

THE LINKAGE BETWEEN LABOUR STANDARDS AND INTERNATIONAL TRADE: HOW TO OFFSET THE GLOBAL INEQUALITY?¹

*ANETA TYC**

KEYWORDS

global trade, labour standards, the ILO, the WTO

ABSTRACT

From a historical point of view, the linkage between core labour standards and global trade has been recurrent for 200 years. Supporters of such a correlation argue that countries that do not respect the International Labour Organization (ILO) core labour standards gain competitive advantage that can result in a ‘race to the bottom’ phenomenon. Critics claim that protectionism and false humanitarianism is hidden behind this concept. Despite a long debate on this subject, there is still significant divergence in power between developed and developing countries. A response to the plight of many workers is still needed. Thus, the author will focus on some attempts to resolve existing problems, mainly: whether labour standards should be left to the ILO, included in the World Trade Organization (WTO) agenda or both forces should be combined; whether the inclusion of a social clause in trade agreements could improve the situation of

* Assistant Professor, The Faculty of Law and Administration of the University of Lodz, Kopcinskiego 8/12, 90-232 Lodz, Poland, atyc@wpia.uni.lodz.pl, <https://orcid.org/0000-0003-0593-2862>

¹ The project was financed by the National Science Centre in Poland pursuant to the decision number DEC-2016/21/D/HS5/03849. The project’s registration number is: 2016/21/D/HS5/03849. This is the expanded version of a paper presented orally at the conference entitled ‘Global Inequality: A Divided History’, organised at the University of Warwick on 19-21 April 2017.

workers; whether the imposition of trade sanctions on countries that do not adhere to the core labour standards could ensure the extension of fundamental rights of workers on their citizens. The author will also comment on the concept of a global labour and trade framework agreement (GLTFA), that is, the proposal based on international framework agreements and ILO tripartite system.

I. INTRODUCTION

Nowadays workers in many countries (regions) point out that fundamental labour rights are not sufficiently respected and efforts should be made to create effective mechanisms in this regard. They still have to deal with the so-called race to the bottom. Low labour costs, the possibility of flexible employment reduction, lowering wages and reduction of duties related to social security are factors that often determine the transfer of business to countries offering the most favourable conditions of its operating. Depletion of workers' rights and cheap labour are incentives for international or cross-border employers to enter the market. The authorities of respective countries create lower standards for the protection of workers in order to attract businesses. Such activities translate into the infringement of human labour rights, for example, the use of forced labour or child labour.² The relationship between labour law and trade policy should be the starting point for the debate.

The main purpose of labour law is to combat injustices in the world of work. In addition, it can boost labour productivity, mitigate failures in labour markets, and facilitate economic production. By contrast, the fundamental objective of trade policy is connected with raising efficiency and income and providing more consumption possibilities. This is because it regulates cross-border flows of goods and services. Moreover, trade creates winners and losers thus deepening inequality. For this reason it is crucial to realise if there is a mutual complementarity or a mutual conflict between labour law and trade policy in achieving development aims.³

² Antoni Dral, 'Uwarunkowania modelu ochrony trwałości stosunku pracy w polskiej gospodarce rynkowej w dobie globalizacji' in Stanisław Sagan (ed), *Państwo i prawo w dobie globalizacji* (Wydawnictwo Uniwersytetu Rzeszowskiego, Rzeszów 2011) 82; Brian Bercusson, Cynthia Estlund, 'Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions' in Brian Bercusson, Cynthia Estlund (eds), *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions* (Hart Publishing, Oxford-Portland, Oregon 2008) 4.

³ David Cheong, Franz Christian Ebert, 'Labour law and trade policy: What implications for economic and human development?' in Shelley Marshall, Colin Fenwick (eds), *Labour Regulation and Development. Socio-Legal Perspectives* (Edward Elgar Publishing, Cheltenham-Northampton 2016) 83-84; see the cited literature.

From a historical point of view, the linkage between core labour standards and global trade has been recurrent for more than 200 years. Supporters of such a correlation argue that countries that do not respect the International Labour Organization (ILO) core labour standards gain competitive advantage that can result in a 'race to the bottom' phenomenon.⁴ Besides, they pose questions about the effectiveness of the ILO's enforcement mechanisms. It is true that, although the ILO has proved its capacity to define, evaluate and monitor international labour standards, it lacks an enforcement history, the necessary jurisdiction to enforce compliance with ILO agreements and binding authority to impose sanctions against countries that fail to comply with its agreements.⁵ Many authors draw attention to the potential of the World Trade Organization (WTO) in this regard. There are opinions claiming that the WTO dispute resolution system is 'the jewel in the crown of the WTO',⁶ and that, thanks to the use of this system, the WTO would have a potential of being successful where the ILO has failed in holding member states responsible for labour violations.⁷ However, this is not a secret that currently the WTO is facing a deep crisis. The stalemate in the Dispute Settlement Body (DSB) over the appointment of new members of the Appellate Body is just one of its symptoms.⁸ Moreover, the current political situation is not conducive to the implementation of the concept, but it is temporary, and probably will change in the future.

