The Challenge of Child Labour in International Law

Child labour remains a widespread problem around the world. Over 200 million children can be regarded as child labourers, and about 10 million children are involved in producing either agricultural or manufactured products for export.

Franziska Humbert explores the status of child labour in international law. Offering a wide-ranging analysis of the problem, she examines the various UN and ILO instruments and reveals the weaknesses of the current frameworks installed by these bodies to protect children from economic exploitation. After assessing to what extent trade measures such as conditionalities, labelling and trade restrictions, and promotional activities can reduce child labour, she suggests an alternative legal framework which takes into account the needs of children.

Franziska Humbert is a policy adviser on labour standards with Oxfam Germany and a research fellow in the Swiss academic research NCCR project on trade regulation in the field of trade and human rights at the University of Zurich.
Established in 1946, this series produces high quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal sub-disciplines, developments since 1946 confirm their interrelation.

Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflicts rules are frequently dealt with by substantive harmonisation of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to ‘foreign affairs’, and to the implementation of international norms, are a focus of attention.

The Board welcomes works of a theoretical or interdisciplinary character, and those focusing on the new approaches to international or comparative law or conflicts of law. Studies of particular institutions or problems are equally welcome, as are translations of the best work published in other languages.

**General Editors**
James Crawford SC FBA  
*Whewell Professor of International Law, Faculty of Law, and Director, Lauterpacht Research Centre for International Law, University of Cambridge*  
John S. Bell FBA  
*Professor of Law, Faculty of Law, University of Cambridge*

**Editorial Board**
Professor Hilary Charlesworth *Australian National University*  
Professor Lori Damrosch *Columbia University Law School*  
Professor John Dugard *Universiteit Leiden*  
Professor Mary-Arn Glendon *Harvard Law School*  
Professor Christopher Greenwood *London School of Economics*  
Professor David Johnston *University of Edinburgh*  
Professor Hein Kötz *Max-Planck-Institut, Hamburg*  
Professor Donald McRae *University of Ottawa*  
Professor Onuma Yasuaki *University of Tokyo*  
Professor Reinhard Zimmermann *Universität Regensburg*

**Advisory Committee**
Professor D. W. Bowett QC  
Judge Rosalyn Higgins QC  
Professor J. A. Jolowicz QC  
Professor Sir Elihu Lauterpacht CBE QC  
Judge Stephen Schwebel

*A list of books in the series can be found at the end of this volume.*
The Challenge of Child Labour in International Law

Franziska Humbert
Contents

List of abbreviations  page xii
Foreword xv
Acknowledgements xvii

Introduction 1
A. Trade measures on child labour 1
   I. The problem of child labour and the international community 1
   II. The trade and labour linkage 2
B. Contents 11
C. Some definitions 12
   I. Trade sanctions and trade measures 12
   II. Effectiveness 13

1. The problem of child labour 14
   A. Introduction 14
   B. Defining child labour 14
      I. Introduction 14
      II. Historical and cultural perspectives of childhood 15
      III. The concept of child labour 17
   C. Forms of child labour 19
      I. Hazardous working conditions 19
      II. Domestic service 20
      III. Street children 21
      IV. The informal economy 21
      V. The unconditional worst forms of child labour 21
D. Statistics: Distribution of child labour 22
E. Causes of child labour 25
   I. Supply-side factors 25
   II. Demand-side factors 29
F. Economic consequences of child labour 31
G. Strategies for combating child labour 31
   I. Introduction 31
   II. Action against child labour 31
H. Conclusion of Chapter 1 33

2. The prohibition of child labour in international law 35
   A. Introduction 35
   B. UN conventions and protocols and the Universal Declaration of Human Rights 35
      I. The Slavery Convention 35
      II. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 38
      III. The Universal Declaration of Human Rights – Art. 4 45
      IV. The International Covenant on Civil and Political Rights – Art. 8 53
      V. The International Covenant on Civil and Political Rights – Art. 24 (1) 61
      VI. The International Covenant on Economic, Social and Cultural Rights – Art. 10 (3) 62
      VII. The Convention on the Rights of the Child – Art. 32 67
      VIII. The Convention on the Rights of the Child – Art. 34 75
      IX. The Convention on the Rights of the Child – Art. 35 77
      XI. The Convention on the Rights of the Child – Art. 38 78
      XII. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts 79
      XIII. The scope of the prohibition of exploitative child labour under UN conventions, protocols and the UDHR 80
   C. ILO conventions and the ILO Declaration on Fundamental Principles and Rights at Work 82
I. Convention concerning Forced or Compulsory Labour No. 29 82
II. Convention concerning the Abolition of Forced Labour No. 105 86
III. Conventions concerning conditions of work and employment 87
IV. Minimum Age Convention No. 138 and Recommendation No. 146 88
V. Convention on the Worst Forms of Child Labour No. 182 95
VI. The ILO Declaration on Fundamental Principles and Rights at Work 103
VII. The scope of the prohibition of child labour under ILO conventions, recommendations and the ILO Declaration on Fundamental Principles and Rights at Work 107

D. The protection from exploitative child labour as customary law 110
E. The protection from exploitative child labour as a general principle of law 110
F. The protection from exploitative child labour as ius cogens 114
G. Conclusion of Chapter 2 119

3. UN and ILO implementation mechanisms for the prohibition of child labour 122
A. Introduction 122
B. The UN human rights implementation mechanism 123
   I. Introduction 123
   II. The treaty-based system 124
   III. Extra-constitutional UN procedures 145
   IV. Conclusion 153
C. The ILO Implementation System 154
   I. Introduction 154
   II. The supervisory bodies 155
   III. The regular supervisory system 155
   IV. The follow-up under the ILO Declaration on Fundamental Principles and Rights at Work 167
   V. The special procedures 172
   VI. Promotional activities 178
VII. Case study – Myanmar 183
VIII. Evaluation of the ILO implementation system 192
D. Conclusion of Chapter 3 194

