of the violating state, could conduct on-the-spot visits. Based on all the information received, the joint ILO-GATT/WTO remediation committee would draft a report to the GB and the Council.[304]

The GB and the Council would consider compliance four months after implementation of the remediation plan and would review the ILO-GATT/WTO remediation committee report every four months thereafter until the offending state achieved full compliance. The chair of the joint ILO-GATT/WTO remediation committee would be present at each of these review sessions to present the

[302] *Id.* at 412-13.

[303] *Id.* at 413

[304] *Id.*

committee's reports and answer questions. If monitoring efforts were deemed ineffective, the chair of the remediation committee would meet with the chairs of the GB and the Council and the Directors-General of the ILO and GATT/WTO to formulate a revised monitoring strategy.[305]

Again based on all information received, the joint ILO'GATT/WTO remediation committee could decide that the implicated state had achieved full compliance. Alternatively, the implicated state could at any time declare that it had achieved full compliance and request that an inspection team visit to verify compliance. Once the remediation committee determined that the state had achieved full compliance, it would file a report to the GB and Council certifying its finding. The GB and Council would each discuss the matter and either adopt the full compliance finding or reject it by consensus, in which case the monitoring procedure and the remediation plan would remain in place.[306]

All economic sanctions would cease once the GB and Council adopt a finding of full compliance, but the certification procedure would remain in effect. The joint ILO-GATT/WTO remediation committee would continue to monitor the state for one additional year and continue to submit reports to the GB and Council every four months. During this period, intermittent and unannounced inspections of production facilities suspected of violating standards would take place. If no consistent pattern of gross and reliably confirmed violations was uncovered during the additional year, all countermeasures, export bans, and certification procedures would be terminated.[307]

3. THE DE WET MODEL

Dr. Erika de Wet, a Labour Legislation Specialist at the International Labour Office, affirms the needed cooperation between the ILO and WTO in social clause implementation. Dr. de Wet realizes the limitations of ILO enforcement powers, and proposes to put it to good use. It is no secret that the ILO cannot compel conduct by a member country, nor can it impose sanctions on violators of labor standards. The ILO's strength lies in its extensive oversight functions. Whether or not a country has ratified an ILO Convention, states are required to submit Conventions to competent national authorities and to report progress toward adoption (or the lack of it) back to the ILO. Countries must regularly report on their observance of ILO standards an respond to complaints of violation. A Committee of Experts and a Commission of Inquiry can launch investigations and issue reports on charges of serious violations of ILO standards, especially regarding rights of association, organizing and bargaining, and forced labor allegations. Thus, the moral force of the ILO in the world community can bring reforms through public embarrassment of a violator.[308]

[305] *Id.* at 414.

[306] *Id.*

[307] *Id.*

[308] Compa, *supra* note 248, at 179.

Accordingly, a two-stage implementation system is suggested: the first involving moral suasion in accordance with ILO procedures, and the second involving economic pressure applied by the contracting parties of the GATT/WTO.

4. PRELIMINARY RULINGS

A procedure analogous to so-called "preliminary rulings" under the European Community legal system should facilitate the effective implementation of international labor standards in the domestic setting. According to Article 177 of the Treaty of Rome, where questions involving treaty interpretation, validity of institutional acts, and interpretation of statutes by created bodies are raised before any court or tribunal of a Member State, if it considers that a decision on the question is necessary to unable it to give judgment, or against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice. Article 177 has been such significance to the development of community law because it has been the vehicle through which seminal Community concepts such as direct effect and supremacy, have been developed.[309]

A procedure can be installed so that when a comprising party seeks refuge under an international labor standards covered under the social clause, the Labor Arbiter or Regional Director could refer the matter to the corresponding social clause tribunal for proper interpretation. After ruling, the Labor Arbiter will receive and adopt the international tribunal decision as if it where his/her own.

VII. THE 1996 NATIONAL CONFERENCE ON THE SOCIAL CLAUSE

From 16 to 18 October, 1996, the Democratic Labor Caucus and the *Sentro ng Alternatibong Lingap Panlegal*[310] or SALIGAN organized a National Conference on the Social Clause. Participants included trade unions and members of non-governmental organizations (NGOs) working with formal and informal labor and migrant Filipinos. Basic aspects of the social clause debate were discussed, leading into a "conditional yes" position adopted by the participants with regard to the social clause.