Critics of the trade-labour linkage claim that protectionism and false humanitarianism is hidden behind this concept.⁹ They point out that trade-labour linkage proponents 'are merely pushing a thinly disguised protectionist agenda and are seeking to deny developing countries the opportunity to realise their competitive and comparative economic and trade advantages and that if

⁴ See, for example, Brian Langille, 'General Reflections on the Relationship of Trade and Labor (Or: Fair Trade Is Free Trade's Destiny)' in Jagdish Bhagwati, Robert E. Hudec (eds.), *Fair Trade & Harmonization: Prerequisites for Free Trade? Vol. 2 Legal Analysis* (MIT Press, Cambridge, Mass., 1996) 231.

⁵ For example, Joshua M. Kagan, 'Making Free Trade Fair: How the WTO Could Incorporate Labor Rights and Why It Should' (2011) 43 *Georgetown Journal of International Law*, 201, 223; Yasmin Moorman, 'Integration of ILO Core Rights Labor Standards into the WTO' (2001) 39 *Columbia Journal of Transnational Law*, 569; Brittany Cohan Baclawski, 'Re-Thinking the WTO's Relationship to International Labor Standards: Is It Finally Time for a Global Approach' (2016) 48 *Georgetown Journal of International Law*, 243, 247.

⁶ Joshua M. Kagan (n 5) 223; Brittany Cohan Baclawski (n 5) 260.

⁷ Brittany Cohan Baclawski (n 5) 260.

⁸ Robert McDougall, 'Crisis in the WTO. Restoring the WTO Dispute Settlement Function' (2018) 194, <<https://www.cigionline.org/publications/crisis-wto-restoring-dispute-settlement-function>> accessed 22 July 2019.

⁹ See, for example, Jagdish Bhagwati, 'Trade Liberalisation and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues' (1995) 18 *The World Economy*, passim.

restrictions were to be placed on developing countries ability to export their goods then, sadly, it would be the most vulnerable in society that would pay the heaviest price'.¹⁰ They also add another argument against the linkage that market-based economic policies are adequate tools in order to improve labour practices in developing countries as they 'offer superior policy settings for lifting the pace and breadth of economic development'.¹¹ Some linkage opponents even highlight that the solution lies not in trade sanctions, but in international agreements on core labour standards, with voluntary compliance.¹²

Despite a long debate on this subject, there is still significant divergence in power between developed and developing countries. A response to the plight of many workers is still needed. Thus, the aim of this article, after providing a historical background, is to focus on some attempts to resolve existing problems, mainly: whether the imposition of trade sanctions on countries that do not adhere to the core labour standards could ensure the extension of fundamental rights of workers on their citizens; whether the application of the social clause could improve the situation of workers; whether labour standards should be left to the ILO, included in the WTO agenda or both forces should be combined; whether the concept of a global labour and trade framework agreement (GLTFA), that is, the proposal based on international framework agreements and ILO tripartite system, could constitute a solution.

II. HISTORICAL BACKGROUND

Trade and labour linkage was already assumed in David Ricardo's theory on comparative costs dating back to eighteenth century. At that time, in 1788, minister of finance of King Louis XVI – baron Jacques Necker – claimed that the abolition of Sunday as a day of rest could provide a competitive advantage to a country if other countries did not act in the same way. Then, many industrialists of the nineteenth century understood that countries that wished to improve the position of their working classes would be negatively affected by competition from other countries that did not. Some of them (e.g. Daniel Legrand and Robert Owen) incited discussions about an international regulation of labour. Admittedly

¹⁰ International Organisation of Employers, *The evolving debate on trade & labour standards*, IOE information paper (Geneve 2006) 2, <https://www.wto.org/english/forums_e/ngo_e/posp63_ioe_e.pdf> accessed 21 July 2019.

¹¹ *ibid* 2.

¹² Stephen S. Golub, *International Labor Standards and International Trade*, International Monetary Fund Working Paper WP/97/37 (1997) *passim*, <<https://www.imf.org/external/pubs/ft/wp/wp9737.pdf>> accessed 21 July 2019.

in the nineteenth century the state focused mainly on the legislation related to the reduction of working time in the civil service, where no risk of international competition existed, but some measures aimed at limiting child labour and night work by women in factories were taken.¹³ The Industrial Revolution, which began in England in the 1800s, caused the working conditions to be intolerable in many European countries. Seeking solutions, in 1802 the English passed an Act which reduced to 12 h a day the employment of children in the textile factories. This Act was the first one that introduced the principle of factory inspection, despite the fact that the predominant belief during that period promoted economic laissez-faire or free-for-all economic development.¹⁴