4. Trade measures on child labour 195
   A. Introduction 195
   B. Social clauses in regional and bilateral trade agreements 195
      I. Introduction 195
      II. US Free Trade Agreements 197
      III. EU Economic Agreements 253
      IV. Conclusion 279
   C. Social clauses in Generalized Systems of Preferences 284
      I. Introduction 284
      II. The US GSP 285
      III. The EU GSP 300
      IV. Conclusion 315
   D. Unilateral and other national trade measures on child labour 318
      I. Introduction 318
      II. Section 307 of the US Tariff Act of 1930 318
      III. The Massachusetts Act on Burma (Myanmar) 322
      IV. The Belgian Social Label Law 323
      V. The Kimberley Process Certification Scheme 329
      VI. Conclusion 331
   E. Corporate social responsibility 332
      I. Introduction 332
      II. Codes of conduct 336
      III. Social labelling 360
      IV. Socially responsible investment 366
      V. Global reporting 367
      VI. Other employer/TNC initiatives 368
      VII. Evaluation 371
   F. Conclusion of Chapter 4 373

5. Recommendations for an ILO–WTO enforcement regime 376
   A. Introduction 376
   B. Addressing the fear of protectionism 377
Abbreviations

ACP  African Caribbean Pacific
ACTA  Alien Tort Claims Act
AFL–CIO  The American Federation of Labour–Congress of Industrial Organizations
AGOA  African Growth and Opportunity Act
ASEAN  Association of South East Asian Nations
BGMEA  Bangladeshi Garment Manufacturers and Exporters Association
BSCI  Business Social Compliance Initiative
CAFTA  Central American Free Trade Agreement
CARIFORUM  Caribbean Forum of African, Caribbean and Pacific States
CCC  Clean Clothes Campaign
CIR  Christliche Initiative Romero
CRC  Convention on the Rights of the Child
DSU  Dispute Settlement Understanding
EBA  Everything but Arms
EC  European Community
ECE  Evaluation Committee of Experts
ECHR  European Commission of Human Rights
ECJ  European Court of Justice
ECOSOC  Economic and Social Council
EPA  Economic Partnership Agreement
EPZ  Export Processing Zone
ETI  Ethical Trading Initiative
ETUC  European Trade Union Confederation
EU  European Union
FIFA  Fédération Internationale de Football Association
FLA Fair Labour Association
FLSA Fair Labor Standards Act
FTA Free Trade Agreement
FTA Free Trade Area of the Americas
GAO General Accounting Office
GATT General Agreement on Tariffs and Trade
GB Governing Body
GRI Global Reporting Initiative
GSP Generalised System of Preferences
HRC Human Rights Committee
ICC International Criminal Court
ICCPR International Covenant on Civil and Political Rights
ICESCR International Covenant on Economic, Social and Cultural Rights
ICFTU International Confederation of International Trade Unions
ICJ International Court of Justice
IFWEA International Federation of Workers’ Educations Associations
ILC International Law Commission
ILRF International Labour Rights Fund
ILO International Labour Organization
IOE International Organization of Employers
IPEC International Programme on the Elimination of Child Labour
IRRC Investor Responsibility Research Centre
ISO International Organization for Standardization
ITUC International Trade Union Confederation
IUF International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations
LAC Labour Advisory Committee
LDC Least Developed Country
MERCOSUR Mercado Commun del Sur
MFA Multifibre Agreement
NAALC North American Agreement on Labor Cooperation
NAFTA North American Free Trade Agreement
NGO Non-governmental Organisation
OECD  Organisation for Economic Cooperation and Development
OHCHR  Office of the High Commissioner for Human Rights
OJ  Official Journal of the European Union
ORSE  Observatoire sur la Responsabilité Sociétale des Entreprises
Oxfam  Oxford Committee for Famine Relief
ppm  process and production method
SACCS  South Asian Coalition on Child Servitude
SAI  Social Accountability International
SIMPOC  Statistical Information and Monitoring Programme on Child Labour
SRI  Socially Responsible Investment
TBP  time-bound programme
TNC  Transnational Corporation
TPSC  Trade Policy Staff Committee
Tralac  Trade Law Centre for Southern Africa
UDHR  Universal Declaration of Human Rights
UN  United Nations
UNAIDS  United Nations Joint Programme on HIV/AIDS
UNCTAD  United Nations Conference for Trade and Development
UNDP  United Nations Development Programme
UNESCO  United Nations Educational, Scientific and Cultural Organization
UNICEF  United Nations Children’s Fund
USAID  United States Agency for International Development
USTR  Office of the United States Trade Representative
VCLT  Vienna Convention on the Law of Treaties
WFSGI  World Federation of the Sporting Goods Industry
WRAP  Worldwide Responsible Apparel Production Principles
WTO  World Trade Organization
Foreword

Around the world, millions of children under the age of fifteen are engaged in the work force, often lacking proper education and schooling. Child labour has remained one of the great dilemmas of our time in particular, but not exclusively, in developing countries. Families still depend upon income generated by children who in turn miss out on education, and fail to make progress and build prosperity for coming generations in a world that is increasingly shaped by knowledge and information. Child labour causes social, educational and economic problems, primarily in the domestic realm of each country and society. It is a core issue of domestic educational and economic policies. It cannot be ignored in development cooperation. As a problem of human rights protection with implications for the conditions of competition in international trade, it also features prominently in public international law. This is the topic of the present book. Franziska Humbert offers a rich and detailed account of the causes, instruments and problems relating to the monitoring and implementation of what essentially amounts to a ban of child labour in international law.