A. Discussion in Other Countries

In the Conference, Jennifer Porges, an American lawyer working for the Asia Monitor Resource Center based in Hongkong, presented views and positions on the social clause of some of the groups around Asia who have discussed linking trade to labor rights.

[309] CRAIG AND DE BURCA, *supra* note 264, 398-99.

[310] The SEC-registered name is the exact English translation: Alternative Legal Assistance Center.

1. INDIA

The groups that participated in social clause consultations in India generally rejected the institution of a social clause in the WTO framework. They have, however, developed several alternatives to achieve the goal of improving working conditions for its people. The first proposal is to establish a National Commission of Labor Rights in India. They envision this as a statutory body which would have the task of monitoring violations of the national labor laws and standards and to prepare periodic reports which would be represented to the public. It would also campaign for the enactment of national laws incorporating the ILO's Conventions not already passed.[311]

The second mechanism was to develop ad UN Convention on Labor Rights, based on the existing UN Convention on Civil and Political Rights and Economic, Social and Cultural Rights, not to mention ILO Conventions. This international body created under the this Convention would monitor the implementation of the labor rights enumerated in the Convention, and provide an area to discuss non-compliance with its provisions.[312]

2. SRI LANKA

Participants of the Sri Lanka National Consultation were split between rejecting the social clause, and studying it further and not rejecting it merely because it was a suggestion made by the Europe and the U.S. There was general agreement on the need to educate workers and grassroots about the debate, and study how the workers in their country would be affected by a social clause.[313]

3. PAKISTAN

The national consultation on the social clause in Pakistan concluded that a social clause within the WTO framework was designated to promote the interest of the developed countries and transnational corporations. They rejected the social clause and instead called for the ILO Conventions as well as their own national labor laws to be effectively implemented. They called for an independent tripartite statutory Labor Commission to regularly review the implementation of the labor laws , with full representation of workers on the Commission.[314]

4. SOUTH KOREA

Several human rights NGOs, trade unions and experts in South Korea have gathered together to discuss the issues surrounding the social clause. No official position was reached, but a key participant in the consultations opined that the

[311] Jennifer Porges, The Social Clause Debate in Asia 2 (Oct. 1996).

[312] *Id.*

[313] *Id.* at 3.

[314] *Id.*

social clause is only the dimension of a solution, and not a comprehensive cure. He hoped that it could serve as a catalyst to enhance the human rights of workers in South Korea, and elsewhere.[315]

5. THAILAND

Porges reported that she was not aware of any national consultation on the social clause in Thailand, though the Director of the Center for the Protection of Children's Rights managed to express her concern about the correlation between the social clause and the alarming increase of child labor. She believed that the social clause should not be used to address the child labor controversy. A social clause with no complementing programs to provide opportunities ending child labor, a social clause with no complementing programs to provide opportunities for children who are now forced to work is not a viable solution. She pointed out that if one cannot stop the needs that drive children to work, social clauses will not stop the practice of child labor.

B. The Linkage

The Conference proceeded to affirm the idea that a social clause in trade agreements is necessary because it is an additional instrument which can force countries to enforce universally-recognized and enforceable labor rights, especially in countries where labor hardly exist, or where not simply enforced.[316] The social clause was seen as an additional instrument for the protection of labor rights and an aid in the organization and education of workers.[317]

C. Basic Rights To Be Included

The Conference also proposed that, in order to prevent the use of the social clause for protectionist purposes, the clause should include only the following basic rights: right to self-organization, right to collective bargaining and concerted action, freedom from child labor, freedom from forced or slave labor, and freedom from discrimination.[318]

D. Conditions

The Conference approved the inclusion of a social clause in multilateral trade agreements such as the WTO Charter, provided all of the following conditions are met:

[315] *Id.* at 4.