The linkage between trade and labour was confirmed with the establishment of the ILO in 1919. According to its Constitution, ‘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’. The ILO’s objective was to assure that the development of international trade would not hinder the achievement of progress in the field of labour rights.¹⁵

The connection was strengthened after World War II. The International Labour Conference used formulations that ‘labour is not a commodity’ and that ‘poverty anywhere constitutes a danger to prosperity everywhere’ already in the Declaration of Philadelphia, which was adopted on 10 May 1944, stated the goals of the ILO and was integrated to its Constitution. In this way, it highlighted the need to ensure that the growth of trade should not be at the expense of workers’ rights.¹⁶

The Havana Charter on the International Trade Organization (ITO), agreed in March 1948, constituted an early attempt to include a comprehensive labour provision into the multilateral trade framework.¹⁷ The ITO, a specialised agency

¹³ Arturo Bronstein, *International and Comparative Labour Law. Current challenges* (Palgrave Macmillan, International Labour Office, Geneva 2009) 86; see the cited literature. See also: Paul Bairoch, ‘Brief History of the Social Clause in Trade Policy’ in Mathias Dewatripont, André Sapir, Khalid Sekkat (eds), *Trade and Jobs in Europe: Much Ado about Nothing?* (Oxford University Press, Oxford 1999) 161 et seq.; Werner Sengenberger, ‘International labour standards in a globalised economy: The issues’ in Werner Sengenberger, Duncan Campbell (eds), *International labour standards and economic interdependence. Essays in commemoration of the 75th anniversary of the International Labour Organization and the 50th anniversary of the Declaration of Philadelphia* (International Institute for Labour Studies, Geneva 1994) 4.

¹⁴ Kofi Addo, *Core Labour Standards and International Trade. Lessons from the Regional Context* (Springer, Heidelberg-New York-Dordrecht-London 2015) 79-80.

¹⁵ Olivier De Schutter, *Trade in the Service of Sustainable Development. Linking Trade to Labour Rights and Environmental Standards* (Hart Publishing, Oxford-Portland, Oregon 2015) 7.

¹⁶ *ibid* 8.

¹⁷ David Cheong, Franz Christian Ebert (n 3) 97.

of the United Nations, was seen as an organisation in which countries could gradually agree on how to support international trade in order to ensure that it would contribute to employment and development, and in close cooperation with the United Nations Economic and Social Council. According to its Article 7, ‘The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members 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’. On 6 December 1950 President Truman communicated that the United States would not ratify the ITO Charter. His decision was connected with the considerable opposition from the US Congress, which was afraid that the ITO would represent an excessive check on the US sovereignty. Meanwhile, the General Agreement on Tariffs and Trade (GATT) entered into force in January 1948. It was initially planned to be provisionally applicable with the aim to avoid a sudden suspension of trade flows, but finally it was institutionalised.¹⁸

The Marrakesh Agreement of 15 April 1994 establishing the WTO reinforced the regime of international trade and constituted a step towards its autonomisation. It was the final phase in a process of gradual liberalisation of international trade that began in 1948, and was conducted through a series of trade negotiations organised formally outside the United Nations system, and without any explicit connection to other areas, for example, labour rights, environmental standards or human rights, that were subject to international cooperation.¹⁹ The WTO Agreement (like the GATT) expressly took into account labour standards concerns only in an exception from the GATT obligations regarding prison labour.²⁰

The Singapore Ministerial Declaration adopted at the first WTO Ministerial Conference on 13 December 1996 cut off any attempts to form a clear link between trade and labour rights at multilateral level. It stated as follows: ‘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

¹⁸ Olivier De Schutter (n 15) 8-9.

¹⁹ *ibid* 9-10.

²⁰ David Cheong, Franz Christian Ebert (n 3) 98.

these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration'. Taking the position, within the WTO, that labour rights should not be seen as being related to trade was the consequence of the tension between two conflicting views presented by the United States and the European Union (EU) on the one hand, and developing countries on the other hand. In response to the entry into force of the WTO Agreement in 1995, the United States and the EU intended to establish a relation between global trade and labour standards, which was opposed by developing countries because of their concerns about a loss of their comparative advantage and concerns that this would constitute a justification for protectionism.²¹

Although it is true that the 1998 ILO Declaration on Fundamental Rights and Principles at Work set out certain fundamental labour standards, it repeated the viewpoint from Singapore on the inappropriateness of labour standards jeopardising comparative trade advantages. Moreover, it contributed to the creation of the World Commission on the Social Dimension of Globalization in 2001. The Commission's report of 2004 concentrated on the concept of 'social dimension of globalisation' upon which it was much more simpler to achieve an agreement in comparison with opting for the trade and labour linkage. Multilateral negotiations on labour standards have been moved away from the WTO and moved a bit closer to the ILO, with the eight ILO core labour conventions more frequently referred to in bilateral and regional trade agreements.²²

Another important document is the 2008 ILO Declaration on Social Justice for a Fair Globalization. Its principal objective was to provide an effective promotion of the Decent Work Agenda. It has placed expectations on the ILO committed to ensure that other institutions would show support for the agenda.²³ The Declaration on Social Justice for a Fair Globalization, as it has been pointed out by one of the ILO's officials, can be seen as the ILO's authoritative opinion on the relation between trade and labour. According to the document: 'the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes'.²⁴

²¹ Olivier De Schutter (n 15) 11.