The book expounds the distressing facts and context of exploiting child labour and its various forms at different levels of social and economic development in great detail. The exploration of the legal framework amounts to a careful analysis of the various instruments. The author starts with the impact of the human rights instruments of the United Nations and the numerous instruments of the International Labour Organization. She focuses on implementation and enforcement and the different avenues available, ranging from moral suasion (name and shame) to support measures in terms of development aid. The work then turns to focus on trade-related measures and inquires to what extent trade measures, ranging from conditionalities, labelling and
trade restrictions, and promotional activities can be lawfully employed to the benefit of reducing child labour around the world. She extensively deals with options for unilateral measures in the field. The book concludes by proposing a multilateral enforcement mechanism by the World Trade Organization and International Labour Organization.

The timely book offers an important source of information and argument in the field. Child labour still ranges among the many unsettled issues of trade and human rights, and the book offers insights and foundations as to how a better equilibrium could be found to balance the two fields within an agenda of sustainable development. The proper shaping of core labour standards and social clauses under WTO law is impending and awaits solutions. While international law offers ample foundations for action, the tools to do so are far from satisfactory at this point in time.

Franizska Humbert makes a remarkable contribution to this effect. She undertook her research at the World Trade Institute with enthusiasm and perseverance, working within a research group in trade and human rights within the Swiss National Centre of Competence on Research (NCCR) Trade Regulation, hosted at the World Trade Institute. The book is based upon her PhD admitted by the Faculty of Law, University of Bern, in 2007. She was able to combine her work with practical experience working with Oxfam. It was truly enriching to work with her.

Thomas Cottier
Bern, February 2009
Acknowledgements

This book is based on the inaugural dissertation ‘The Challenge of Child Labour in International Law: Instruments, Implementation and the Effectiveness of Trade-Related Measures’ to obtain the degree of a Doctor in Law by the Faculty of Law of the University of Berne.

The Faculty has approved this thesis as a dissertation on basis of the application of the two examiners Prof. Thomas Cottier and Prof. Christine Kaufmann without giving a judgement on the opinion expressed in the thesis.

I am particularly thankful to Thomas Cottier and Christine Kaufmann for their support and useful comments. I have greatly benefited from discussions with Katja Gehne, Elisabeth Tuerk, Andreas Bluethner, Lisa Buergi, Christian Tietje, Lorand Bartels, Jonell Goco, Martin Michaelis, Simon Walker, Steven Oates, Caroline Dommen and Gabrielle Marceau.

I am also grateful to my parents for their support.

Franziska Humbert
May 2009
Introduction

A. TRADE MEASURES ON CHILD LABOUR

This study examines whether the prohibition of child labour in international law should be imposed through trade measures. It explores the status of child labour in international law and asks whether the existing legal framework should be complemented by trade measures.\(^1\) It seeks to define an appropriate framework in international law.

I. The problem of child labour and the international community

The problem of child labour has existed for a long time. Whilst it was prevalent in Europe during the Industrial Revolution in the nineteenth century, it still exists on a large scale in developing countries in Asia, Africa and Latin America. From the end of the 1980s, the international community has increasingly recognised the need for action. Starting with the adoption of the Convention on the Rights of the Child (CRC) in 1989, followed by the World Summit for Children in 1990,\(^2\) the adoption of various soft law instruments such as the Programme of Action for the Elimination of the Exploitation of Child Labour\(^3\) and the United Nations (UN) Special Session of the General Assembly in 2002,\(^4\)

---

\(^1\) The case law, as well as scholarly writing up to 30 September 2008, is considered.


the UN undertook various efforts to promote the rights of children, including addressing the problem of child labour.

Likewise, in 1998, in an effort to take up the challenges of globalisation, the International Labour Organization (ILO) adopted the ILO Declaration on Fundamental Principles and Rights at Work,\(^5\) which referred *inter alia* to the effective abolition of child labour, and, in 1999, the Convention on the Worst Forms of Child Labour. In addition, the ILO considerably increased its International Programme on the Elimination of Child Labour (IPEC).\(^6\)

As well as efforts undertaken by ILO and UN bodies, various trade measures have increasingly been introduced since the 1990s to solve the problem of child labour. Examples are the proposed US Harkin Bill banning goods made with child labour\(^7\) or private sector action such as the adoption of codes of conduct by transnational corporations in response to criticism by civil society and exposure in the media.\(^8\) Also, at an international level, there have been efforts to link trade and labour standards. The linkage of trade and child labour is thus worth exploring.

**II. The trade and labour linkage**

The trade and labour debate is not new. Already during the Industrial Revolution in Europe in the nineteenth century, there were concerns that trade pressures would hinder the adoption of domestic laws for the elimination of child labour.\(^9\) Most importantly, the ILO Constitution as established by the Treaty of Versailles states in its Preamble:

---


\(^6\) As of 2005, IPEC was operating in eighty-six countries, ILO, *The End of Child Labour: Within Reach, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: International Labour Office, 2006), para. 118.

\(^7\) The Child Labour Deterrence Act was introduced various times, for the first time in 1992 by Senator Harkin, see Harkin, Child Labour Deterrence Act of 1999, Senate 1551–106th Congress.


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; . . .

While unfair competitive advantages resulting from low labour standards were apparently in the minds of the drafters, human dignity was the underlying principle.