[316] PROCEEDINGS ON THE NATIONAL CONFERENCE ON THE SOCIAL CLAUSE, at 2 (Oct. 1996).

[317] *Id.* at 3.

[318] *Id.* at 6.

(1) The labor rights should be limited to the five (5) enumerated rights. Minimum standards of employment, such as those minimum wage, days and hours of work, and overtime pay, should never be included.

(2) There shall thus be no sanctions imposed outright on the alleged violators, and additional trade incentives and trade preferences shall be given to developing countries which enforce the basic labor rights in the social clause.

(3) The alleged offenders should be given sufficient time to comply progressively, technical assistance should be provided, and there should be periodic monitoring. Only after all of these are exhausted should trade sanctions be imposed.

(4) The ILO should have jurisdiction to investigate and monitor compliance, and should also have a hand in the enforcement of trade sanctions.

(5) All member-states should establish sufficient safety nets for workers that may be affected.

(6) The WTO should change its system of representation. Since the developing countries may be affected adversely, they should be given more representation in the social clause adjudication body. Labor should also be given sufficient representation in monitoring, adjudication, and enforcement bodies.

(7) Labor groups and workers themselves should be allowed to file complaints directly with the adjudicatory bodies.

(8) All member States of the WTO, or whatever trade bloc, should sign a treaty on inter-country liability of multinational companies which will allow legal actions against MNCs, wherever they are located, for violation of national labor laws committed by their branches, subsidiaries, and subcontractors who manufacture their products, wherever these are located.

(9) All member-states of the WTO should sign the core conventions of the ILO.

(10) The social clause shall also be applicable to migrant workers and the informal labor sector.[319]

[319] *Id.* at 7-8.

E. Enforcement Mechanism

The procedure for the enforcement of the social clause was inspired by the Ehrenberg Model. The Conference envisioned a mechanism which establishes a body called the "Joint ILO-WTO Enforcement Regime." The Regime possesses a distinct international legal personality, though its members would come from those recommended by the Directors-General of the ILO and the WTO with approval of the Governing Body of the ILO and the Dispute Settlement Body of the WTO, respectively.

The procedure suggested by the Conference runs as follows:

> A complaint may be instituted by either: 1) the enforcement Regime or 2) members of the ILO and/or the WTO. An employers' or workers' association may file a complaint, but the Enforcement Regime would have to set up a joint committee comprising three of its members (two from the ILO and one from the WTO), who would determine whether or not a complaint should be filed with a Dispute Panel to be created from a pool of labor and trade experts named by the Directors-general of the ILO and the WTO. should the Enforcement Regime find that *prima facie* evidence of a pattern of gross and reliably confirmed international labor rights violations have been committed, a case will be filed before the International Labor Office or the WTO Secretariat.
>
> The Dispute Panel would come from a pool of experts to be selected by the Directors-General of the ILO and the WTOI. Two members of the Panel would be from the ILO and one member would come from the WTO, with the senior of ILO member to act as Chair. the Dispute Panel would require the parties to present submissions and thereafter conduct hearings and deliberations. It may undertake on-the-spot investigations.
>
> Should the Dispute Panel find that a pattern of gross and reliably confirmed labor rights violations were committed by the implicated state, the Dispute Panel Report would suggest a reasonable period of time for compliance, programs to aid in compliance, and possible countermeasures. the Report would be submitted before the enforcement Regime for adoption, applying the "auto-consensus" rule (it is assumed that the Report will be adopted, unless there is a consensus not to adopt the report) prevailing in the Dispute Settlement Body of the WTO. Should the Enforcement Regime be a party to the case (when an employers' or workers' association originates the complaint), the Dispute Settlement Body of the WTO will adopt the Report accordingly.
>
> Three months after adoption of the Dispute Panel Report, the violating state may enter into a technical cooperation program with the ILO. Should the violating state continue to commit patterns of international labor rights violations in bad faith, or should the violating state fail to enter into a technical cooperation program within the three-month period, the Enforcement Regime shall form a Remediation Committee. The Remediation Committee shall form a remediation plan which shall take into consideration the suggestions of the Dispute Panel with regard to the reasonable period of time for compliance and possible countermeasures. The remediation plan shall be adopted by the Enforcement Regime, applying once more the "auto consensus" rule. the plan would indicate compliance with international labor rights for a stipulated period, after which time countermeasures would be instituted. A wide variety of penalties are available, which include export bans, suspension of concessions, anti-dumping or countervailing duties, or payment of compensation. Wider trade sanctions would be instituted and would intensify over time until the violations are eradicated.
>
> All economic sanctions would cease once the enforcement regime adopts a finding of full compliance. The remediation committee would continue to monitor the state for one additional year, and continue to submit reports to the regime every four (4) months.
>
> Also, a developing country which enforces all of the five (5) basic labor rights may apply for additional trade concessions. The above procedures, as far as they are applicable, would also be followed; but instead of filing a complaint, a petition to grant additional trade concessions may be filed. However, unlike the complaint for non-compliance which understandably takes more time to resolve, the petition for additional concessions should be resolved as early as possible. After the Dispute Panel finds that a developing country enforces the five basic labor rights, it shall submit the Dispute Panel Report to the WTO, which will then order all member states to grant additional trade concessions.