²² Pieter Leenknecht, 'EU Trade Policy and International Labour Standards: The View from the ILO' in Roger Blanpain (ed), Jan Wouters, Glenn Rayp, Laura Beke, Axel Marx (guest eds), *Protecting Labour Rights in a Multi-polar Supply Chain and Mobile Global Economy* (Kluwer Law International, Alphen aan den Rijn 2015) 75-76; see the cited literature.

²³ Olivier De Schutter (n 15) 11.

²⁴ Pieter Leenknecht (n 22) 76.

III. TRADE SANCTIONS

Critics of the use of trade sanctions raise that the construction of the WTO implies that in most cases trade sanctions do not constitute a proper safeguard of compliance with labour standards. Trade sanctions seem to be contrary to the WTO system. As pointed out by C. Kaufmann, generally speaking, international agencies do not sponsor actions that are contrary to their own aims, and the WTO would be doing exactly that by applying trade sanctions. According to the author, the increasing pressure to reduce labour standards is a result of a lack of compensation for the higher costs involved in observing higher labour standards and the subsequent loss of competitive advantage.²⁵ However, D.M. Trubek and L. Compa, supporters of sanctions, give an example of the EU that provides funding transfers to poorer new entrants to facilitate them to meet higher social standards, and infers from this pattern that such funding might be made available through international development agencies for countries that want to comply with international labour standards.²⁶

As indicated by the critics, decisions about imposing sanctions for labour rights infringements would be virtually impossible to achieve within the WTO. This is because the WTO normally acts by consensus, effectively giving every Member a veto. This does not coincide with the ILO's system where conventions can be adopted by a two-thirds majority of delegates but should be ratified before they are binding on a Member State. However, acting by a majority in case of the International Labour Conference comes into question for the securing compliance with the recommendations of a Commission of Inquiry under Article 33 of the ILO Constitution, such as in the case of Myanmar. Bob Hepple expressed his doubts on whether WTO-authorized sanctions would be more effective than action under Article 33,²⁷ which stipulates that 'In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith'. However, the author's scepticism is not synonymous with the need to displace the sanctions from the system of transnational labour

²⁵ Christine Kaufmann, *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law* (Hart Publishing, Oxford-Portland, Oregon 2007) 239-240.

²⁶ David M Trubek, Lance Compa, 'Trade Law, Labor, and Global Inequality' in Paul Carrington, Trina Jones (eds), *Law and Class in America: Trends Since the Cold War* (New York University Press, New York 2006) 239.

²⁷ Bob Hepple, *Labour Laws and Global Trade* (Hart Publishing, Oxford 2005) 150.

regulation. Quite the contrary, persuasion and conciliation will not function unless there is ultimately a sanction that can be invoked.²⁸

Some authors point out that the employment of sanctions may have counterproductive effects. The experience of Bangladesh in 1993 is given as an example. The owners of garment factories in Dhaka dismissed all children below the age of 16 due to the threat of US sanctions under the 1992 Child Labour Deterrence Act. As a result, many of these children ended up as prostitutes and street vendors or in factories and workshops not producing for export. As K. Addo correctly argues, ‘The emphasis on sanctions should not only be in terms of trade and the after-effects considered as social and left to governments of the targeted countries to deal with, but rather the so-called social effects should be considered in the light of whether sanctions are appropriate in correcting what may be regarded as a «social ill»’.²⁹

IV. SOCIAL CLAUSE

The social clause, referred to in this item, has a multilateral or a unilateral source. In the first case, it can form part of a treaty or an international trade agreement. The social clause, included in the treaty or the agreement, would allow to investigate and to impose trade restrictions or fines on countries that have rejected or infringed core labour standards with the objective or result of improving international competitiveness. The social clause was projected in Havana Charter and has increased in importance during the Uruguay Round negotiations between 1986 and 1994 that gave rise to the WTO. However, it was included neither in the Marrakesh Agreement of 15 April 1994 establishing the WTO nor in the Singapore Ministerial Declaration of 1996.³⁰

As has been mentioned above, the social clause can have a unilateral source, being included by a state in its national law on foreign trade. The US government launched this practice in the early 1980s. The US Generalized System of Preferences (GSP) gives the US government the possibility of withdrawing custom duties exemptions to imports coming from countries that do not comply with internationally recognised workers’ rights. Sometimes such a solution is perceived to have better effectiveness than multilateral social clause. As highlighted by A. Bronstein, there is a strong likelihood that the eventuality of having GSP privileges withdrawn constituted a reason for changing labour laws

²⁸ *ibid* 274.