The Declaration of Philadelphia of 1944 reaffirmed the fundamental principles of the ILO and broadened its mandate stating inter alia that labour is not a commodity, that poverty anywhere constitutes a danger to prosperity everywhere, and that the ILO will address the social implications of economic and financial policies and fully cooperate with international bodies promoting a high and steady volume of international trade. It thus foresaw the necessity of linking economic and financial policies and measures with the fundamental objective of social justice.

Another example of the trade and labour link is the 1948 Havana Charter providing for the establishment of the International Trade Organization, which did not enter into force. One of the purposes of the Charter was:

(6) To facilitate, through consultation and cooperation, the solution of problems relating to international trade, employment, economic development, commercial policy, business practices, and commodity policy.

Art. 7 of Chapter II on Employment and Economic Activity reads:

1. The Members recognize that measures relating to employment must take fully into account the rights of workers under intergovernmental 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.

2. Members which are also members of the International Labour Organization shall cooperate with that organization in giving effect to this undertaking.

3. In all matters relating to labour standards that may be referred to the Organization in accordance with Articles 94 or 95, it shall consult and cooperate with the International Labour Organization.14

Thus, the drafters of the Havana Charter also recognised the interaction between trade and labour. The main concern was however not humane conditions but that low labour standards could be an obstacle to international trade.

As indicated above, there are also more recent examples of the trade and labour linkage.

1. The current state of affairs

Recent examples are so-called ‘social clauses’ in trade incentive regimes and in an increasing number of regional and bilateral trade agreements. For the purpose of this work, the term ‘social clause’ is broadly defined and refers to any linkage of trade rules and rules relating to labour standards in one international agreement.15 However, on the global level, efforts to link trade and labour so far have failed.

When the trade and labour debate restarted in the mid 1990s in the context of the Copenhagen Social Summit, the issue of a trade and labour linkage was firmly rejected and led to the creation of the Working Party of the Social Dimensions of the Liberalization of International Trade.16 An agreement was also reached that the ILO supervisory

---

15 See also G. van Liemt, ‘Minimum Labour Standards and International Trade: Would a Social Clause Work?’, International Labour Review, 128 (4) (1989), 433–48, 434 who defines a social clause as a clause that ‘aims at improving labour conditions in exporting countries by allowing sanctions to be taken against exporters who fail to observe minimum standards. A typical social clause in an international trade agreement makes it possible to restrict or halt the importation or preferential importation of products originating in countries, industries or firms where labour conditions are inferior to certain minimum standards.’
system needed to be strengthened but that no fundamental reform or overhaul by the introduction of trade sanctions was required. Likewise, the introduction of an explicit multilateral social clause into the World Trade Organization (WTO) was rejected at the first Ministerial Conference of the WTO held in Singapore. Proposed by Michael Hansenne, former Director-General of the ILO, in the conference and strongly supported by the US, it was opposed by a substantial number of developing countries and the UK. On the general issue of linkage between trade and labour standards, a compromise was reached in the final Ministerial Declaration:

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

Whilst it is noteworthy that labour standards are mentioned in an official WTO document, there was no further progress, for example by establishing a WTO Committee on trade and labour. This might be due to the strong opposition of developing countries to an explicit social clause and further initiatives in that direction. The main reason for this reluctance is the fear of disguised protectionism: a social clause only aims to take away the comparative advantages of developing countries and to weaken their competitiveness.

The ILO Declaration on Fundamental Principles and Rights at Work from 1998 reiterated that labour standards should not be used for...
protectionist purposes. However, the recent ILO Declaration on Social Justice for a Fair Globalization adopted in June 2008 constitutes a shift in the debate, stating that 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.

Thus, increasing national economic growth should not take primacy over achieving the fulfilment of fundamental rights at work. Most importantly, the Declaration on Social Justice for a Fair Globalization highlights that the ILO has a key role to play in placing decent work at the centre of economic policies and invites other international organisations in related fields to contribute to the promotion of decent work. Hence, it is timely to explore the question of a trade and child labour linkage at the international level.

2. Different rationales for the linkage

Although the most obvious reason why trade and labour should be linked in international law is that labour is the main component of production, there is an extensive debate in academia as to whether such linkage is indeed recommendable. One can distinguish four main approaches to the trade and labour debate.

a) The fair trade/free trade debate

The first group of arguments focuses on the fair trade/free trade debate. As indicated above, the Preamble of the ILO Constitution and the Havana Charter suggest that the prevailing rationale for the adoption of social clauses to date has been fair competition. In a similar vein, advocates of a trade and labour linkage argue that ‘fair trade is free trade’s destiny’,

---

23 Para. 5 of the ILO Declaration on Fundamental Principles and Rights at Work.
25 Preamble, section I A and section II C of the ILO Declaration on Social Justice for a Fair Globalization.
27 Whether this holds true for the more recent social clauses in regional and bilateral trade agreements will be examined during the course of this work.
and that there is no way for trade policy to be insulated from the political
issues at stake including labour relations. It is held that the absence of a
social clause is an unfair trade advantage. Brown, Deardoff and Stern,
who argue that the case for the harmonisation of international labour
standards is rather weak, exempt child labour, stating that, in this case,
there are current allocations that are highly inadequate. Trade could
therefore be considered to be ‘unfair’. Likewise, Bhagwati, who usually
argues against social clauses, maintains that exploitative child labour
should be prohibited on a global scale, although such a prohibition
contained in a trade agreement would not be very effective.

Many countries – mostly developing – often argue that divergent
labour standards are just another comparative advantage. In their
view, it would contradict the rationale of the WTO to make high labour
standards a legal condition. They reject the incorporation of labour
standards into trade agreements as disguised protectionism.