IX. THE SINGAPORE MINISTERIAL CONFERENCE

A. Battle Lines Drawn

The inaugural Ministerial Conference of the World Trade Organization (WTO) was held in December of 1996 in Singapore. Director-General Renato Ruggiero noted that the Conference built on the achievements of the WTO's first two years, and laid a firm political foundation for future progress.[320] He noted the skillful chairmanship of the conference, which played a very important role in, among other things, undertaking the preparatory work necessary to clarify and lay down a "political agreement" in difficult questions such as the social clause.[321]

[320] WTO Director-General Renato Ruggiero, *Imprementing the WTO Singapore Declaration in 1997 and Beyond*, Address at the Conference of APEC Trade Ministers, Montreal, Canada (May 15,1997) (available at <http://www.wto.org/speeches/speech.htm, last updated 30 May 1997>).

[321] *Id.*

Two days prior to the Singapore Declaration, it was reported that sixteen of the twenty paragraphs have been agreed, with reference to labor standards being left to last.[322] The United States had earlier served notice that it would still push hard to get the explosive issue of labor rights on the Ministerial Conference agenda. But several key economies in Asia, including India, Malaysia, and Indonesia, were insisting there should be no mention at all, arguing that even a neutral phrasing would suggest work conditions were a subject for the WTO. France and Norway supported the United States proposal, but other EU countries like Germany and the United Kingdom were lukewarm to the suggestion.[323]

The German Federal Minister on Economics, Gunter Rexrodt, expressed the view that

> [s]ocial issues deal with the political order of nations and with their societal values as a whole. Such fundamentally complex concepts cannot be dealt with by trade policy measures which are precisely defined in a legal sense but limited in scope. We must not bring into the WTO a confrontation about cultural and social values. this would destroy the credibility of the system including the highly valuable dispute settlement instrument. The dispute settlement instrument has to be applied to real trade disputes and not to foreign or social policy issues.[324]

United Kingdom Representative Ian Lang, the President of the Board of Trade and the Head of the Department of Trade and Industry, stated that

> [t]he UK's priorities for the World Trade Organization are focused on issues which are most important in tackling the trade barriers which confront our businesses and those of our trading partners. We want to push ahead with work on these issues in a spirit of cooperation not confrontation.
>
> So we would like to see a substantial new work programme. I believe that this offers benefits to the developed and developing economies alike. Some examples:
>
> Standards: we need closer cooperation between the WTO and the international standard-setting bodies; we need these bodies to concentrate their work on those standards and technical regulations which are of real practical importance to trade; and we need WTO Members to make much more use of international standards rather than going their own way. We cannot rest on our laurels in this field, there is much more work to do...
>
> ...Some countries have proposed that trade and labour should form part of the WTO's new work programme. Here I have to disagree. While Britain is as strongly opposed to child labour and forced labour as anyone else, we see no case for taking trade measures in support of social standards. This would only weaken the economies of the countries concerned and make them less able to remedy the social programs. We take the view that the International Labour Organization is the appropriate forum for promoting labour standards, not the WTO. This is also the view of most of European industry, as the Union of Industrial and Employers Confederations of Europe have recently confirmed. We know it is also the view of most other countries around the world. Let us not divide the WTO on this issue.
>
> Let us instead look forward on matters where we have interests in common.[325]

[322] *WTO May Yield Pacts on Technology, But Not Labor,* THE BUSINESS DAILY, December 11, 1996, at 7.