²⁹ Kofi Addo (n 14) 36-37.

³⁰ Arturo Bronstein (n 13) 95.

(especially in order to improve protection of freedom of association) in the Dominican Republic in 1992, Costa Rica in 1993, El Salvador in 1994 and Guatemala some years later. The EU' GSP, in contrast to the US one, refers expressly to the ILO core conventions. Its GSP labour provisions have already been used in Myanmar's case. It was deprived of trade privileges because of the widespread use of forced labour by the government.³¹ A similar method was deployed in case of trade union rights infringements in Belarus. However, this did not give rise to any significant policy change regarding labour standards.³² In addition, GSP labour clauses may entail a danger of having double standard practices as they are developed and applied unilaterally. A country that has introduced a GSP labour clause is the only decision-maker on which country and when would be subject to a GSP investigation and may eventually be excluded from trade benefits.³³ In fact, many observers claim that the EU uses the GSP scheme discretionally and instrumentally with the purpose of pursuing foreign policy goals rather than for safeguarding labour rights.³⁴

V. LABOUR STANDARDS: WITHIN THE ILO, THE WTO OR BOTH

As it has been already mentioned, the ILO does not have the capacity to directly enforce the standards it adopts. It is in position to detect and reveal cases of non-compliance, but it is not able to react to such cases, particularly the more grave the infringements are.³⁵ When we look at the Myanmar case and observe how the ILO legal system really works, we realise that it is not a system ensuring enforcement whatsoever.³⁶ According to F. Maupain, 'a massive project lays before the organisation, but only so long as it does more than survive (...)'.³⁷

³¹ *ibid* 95, 108-109.

³² David Cheong, Franz Christian Ebert (n 3) 107; see the cited literature.

³³ Arturo Bronstein (n 13) 110.

³⁴ Samantha Velluti, 'The EU's social dimension and its external trade relations' in Axel Marx, Jan Wouters, Glenn Rayp, Laura Beke (eds), *Global Governance of Labour Rights. Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edward Elgar Publishing, Cheltenham-Northampton 2015) 50; see the cited literature.

³⁵ Lars Thomann, *Steps to Compliance with International Labour Standards. The International Labour Organization (ILO) and the Abolition of Forced Labour* (VS Verlag für Sozialwissenschaften, Wiesbaden 2011) 339-340.

³⁶ Brian Langille, 'The curious incident of the ILO, Myanmar and forced labour' in Adelle Blackett, Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing, Cheltenham-Northampton 2015) 522.

³⁷ Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing, Oxford-Portland, Oregon 2013) 258.

Although Hepple argued that the WTO is appropriate neither in terms of institutional design nor democratic legitimacy as a body for labour regulation,³⁸ the desperation over the lack of international enforcement mechanisms for worker rights provokes proposals to link labour rights with WTO trade rules.³⁹ As it has been stated, the WTO dispute resolution system is often perceived as ‘the jewel in the crown of the WTO’.⁴⁰ The WTO could contribute to making free trade fair trade through opening this system to labour complaints that exert impact on trade among state parties.⁴¹ The WTO is seen as the best and the only venue where the labour-trade linkage could be realised.⁴²

Cohan Baclawski discusses three crucial arguments as to why the WTO should adopt and has the power to adopt labour standards. The lack of an effective enforcement mechanism is the first one of these arguments. The second point is that the WTO is saddled with the obligation of adopting and enforcing labour standards because they protect basic human rights. Third, the WTO is competent to include labour in its regulation of international trade since labour is an essential aspect of trade.⁴³ Wolfgang and Feuerhake are also among supporters of the incorporation of core labour standards in the WTO – an international organisation endowed with its own personality under international law, and having the possibility of triggering both positive and negative sanctions with the aim of ensuring compliance. Incentives and sanctions are important for an organisation that is expected to administer the core labour standards effectively since the impact of the core labour standards is principally of an economic character, and violations are mainly caused by economic factors. Therefore, the WTO ‘is not only the most appropriate organization to make a serious effort to help achieve international recognition for the core labour standards, but is in fact ideally suited for this purpose. Incorporation of the core labour standards in the WTO regulations is the only appropriate way of doing justice to their claims to validity under international law’.⁴⁴

D.M. Trubek and L. Compa suggest to form transnational labour law in a way that would both articulate global standards and provide means for

³⁸ Bob Hepple, ‘The WTO as a Mechanism for Labour Regulation’ in Brian Bercusson, Cynthia Estlund (eds), *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions* (Hart Publishing, Oxford-Portland, Oregon 2008) 161 et seq.

³⁹ See Gary Vause, ‘Labor Issues in International Trade’ (2000) 51 *Labor Law Journal*, 92.