Whether fair competition indeed requires the inclusion of labour
standards into a trade agreement from an economic point of view is
however subject to much debate. While it is obvious that labour
standards have an impact on the competitiveness of economic players,
the precise effect of labour standards on terms of trade is not clear in
economic theory.

28 B. A. Langille, ‘General Reflections on the Relationship of Trade and Labour (Or: Fair
Trade is Free Trade’s Destiny)’ in J. Bhagwati, R. Hudec (eds.), Fair Trade and Harmonization,

Trade’, 178; D. Ehrenberg, ‘The Labour Link: Applying the International Trading System
to Enforce Violations of Forced and Child Labour’, Yale Journal of International Law, 20

30 D. K. Brown, A. V. Deardoff, R. M. Stern, ‘International Labour Standards and Trade:
A Theoretical Analysis’ in J. N. Bhagwati, R. Hudec (eds.), Fair Trade and Harmonization,

31 Ibid.

32 Interview with J. N. Bhagwati in Die Zeit, 23 November 2006.

33 See for example statements of ministers made at the Third Ministerial Conference
of the WTO in Seattle, GB.277/WD/SDL/2(Add.1).

34 Singapore Ministerial Declaration, WT/MIN (96) /DEC, adopted on 13 December 1996;
see also references in E. de Wet, ‘Labour Standards in the Globalized Economy: The
Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade

35 For an overview of the debate see Lee, ‘Globalization and Labour Standards’, 176 et seq.
The well-known Organisation for Economic Cooperation and Development (OECD) study on the interaction of trade and labour found:

The view which argues that low-standards’ countries will enjoy gains in export market shares to the detriment of high standards’ countries appears to lack solid empirical support.\(^\text{36}\)

It also found:

Moreover on average, the price of US imports of textile products does not appear to be associated with the degree of enforcement of child labour standards in exporting countries.\(^\text{37}\)

On the other hand, according to estimates from 2001, manufacturing costs per worker could be reduced by US $6000 per year in economies where both freedom of association and child labour are not well protected.\(^\text{38}\)

b) The race to the bottom
Another line of reasoning invokes a ‘race to the bottom’ scenario.\(^\text{39}\)
Advocates of a social clause hold that the globalisation of production and the growing mobility of capital will reduce standards in higher-standard countries.\(^\text{40}\)
Governments indeed often choose to suspend or modify labour laws inside so-called export processing zones (EPZs) in order to attract investment and to raise export competitiveness.\(^\text{41}\)


The chronic unemployment in Germany is often deemed to be caused by the relocation of German companies to places like China where wages are lower. A multilateral social clause is therefore needed to provide a ‘level playing field’.\textsuperscript{42} It is argued that markets cannot decide on their own on the regulatory optimum and that social clauses are justified if based on minimum standards and multilateral negotiations.\textsuperscript{43} The ILO addressed the problem of a ‘beggar-thy-neighbour’ policy in its 1998 report on child labour, recommending a joint solution by all countries involved.\textsuperscript{44}

On the other hand, it is held that the likelihood that inadequate labour standards in developing countries place downward pressure on wages in developed countries is small.\textsuperscript{45} Arguably technological change is a much larger factor than third-world competition in the growth of low-wage work in the US.\textsuperscript{46} In particular, in relation to child labour, it has been estimated that changes of trade flows after child labour has been eliminated or reduced by 50 per cent are so marginal that effects on relative wages are too small to be observable.\textsuperscript{47} Finally, while multinational enterprises in labour-intensive sectors may invest \textit{inter alia} on the basis of low wages, there is little systematic evidence that these incentives are markedly enhanced by poor labour standards.\textsuperscript{48}


\textsuperscript{48} Maskus, ‘Should Labour Standards Be Imposed Through International Trade Policy’, 46. It should however be noted that this might be different in the case of child labour since child labour has a direct bearing on wages.
c) Human rights arguments/Coherence in international law

A third rationale for linking trade with labour standards is based on human rights arguments.49 As mentioned above, the ILO already recognised human dignity as the underlying rationale for linking trade and labour. Human rights arguments may well be a solution for advocates of a social clause faced with a growing amount of counter-arguments raised by trade economists. It is argued:

. . . the most obvious and compelling normative basis for insisting on compliance with minimum welfare may have little relation to economic welfare; this is particularly true in the case of universal human rights . . . Human rights are frequently and increasingly regarded as inalienable rights . . .50

It has been pointed out that WTO law has to be applied in accordance with the international law on child labour, suggesting that the most exploitative examples form part of ius cogens.51 The human rights argument is thus closely connected with the issue of coherence in international law. These arguments highlight the link of trade and labour to the trade and human rights debate, which has increasingly been at the centre of academic debate on public international law.52

d) Effectiveness arguments/Trade measures for human rights

Finally, another main approach to the trade and labour debate is based on the idea that the current human rights system is inadequate to prevent human rights violations and that therefore an economics based system is needed to achieve effective enforcement.53 Some scientists have calculated that a tariff increase of 50 per cent would yield sufficient


51 Diller, Levy, ‘Child Labour, Trade and Investment’, 664 and 678 et seq.


incentives for a significant number of violating countries to improve enforcement of core labour standards substantially.\textsuperscript{54}

3. Trade measures on child labour

This work explores the human rights and effectiveness approach, asking whether the problem of child labour may be helped by taking recourse to trade measures. Arguments relating to coherence in international law will also be taken up. The question is whether and how trade measures should complement the existing international system for the protection of children from economic exploitation. The broader question would be whether and to what extent trade rules should be employed for the promotion and protection of human rights. The work thus attempts to make a contribution to both the trade and labour discussion and the perhaps broader debate on trade and human rights.

B. CONTENTS

The work is divided into five chapters.