[323] *Id.*

[324] Excerpts From Statements Made at the Ministerial Conference of the World Trade Organization, *supra* note 15 at 21.

It was, to say the least, a position that did not surprise European Community members, considering the U.K.'s experience as a lone holdout on the European Social Charter issue.

Malaysian Representative Dato' Seri Rafidah Aziz, the Minister of International Trade and Industry, boldly declared that Malaysia rejected any attempt to link labor standards and other social clauses to trade and trade action, and rejected any move to discuss and deliberate labor standards and other social clauses in the WTO.[326] The Indian Representative, Minister of Commerce Dr. B.B. Ramaiah, wanted the Conference to consider that

> India has a long history of commitment and adherence to the ILO conventions which deal with such rights and issues. We do not see any purpose in bringing this subject into the WTO except possibly to use trade measures to enforce labor standards, if not now, then at a future date. We are of the opinion that trade measures should not be used to address non-trade objectives, however laudable they may be. It is also our considered view that the International Labor Organization is clearly the institution that has the exclusive mandate, competence and responsibility to deal with the subject.[327]

Australian Representative Tim Fischer, the deputy prime minister AND minister for Trade, stated that Australia, like most WTO Members, does not support a working role for the WTO on labor standards or human rights. "This is something for the ILO," he concluded.

For his part, Philippine Representative and Secretary of Trade and Industry Cesar B. Bautista, declared:

[325] *Id.* at 45-46.

[326] *Id.* at 29.

[327] *Id.* at 24.

...And worse, it would be disastrous if Members resort to blatantly protectionist and unilateral measures whether in the guise of standards, the protection of the environment, or other excuses...

...The outstanding issues, that prevented our officials from agreeing on a draft declaration, have indeed been exacting on all of us. We are, after all, assessing what has been accomplished in the first two years of WTO, and what needs to be done in the future. As in the law or economics professions, there could easily be as many views on these topics as there are WTO Members...

...My government believes that we can – and that we must – come to terms with the issues that appear to divide us. Our vision of the WTO's future, complemented with negotiating flexibility, which I hope we all have in abundance, should allow us to reach a consensus on these issues. Our task of bridging the gaps, therefore, is crucial...

...There were also changes in rules of origin, which are particularly worrisome as these kinds of changes – which violate the standstill we agreed upon in the ATC and the Agreement on rules of Origin – can potentially wipe out a whole industry in the Philippines. This industry employs some 5,000 workers, who at the end of the day may lose their jobs. They will of course blame the WTO, where ironically labor standards are championed by the very members who unilaterally change the rules...

...And thirdly, the new issues. We have expressed our highest concern for labor standards. Our difficulty, however, is in the area of recognizing links between trade and labor standards, and what to do after that. Historically and substantively speaking, we do not consider this as an issue for the WTO, but for the ILO.[328]

United States Trade Representative Charlene Barshefsky expectedly pushed for the pro-social clause position of her government:

...With regard to broadening the WTO's agenda, we are prepared to consider whether the WTO should begin careful examination of new issues some feel should be debated. Like others, we are concerned about finding the right balance of interests. That is why we have been willing to go along with others who wish to begin a modest work program in the areas of investment competition, as part of a balanced overall agenda for the WTO.

...To remain viable, the WTO must reflect the needs of various constituencies involved in world trade. Each of our

[328] *Id.* at 36.

economies will be facing more pressure from globalization in the coming years, and we must help workers adjust to and benefit from an open trading system. We must do more to acknowledge that there is a mutually reinforcing relationship between an open trading system and respect for core labor standards.