⁴⁰ Joshua M. Kagan (n 5) 223; Brittany Cohan Baclawski (n 5) 260.

⁴¹ Joshua M. Kagan (n 5) 223.

⁴² *ibid* 224.

⁴³ Brittany Cohan Baclawski (n 5) 239-240.

⁴⁴ Hans-Michael Wolfgang, Wolfram Feuerhake, ‘Core Labour Standards in World Trade Law. The Necessity for Incorporation of Core Labour Standards in the World Trade Organization’ (2002) 36 *Journal of World Trade*, 900-901.

enforcement. According to the authors, such a system could be established jointly by the WTO and the ILO.⁴⁵ The WTO could adopt labour standards and labour rights into its trade disciplines and any trade-related sanctions could be based on conclusive findings by the ILO.⁴⁶

VI. THE CONCEPT OF A GLOBAL LABOUR AND TRADE FRAMEWORK AGREEMENT (GLTFA)

The concept of a GLTFA – K. Addo’s proposal based on international framework agreements and ILO tripartite system – has the potential to meet the needs for the above-mentioned mechanism. It is projected that the GLTFA would be accommodated to suit regional trade agreements, thus creating a regional labour and trade framework agreement (RLTFA) as part of future regional trade agreements. The joint ILO/WTO enforcement mechanism should not only fill the gap between adherence to the core labour standards and international trade, but also should have a positive impact on economic growth and social justice.⁴⁷

As K. Addo rightly noted, the ILO and the WTO are not prepared to handle the linkage problem individually without encroaching on each other’s area of expertise. Additionally, there is a plethora of competing issues. For this reason, the foundation of a multilateral enforcement mechanism built on a new governance structure is required. On the one hand, it should create conditions for wider participation in the formulation of policy at the national, regional and multilateral levels, in a way that would allow making balanced decisions. On the other hand, an enforcement regime can be accomplished with the participation of all the ILO’s and WTO’s Member states, and the employers’ and workers’ groups, too. The participation of Member states both in the standards creation process and in the enforcement mechanisms would guarantee that no single state gains an unfair advantage by weakening its labour standards. Thus, the fear of protectionism would be reduced and the ‘race to the bottom’ phenomenon would be avoided. The proposal consists of a joint mechanism agreed by the ILO’s and the WTO’s Members, and signed by governments, employers’ associations and global unions on behalf of all workers and in the operations of all multinational corporations

⁴⁵ David M. Trubek, *Lance Compa* (25) 239. Similarly: Thomas Cottier, ‘The Common Law of International Trade and the Future of the World Trade Organization’ (2015) 18 *Journal of International Economic Law* 17-18. Doi: 10.1093/jiel/jgv005. According to this author: ‘Addressing labour standards calls for close cooperation between the WTO and the ILO’.

⁴⁶ David M. Trubek, *Lance Compa* (n 26) 239.

⁴⁷ Kofi Addo (n 14) 320-321, 329.

(MNCs) involved across their operations worldwide. It should connect the respect for the core labour standards with international trade. Kofi Addo's intention is not to set up a new mechanism but to take advantage of what already exists: for the ILO, the Committee of Experts and their technical cooperation programmes and, for the WTO, the Trade Policy Review Mechanism and panel procedures. The ILO/WTO labour and trade commission should deal with the issues that result from the linkage, depending on the particular core labour standard under challenge. In case of a complaint filed against the ILO's or the WTO's Member state, and activities of an MNC within a Member state, the work of the commission, formed on an ad hoc basis, should split the procedure for: first, determination phase and, second, remedy for the alleged offence. During the initial determination phase, the commission would need to estimate whether the state or MNC has demonstrated a consistent pattern of gross and reliably attested violations of the core labour standards and determine the extent of the practice, too. The ILO should use similar procedures under its complaint procedure but in conjunction with the WTO. When a complaint is made, the ILO Governing Body and the WTO General Council should form an Inquiry Commission. It would consist of five independent members: two of them selected by the ILO Governing Body, two by the WTO General Council and the fifth – Chairperson – shall be chosen by both the Director Generals of the ILO and the WTO. The crucial aim of the Inquiry Commission would be to determine whether a consistent breach of the core labour standards has taken place and how it influences trade relations. The Inquiry Commission would initiate the second phase if it reveals that there have been infringements and there has been an impact on trade relations. It would focus on how to remedy the situation, on the appropriate measures to apply and on the timeline for eventual resolution. The second stage should be devoted to implementing the recommendations of the Inquiry Commission. On the one hand, the ILO would verify whether the infringements have terminated and would decide what assistance to provide through its technical cooperation programmes. On the other hand, the WTO would state how the practices have influenced trade flows and provide an evaluation. Then, both organisations would supervise the compliance programme put in place and make a decision to apply sanctions. The activities of both organisations in the area of cooperation should follow the ILO reporting procedures and the WTO Trade Policy Review Mechanism, whereas the work of the Inquiry Commission should be based on the GLTFA developed by both organisations.⁴⁸

⁴⁸ *ibid* 321-323; see the cited literature.