The first chapter will explore the problem of child labour, presenting the facts of child labour and strategies for combating it.

The second chapter examines the content and scope of international child labour law, including whether the prohibition of child labour in international law forms part of customary law and \textit{ius cogens}.

The third chapter undertakes a stocktake of the UN and ILO implementation systems. It asks how UN and ILO norms regarding child labour are enforced with a view to whether they should be complemented by a new legal framework providing for the imposition of trade measures.

The fourth chapter examines the effectiveness of existing trade measures, including social clauses in trade agreements, trade incentive regimes and unilateral legislation providing for trade measures as well as private sector action aimed at the eradication of child labour. The part on private sector action also refers to voluntary international standards. The analysis focuses on whether a trade and labour linkage is recommendable and what lessons can be learned for future social clauses.

Chapter V concludes by making recommendations for a future multilateral social clause at a global level \textit{de lege ferenda}.

C. SOME DEFINITIONS

I. Trade sanctions and trade measures

Since the concept of trade sanctions and trade measures is central to this study, some characteristics of both concepts ought to be highlighted at this point.

The term ‘trade sanctions’ is often used interchangeably with the term ‘trade measures’. Since the term ‘trade sanctions’ is not defined by positive law, each author is in principle free to give the definition of his or her choice. However, trade sanctions are commonly understood as being possible consequences or reactions by states in response to violations of rules of public international law. More specifically, they are referred to as measures taken in response to a violation of public international law resulting in a less favourable position for the violating state in order to coerce this state into putting an end to the continuing situation resulting from its initial action. Trade sanctions thus have a more restricted scope than trade measures, which also refer to acts by private parties. It should also be pointed out that, according to this definition, trade sanctions target specific states while the broader term of trade measures encompasses all types of measures against all types of bodies.

In addition, there seems to be a prevailing view among legal scholars that sanctions only refer to reactions put into practice by international organisations against one of their members. Economic sanctions under Art. 41 of the UN Charter are a typical example. Unilateral reactions by states however come within the definition of countermeasures. The term ‘trade measures’ encompasses both unilateral state measures as well as reactions put into practice by international organisations. For the purpose of this work, the term ‘trade sanctions’ will be used in its narrow sense.

58 Combacau, ‘Sanctions’, p. 314 with further references; Schröder, ‘Sanktionen’, para. 103.
60 Combacau, ‘Sanctions’, p. 315.
II. Effectiveness

Since the question of what measures under what regime are effective in combating child labour is central to this study, the term ‘effective’ shall be briefly defined here. The Longman Dictionary defines ‘effective’ as producing a decided, decisive or desired effect.\(^{61}\)

Relating to synonyms, it reads:

\[\ldots\] effectual, efficient, efficacious, all mean ‘capable of producing result’
\[\ldots\] effective stresses the ability to produce an effect or its actual production <take effective measures>\(^{62}\)

Accordingly, trade or non-trade measures are effective if they are capable of contributing to the eradication of child labour. In light of the importance of the eradication of child labour, for the purpose of this work ‘capable of producing result’ shall mean capable of producing measurable outcomes within a reasonable period. In accordance with timeframes for revision of international trade regimes such as the Generalized Systems of Preferences (GSP) or the Cotonou Agreement, which are revised every four or five years,\(^{63}\) a reasonable period to determine effectiveness is approximately four or five years. Having said that, because of the problem of impact assessment, when analysing whether trade or non-trade regimes are ‘capable of producing results’, the focus should be on the characteristics and function of these systems.\(^{64}\)

\(^{62}\) Ibid.
\(^{63}\) See below, p. 301 and p. 196.
\(^{64}\) See below, p. 122.
# 1 The problem of child labour

## A. INTRODUCTION

This chapter presents the main facts about child labour. It starts by defining child labour, outlines its current forms, explores the statistics on child labourers worldwide and examines the causes of child labour. It concludes by developing possible strategies for combating child labour, taking into account the factors causing child labour.

## B. DEFINING CHILD LABOUR

### I. Introduction

It is part of the problem of child labour that to treat all work done by children as equally unacceptable means to confuse and trivialise the issue. Children do a variety of work in widely divergent conditions. But age limits differ from activity to activity and from country to country. Many societies, especially poor rural ones, do not necessarily view child work as ‘bad’, even at an age of eight or nine years.¹ This is partly due to the fact that, in many societies, an apprentice of eight or nine years is not considered as a child.² As Veerman puts it, ideas concerning the rights of children are dependent on the prevailing image of childhood, and when that image changes, the ideas about the rights of the child also change.³

---


Therefore, to understand the problem of combating child labour one has to become aware of the relativity of the notions of ‘childhood’ and ‘child labour’, although the complete analysis of the complex relationships between the social and cultural context and children’s rights in different backgrounds is beyond the scope of this work.

II. Historical and cultural perspectives of childhood

1. Changing historical attitudes

The first main author to consider the different images of childhood, Ariès maintained that, in medieval times, the idea of childhood did not exist.4 Ariès based his work mainly on the study of paintings from the Middle Ages and the fact that only in the sixteenth and seventeenth century did some moralists5 recognise the importance of schooling and education of children.6 Agreeing with Ariès, many authors had and still have a linear view of the evolution of childhood from children regarded as ‘mini-adults’ to today’s perception of children as right-holders.7 The famous sentence of DeMause was:

The history of childhood is a nightmare from which we have only recently begun to awaken. . . . 8

There is a strong consensus that the social concept of childhood has changed greatly in recent years. Recognising the difference in the social status of the child, the twentieth century is generally called the ‘Century of the Child’ after the novel by Ellen Key with the same title.9

---


6 Ariès, Geschichte der Kindheit, p. 92 et seq.


9 L. Dasberg, ‘What is a Child and What are its Rights?’ in E. Verhellen, F. Spiesschaert (eds.), Ombudswork for Children, A Way of Improving the Position of Children in Society
The new social concept of childhood as a period of life devoted to education and growth and not to work appeared as a formal definition as early as 1919 in ILO Convention No. 5 – Minimum Age (Industry).\(^\text{10}\) This social position of children has manifested itself within the framework of the new international legislation concerning children. The principle of special protection of the child is enshrined in the Declaration of the Rights of the Child of 1959. The new concept of the child is best expressed in Art. 3 of the Convention:

In all actions concerning children, . . . the best interests of the child shall be a primary consideration. . . .