That is why we hope to have an agreement that the WTO should, in cooperation with the International Labor Organization, examine in greater detail the important nexus between trade and labor standards. We believe strongly that increased trade and the economic growth that it brings should also engender greater respect for the basic human rights which are the focus of our core labor standards proposal.

We are not proposing an agreement on minimum wages, changes that could take away the comparative advantage of low-wage producers, or the use of protectionist measures to enforce labor standards. We are proposing that the concerns of working people – people who fear that trade liberalization will lead to distortion – be addressed in a modest work program in the WTO. Trade liberalization can occur only with domestic support; that support, and support for the WTO, will surely erode if we cannot address the concerns of working people and demonstrate that trade is a path to tangible prosperity.[329]

After an exercise of skillful bargaining and a game of words, the Conference finally came up with what is now Paragraph 4 of the Singapore Ministerial Declaration, which reads:

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 the 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 in their existing collaboration.

B. ILO Reaction

Almost a month before the Singapore Ministerial Conference, the Working Party on the Social dimensions of the Liberalization of International Trade had already discussed a publication by the Organization of Economic Cooperation and Development, called "Trade, employment and Labour Standards." The working

[329] *Id.* at 46-47.

Party paid tribute to the OECD analysis and reaffirmed the ILO mandate and means of action.

Another reaffirmation of ILO's role in the international protection of workers' rights, the Chairperson of the 85th International Labor Conference Governing Body pointed out,[330] was the Singapore Ministerial Declaration. In March, 1997 the Governing Body considered a paper summarizing the developments at the Singapore Ministerial conference, which highlighted the many statements made at the meeting in support of the ILO's role. The Chairperson of the Working Party echoed this view:

> The final item before the Working Party was a report on the Ministerial Conference of the World Trade Organization in Singapore. this report contained all the references made by the different delegations at Singapore to the role of the ILO and the importance of labor standards, and it provoked a long and rich debate on how the ILO should now move forward and further develop its means of action for the future. There were perhaps almost as many different views on exactly what the outcome meant as there were speakers in that debate. What all were agreed upon, however, was the fact that the role of ILO had been further reaffirmed, as had the importance and urgency of its making constructive progress on those issues. many speakers also recalled that was not just the WTO in Singapore, but also the World summit in Copenhagen, which had given fresh momentum to the ILO.[331]

At the 270th Session of the governing body, the ILO governing Body agreed to place on the agenda of the 1998 International Labor conference an item relating to the consideration of a possible ILO Declaration of principles concerning fundamental rights and its appropriate follow-up mechanism. The Declaration is to be based on the principles embodied in the seven core Conventions of the ILO relating to fundamental rights. A campaign to achieve universal ratification of the seven core Conventions, launched in May 1995, was revitalized. Meanwhile, the Director-General continues to preach the word of labor protection amid globalization. "Globalization will not be politically viable if it leads to a deterioration in social justice," the Director-General said, adding that rising inequality, deteriorating labor welfare, and the absence of adequate social protection could breed "discontent and provoke a strong backlash against globalization.[332] Needless to say, the approach should be within the ILO framework.

For the Chairperson of the Working Party, based on the Singapore debates three issues need to be threshed out by the ILO itself. First would have to be the question of how to improve and strengthen the ILO's supervisory system and normative action. Among additional suggestions made were the idea of regional

[330] Report of the Chairperson of the Governing body to the Conference for the year 1996-97, International Labour Conference, 85th Sess. (June 1997) (available at <http://www.ilo.org>).

[331] Statement by the Chairperson of the Working Party on the Social Dimensions of the Liberalization of International Trade, GB.268/WP/SDL/D.1 (March 1997) (available at <http://www.ilo.org>).