VII. CONCLUSION

With a view to ensuring economic growth, social justice and the effectiveness of core labour standards, opportunities are sought to combine labour standards with international trade. The goal, from a labour lawyer standpoint, is to uncover an equilibrium path between strengthening the workers' rights and free trade and investment. This article explored some ways in which the desired aim could potentially be achieved. Some have suggested that the solution lies in the social clause, whereas others suggested that trade sanctions should be imposed on countries that do not comply with core labour standards. Another part of the doctrine contends that labour standards should be left to the ILO. There are also those who claim that labour standards should be encompassed by the WTO agenda. I brought together several strands of the literature in order to demonstrate that such solutions are not without limitations and shortcomings. It can be argued that the most convincing views are ones that try to combine the ILO's and the WTO's forces. Particular attention should be paid to the concept of a GLTFA, developed by K. Addo. Like the author whose work I draw upon, I am, however, keen to move beyond a simple combination of power of both organisations. I share the view that the foundation of a multilateral enforcement mechanism should rest on the principle of participation and should be agreed by the ILO's and the WTO's Members, and signed by governments, employers' associations and global unions. It is clear that the shape of the project requires development, but my main concern is elsewhere. The problem appears to be lack of willingness on the part of organisations. They seem to be satisfied with the existing collaboration between them, that is, 'participation by the WTO in meetings of ILO bodies, the exchange of documentation and informal cooperation between the ILO and WTO Secretariats'.⁴⁹ According to the information that can be found on the WTO's website, 'The WTO Secretariat maintains technical exchanges with the International Labour Organization with a view to helping members' global economic policies. Activities range from compiling statistics, research and technical assistance and training'.⁵⁰ For this reason, further extensive debate concerning this issue is needed. To sum up, these organisations need to understand that their potential is much greater than what they are right now. The cooperation should not be limited to the actions listed above.

It must also be recognised that the concept of a GLTFA is only part of the story. A multilevel approach should be adopted when assessing the trade and labour linkage. Currently, references to labour rights are included in many trade

⁴⁹ <https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm> accessed 21 July 2019.

⁵⁰ <https://www.wto.org/english/thewto_e/coher_e/wto_ilo_e.htm> accessed 21 July 2019.

agreements⁵¹ for a number of rationales, that is, economic, social and human rights.⁵² According to the ILO, from only four trade agreements with labour provisions in 1995 this number had risen to 21 in 2005 and to 58 of such agreements by June 2013, out of the 248 trade agreements listed in the WTO's Regional Trade Agreements Information System.⁵³ As of December 2015, there were 76 such trade agreements.⁵⁴ Besides, the analysis of – inter alia – supply chain management, corporate codes of conduct, product labelling, procurement policy and generalised system of preferences should be included in the debate.⁵⁵

References

Addo Kofi, *Core Labour Standards and International Trade. Lessons from the Regional Context* (Springer, Heidelberg-New York-Dordrecht-London 2015)

Bairoch Paul, 'Brief History of the Social Clause in Trade Policy' in Mathias Dewatripont, André Sapir, Khalid Sekkat (eds), *Trade and Jobs in Europe: Much Ado about Nothing?* (Oxford University Press, Oxford 1999)

Bercusson Brian, Estlund Cynthia, 'Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions' in Brian Bercusson, Cynthia Estlund (eds), *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions* (Hart Publishing, Oxford-Portland, Oregon 2008)

Bhagwati Jagdish, 'Trade Liberalisation and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues' (1995) 18 *The World Economy*

Bronstein Arturo, *International and Comparative Labour Law. Current challenges* (Palgrave Macmillan, International Labour Office, Geneva 2009)

Cheong David, Ebert Franz Christian, 'Labour law and trade policy: What implications for economic and human development?' in Shelley Marshall, Colin Fenwick (eds), *Labour Regulation and Development. Socio-Legal Perspectives* (Edward Elgar Publishing, Cheltenham-Northampton 2016)

Cohan Baclawski Brittany, 'Re-Thinking the WTO's Relationship to International Labor Standards: Is It Finally Time for a Global Approach' (2016) 48 *Georgetown Journal of International Law*

⁵¹ Olivier De Schutter (n 14) 11.

⁵² The economic rationale is based on the assumption that labour provisions should be used as instruments against unfair competition. The social rationale mirrors concerns about guaranteeing social protection. The human rights rationale perceives labour provisions as a measure to generally improve labour standards and to assure respect for human labour rights reflecting values universally accepted by the international community. See Samantha Velluti (n 33) 43-44.

⁵³ ILO, *Social Dimensions of Free Trade Agreements* (ILO, Geneva 2013) 19.