Thus, the child is now considered as a subject rather than an object of rights and duties.

2. Diverging cultural attitudes

However, the concept of childhood contained in the CRC is still not truly universal. The Preamble of the Convention acknowledges that due account should be taken of the importance of traditions and cultural values. By linking the international definition of childhood to the national law on majority, the CRC attempts to accommodate the existing cultural and religious diversities reflected in different national age limits.

In contrast to the common approach of the ‘Western world’ and the international legal instruments, in many African communities childhood is not perceived and conceptualised in terms of age but in terms of intergenerational obligations of support and reciprocity to parents and elders.\(^\text{11}\)

However, childhood in its narrower sense of maturity can be separated from adulthood. The attainment of adulthood is conceived as a gradual process often marked by initiation ceremonies and culminating in marriages.\(^\text{12}\) Another constant feature that distinguishes childhood

\(^{10}\) Art. 2 of ILO Convention No. 5.


from adulthood is perceived incompetence.\textsuperscript{13} Hence, different but equally fundamental considerations apply to the end of childhood.

Since there is no truly universal definition of childhood, there is no consensus on which rights are to be attached to the status of childhood and what forms of child labour should be abolished.\textsuperscript{14} As will be examined below, these cultural diversities concerning the concept of childhood contribute to the widespread acceptance of child labour.

\section*{III. The concept of child labour}

The concept of labour is equally problematic to apply to the many activities done by children. There is a growing consensus that not all those activities are equally intolerable. Black's Law Dictionary\textsuperscript{15} defines labour as follows:

\begin{quote}
Work; toil; service; mental or physical exertion. Term normally refers to work for wages as opposed to profits; though the word is sometimes construed to mean service rendered or part played in production of wealth . . .
\end{quote}

The Longman Dictionary says that 'to labour' means:

\begin{quote}
to exert one's powers of body or mind, esp. with painful or strenuous effort; work; strive; to move with great effort . . .\textsuperscript{16}
\end{quote}

This definition implies that labour cannot be equated with every type of work. The terms 'toil', 'exertion' and 'painful and strenuous effort' demonstrate that the term 'labour' refers usually to hard or even harmful work.

The term 'child labour', which was coined in Britain during the nineteenth century, referred to child work that should be abolished.\textsuperscript{17} In this sense, the relevant international organisations such as the UN Children’s Fund (UNICEF)\textsuperscript{18} and the ILO\textsuperscript{19} as well as most of the legal

\begin{footnotesize}
\begin{enumerate}
\item \textit{Longman Dictionary of the English Language}.
\item ILO, \textit{Child Labour, Targeting the Intolerable}, p. 4.
\end{enumerate}
\end{footnotesize}
writers\textsuperscript{20} speak of a continuum that embraces at one end work that is beneficial, promoting or enhancing a child’s physical, mental, spiritual, moral or social development without interfering with schooling, recreation and rest. At the other end, the work is exploitative including as most obvious examples child prostitution and bonded child labour. Between the two poles, much child labour falls into a grey area. Thus, the question is what elements constitute universally intolerable child labour. In order to have a more or less precise and workable definition, UNICEF classifies child labour as intolerable and exploitative in contrast to beneficial work if it involves the following characteristics:

It is carried out full-time at too early an age; too many hours are spent on working; it exerts undue physical, social or psychological stress; it includes work and life on the streets in bad conditions; inadequate pay; too much responsibility; it hampers access to education; it undermines children’s dignity and self-esteem, such as slavery or bonded labour and sexual exploitation; it is detrimental to full social and psychological development.\textsuperscript{21}

According to the ILO,\textsuperscript{22} which classifies all intolerable child work as child labour, child labour is a form of denial of the right to education and of the opportunity to reach full physical and psychological development. Hence, the key factor for both organisations in determining child labour – or exploitative child labour according to UNICEF – is the impact on the child’s development. Child labour may endanger the child’s development physically – including overall health, coordination, strength, vision and hearing; in its cognitive context – including literacy, numeracy and the acquisition of knowledge necessary to normal life; and emotionally – including self-esteem, family attachment and feelings of love and acceptance.

According to the Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, the ILO furthermore distinguishes between the following categories of child labour:

- Labour that is performed by a child who is under the minimum age specified for that kind of work (as defined by national legislation, in accordance with accepted international standards), and that is thus likely to impede the child’s education and full development;


\textsuperscript{22} ILO, Child Labour, Targeting the Intolerable, p. 8.
• Labour that jeopardizes the physical, mental or moral well-being of a child, either because of its nature or because of the conditions in which it is carried out, known as hazardous work; and

• Unconditional worst forms of child labour, which are internationally defined as slavery, trafficking, debt bondage and other forms of forced labour, forced recruitment of children for use in armed conflict, prostitution and pornography, and illicit action.23

These forms of child work are different from cases where children are engaged in any type of economic activity such as light work or work for a short period of time.24 For the purpose of this work, the term ‘exploitative child labour’ or ‘child labour’ shall be employed interchangeably for intolerable forms of child work. In contrast, the term ‘child work’ includes any type of economic activity. The ILO defines light work as work that is not hazardous in nature and that does not exceed fourteen hours per week.25

C. FORMS OF CHILD LABOUR

According to the ILO/UNICEF,26 there are today eight main types of exploitative child labour: hazardous working conditions, domestic service, street children, child labour in the informal economy, child slavery, trafficking and commercial sexual exploitation, children in armed conflicts and illicit activities. The last four of these are considered by the ILO to be the unconditional worst forms of child labour.