[332] ILO Press Release, *ILO Director-General Warns of Potentially Grave Social Consequences of Asian Financial Crisis*, December 9, 1997 (available at <http://www.ilo.org>).

monitoring mechanisms, of peer reviews, and of country policy reviews. The role of technical cooperation in promoting core labor standards, and the question of how to focus technical cooperation more effectively on such core standards was also stressed. Second, the persisting question of how to improve the research capacity and knowledge base of the ILO on such issues. It was suggested that there was a need to put forward a comprehensive program for analysis of the issues and operations concerning the social implications of globalization, and that overall a more strategic approach is necessary. Finally, the mandate and work programs of the Working Party itself should be clarified.[333]

X. Outlook and Conclusion

The Singapore Ministerial Declaration of 13 December 1996 seems to be the happy compromise between the pro-social clause developed countries such as the United States and France and the skeptical developing countries such as India, Malaysia, and Indonesia. At the time Paragraph 4 of the Declaration was instituted, then U.S. Trade Representative Charlene Barshefsky proclaimed that it was the first time in 50 years of the GATT that labor standards made it to a final declaration. Indeed, a ranking trade official stated that the Declaration provided a framework system through continued attention to labor standards.[334] An Asian diplomat saw it as a cornerstone which pro-social clause advocates may build upon. "With this declaration," he said, "what can stop others from raising this again in future meetings?"[335] A close look at Paragraph 4 of the Singapore Ministerial Declaration reveals that its seemingly neutral phraseology still actually reflects the sentiments of a pro-social clause advocate such as the United States. So what could be the final word on the matter for opponents of the clause could actually be a window of opportunity for its proponents.

Philippine Representative Cesar Bautista drew the line clearly: "We're not against putting it in the main declaration as long as it is clearly stated that labor standards are an ILO matter",he said.[336] For the time being, protection of labor standards within the WTO framework cannot go any further than this. But hope hasn't gone overboard yet.[337]

[333] Statement by the Chairperson of the Working Party on the Social Dimensions of the Liberalization of International Trade, *supra* note 331, at 3.

[334] Jon Schaffer, *U.S. Sees Worker Rights Issues as a Legitimate TWO Topic*, (available at <http://www.usia.gov/topic /econ/wto/art 1223.htm>).

[335] Cristina C. Pastor, *RP Delays ITA Entry*, Business World, December 16,1996 at 16.

[336] *Id.*

[337] As a postscript, in the 86th International Labor Conference last June, 1998 a decision was made to reaffirm the commitment of the international community to uphold fundamental rights in the workplace. In a document called the "ILO Declaration on Fundamental Principles and Rights at Work," the ILO's 174 member States were mandated to respect the principles inherent in the seven core labor standards, and to promote their universal application.

THE LEGAL CHARACTERIZATION OF THE ASIA-PACIFIC ECONOMIC COOPERATION (APEC) AND THE INDIVIDUAL ACTION PLANS IN INTERNATIONAL LAW*

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ABSTRACT

The emergence of various economic groupings in different parts of the world has given rise to the accompanying issue of compliance by member States with their commitments under the respective charters or codes of conduct of their economic or trade regimes. A fundamental concern confronting these regimes is the need to design a system of effectively enforcing the obligations and commitments assumed by member States. Historically, the evolution of law in the realm of international economic transactions took a cautious route. While States have traditionally entered into bilateral agreements in the form of friendship, commerce and navigation treaties, the concept of multilateral economic engagements gained wide acceptance only after the Second World War through the establishment of the Bretton Woods institutions. This development indicated the softening stance of some States towards economic sovereignty. The recognition of economic sub-groupings under the recently adopted WTO Agreement further reinforced the openness of member States towards economic interdependence.

In the Asia-Pacific, a significant number of "economies" had committed themselves towards greater cooperation. A study of the implications of this economic sub-groupings both at the national and international level is crucial, particularly in light of the existence of other multilateral economic agreements to which most governments of these "economies" are presently committed. Of more immediate concern is how a member of APEC is expected to carry out its commitment and Individual Action Plan. The present research proposal intends to focus on the juridical or legal significance of the APEC and the Individual Action Plans. A principal issue that will be addressed is whether APEC "commitments" may be susceptible of international legal obligations to which the law of treaties and principles of state responsibility may be applied. In relation to this, the research to this, the research will inquire into the domestic law implication of commitments made under APEC and the Individual Action Plans.[1]

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[1] A speech delivered by former President Fidel V. Ramos, APEC and the Filipino Vision, An Address Before the National Preparatory SUMMIT FOR APEC (December 7, 1995).