⁵⁴ ILO, *Assessment of Labour Provisions in Trade and Investment Arrangements. Studies on Growth with Equity* (ILO, Geneva 2016) 1.

⁵⁵ *International Organisation of Employers* (n 9) 7 et seq.

Cottier Thomas, 'The Common Law of International Trade and the Future of the World Trade Organization' (2015) 18 *Journal of International Economic Law*

De Schutter Olivier, *Trade in the Service of Sustainable Development. Linking Trade to Labour Rights and Environmental Standards* (Hart Publishing, Oxford-Portland, Oregon 2015)

Dral Antoni, 'Uwarunkowania modelu ochrony trwałości stosunku pracy w polskiej gospodarce rynkowej w dobie globalizacji' in Stanisław Sagan (ed), *Państwo i prawo w dobie globalizacji* (Wydawnictwo Uniwersytetu Rzeszowskiego, Rzeszów 2011)

Golub Stephen S., *International Labor Standards and International Trade*, International Monetary Fund Working Paper WP/97/37 (1997) passim, <<https://www.imf.org/external/pubs/ft/wp/wp9737.pdf>> accessed 21 July 2019

Hepple Bob, *Labour Laws and Global Trade* (Hart Publishing, Oxford 2005)

Hepple Bob, 'The WTO as a Mechanism for Labour Regulation' in Brian Bercusson, Cynthia Estlund (eds), *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions* (Hart Publishing, Oxford-Portland, Oregon 2008)

ILO, *Assessment of Labour Provisions in Trade and Investment Arrangements. Studies on Growth with Equity* (ILO, Geneva 2016)

ILO, *Social Dimensions of Free Trade Agreements* (ILO, Geneva 2013)

International Organisation of Employers, *The evolving debate on trade & labour standards*, IOE information paper (Geneve 2006) 2, <https://www.wto.org/english/forums_e/ngo_e/posp63_ioe_e.pdf> accessed 21 July 2019

Kagan Joshua M., 'Making Free Trade Fair: How the WTO Could Incorporate Labor Rights and Why It Should' (2011) 43 *Georgetown Journal of International Law*

Kaufmann Christine, *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law* (Hart Publishing, Oxford-Portland, Oregon 2007)

Langille Brian, 'General Reflections on the Relationship of Trade and Labor (Or: Fair Trade Is Free Trade's Destiny)' in Jagdish Bhagwati, Robert E. Hudec (eds.), *Fair Trade & Harmonization: Prerequisites for Free Trade? Vol. 2 Legal Analysis* (MIT Press, Cambridge, Mass., 1996)

Langille Brian, 'The curious incident of the ILO, Myanmar and forced labour' in Adelle Blackett, Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing, Cheltenham-Northampton 2015)

Leenknecht Pieter, 'EU Trade Policy and International Labour Standards: The View from the ILO' in Roger Blanpain (ed), Jan Wouters, Glenn Rayp, Laura Beke, Axel Marx (guest eds), *Protecting Labour Rights in a Multi-polar Supply Chain and Mobile Global Economy* (Kluwer Law International, Alphen aan den Rijn 2015)

Maupain Francis, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing, Oxford-Portland, Oregon 2013)

McDougall Robert, 'Crisis in the WTO. Restoring the WTO Dispute Settlement Function' (2018) 194, <<https://www.cigionline.org/publications/crisis-wto-restoring-dispute-settlement-function>> accessed 22 July 2019

Moorman Yasmin, 'Integration of ILO Core Rights Labor Standards into the WTO' (2001) 39 *Columbia Journal of Transnational Law*

Sengenberger Werner, 'International labour standards in a globalized economy: The issues' in Werner Senegenberger, Duncan Campbell (eds), *International labour standards and economic interdependence. Essays in commemoration of the 75th anniversary of the International Labour*

Organization and the 50th anniversary of the Declaration of Philadelphia (International Institute for Labour Studies, Geneva 1994)

Thomann Lars, *Steps to Compliance with International Labour Standards. The International Labour Organization (ILO) and the Abolition of Forced Labour* (VS Verlag für Sozialwissenschaften, Wiesbaden 2011)

Trubek David M., Compa Lance, 'Trade Law, Labor, and Global Inequality' in Paul Carrington, Trina Jones (eds), *Law and Class in America: Trends Since the Cold War* (New York University Press, New York 2006)

Velluti Samantha, 'The EU's social dimension and its external trade relations' in Axel Marx, Jan Wouters, Glenn Rayp, Laura Beke (eds), *Global Governance of Labour Rights. Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edward Elgar Publishing, Cheltenham-Northampton 2015)

Wolfgang Hans-Michael, Feuerhake Wolfram, 'Core Labour Standards in World Trade Law. The Necessity for Incorporation of Core Labour Standards in the World Trade Organization' (2002) 36 *Journal of World Trade*