I. Hazardous working conditions

The effects of hazardous working conditions on children’s health and development can be immense.

For example in small-scale mining, the health of the child is endangered by deep and poorly reinforced pits, poor ventilation, excessive noise, vibrations from machines, excessive heat or cold, awkward positions and extremely arduous work.27

24 Ibid., p. 16.
27 ILO, Targeting the Intolerable, Children in Mines and Quarries.
Children are involved in manufacturing for export such as carpet-weaving, soccer ball stitching and clothing production. Production processes such as leather tanning and brassware production are extremely hazardous because of the toxic products used. Incense stick production in India and Pakistan causes upper respiratory tract problems.

Children are also engaged in construction-related activities and industries such as cement-mixing, fixing of windows and pipes, painting, electrification and, in particular, brick-making. The work is extremely hazardous because conditions are usually unsafe and unsanitary. Mining sometimes involves debt bondage (e.g. gold mining in Peru). Also in Peru, many young mineworkers show mercury contamination in their blood and hair.

Occupational health and safety experts consider agriculture to be among the most dangerous of occupations. Children not only face work that is too heavy for young bodies and cuts from sharpened tools but also hazards from the use of toxic chemicals and motorised equipment without safety precautions. In the US, the highest number of occupational fatalities for youth under eighteen occur in agriculture, accounting for 42.7 per cent of all fatalities in that age range.

In the hotel, catering and tourism industry, children might be pulled into prostitution. In Kenya, for example, children’s work in tourism includes selling crafts, food and other items, entertainment, beach work and prostitution.

II. Domestic service

Children in domestic service are among the most exploited of all. Many of them work in almost total isolation for up to fifteen hours per day, frequently unpaid. They are often subjected to physical, emotional and sexual abuse.

28 ILO, A Future without Child Labour, p. 28.
29 Ibid.
30 Ibid.
31 ILO, Targeting the Intolerable, Child Labour in Construction and Brick-making.
32 Ibid.
34 ILO, Targeting the Intolerable, Child Labour in Agriculture.
35 Ibid.
37 Ibid., p. 29.
38 Ibid.
39 ILO, Targeting the Intolerable, Domestic Service.
III. Street children

Children living and working on the street are typically involved in the following activities: vending food and small consumer goods, shining shoes, washing windscreens, repairing tyres, scavenging and ragpicking, begging and portering. The hazards of their work stem from both the work itself and more importantly from the environment, such as traffic, exhaust fumes, exposure to the elements, insecurity, harassment and violence.

IV. The informal economy

Children working in the informal economy are not recognised or protected under the legal and regulatory frameworks. The informal economy is often closely linked to formal sector production. For example in manufacturing, the factory of a multinational or a national enterprise may contract out some production to small-scale family firms. Since most child labour occurs in this sector and is beyond the reach of most formal institutions, it represents one of the principal challenges of the effective abolition of child labour.

V. The unconditional worst forms of child labour

According to the ILO, the unconditional worst forms of child labour include the following types of child labour:

- forms of child labour such as sale and trafficking, debt bondage, serfdom and forced and compulsory labour;
- forced recruitment of children for use in armed conflict;
- commercial sexual exploitation of children;
- children in illicit activities.

1. Child slavery

Slavery is a status, labour an activity. A practice similar to slavery, explicitly mentioned in the Supplementary Convention on Abolition of Slavery of 1956, is bonded labour in industries such as agriculture, carpet and textiles, quarrying and brick-making. One of the most common forms of bondage is family bondage where children work to

---

40 ILO, *A Future without Child Labour*, p. 27.
41 Ibid., p. 22.
42 Ibid.
43 Ibid., p. 31 et seq.
help pay off a loan incurred by his or her family.\textsuperscript{45} Usually the situation is manipulated in such a way by the creditor that it is impossible to pay back the loan. Bonded child labour also exists in domestic service.\textsuperscript{46} Debt bondage is increasingly associated with the trafficking of children for labour exploitation.\textsuperscript{47}

2. Trafficking and commercial sexual exploitation

Children are trafficked for prostitution, for begging and for soliciting, and for other types of child labour such as work on construction sites, in small shops, in factories and in domestic service.\textsuperscript{48} Child victims of commercial sexual exploitation suffer extreme physical, psychological and emotional abuse, which has life-threatening consequences.\textsuperscript{49}

3. Children in armed conflicts

Children are also used in armed conflicts and participate in rebel and guerrilla actions.\textsuperscript{50} The number of children under the age of eighteen who have been coerced or induced, either by state or by non-state military groups, to become child soldiers or to serve as porters, messengers, cooks and sex slaves is generally thought to be in the range of 300,000, with 120,000 of those in Africa alone in 2000.\textsuperscript{51}

4. Children in illicit activities

Children are involved in illicit activities such as producing and trafficking drugs, especially in countries with problems with the drug trade such as Colombia and Cambodia.\textsuperscript{52}

D. STATISTICS: DISTRIBUTION OF CHILD LABOUR

In 2000, 211 million children between five and fourteen years of age were estimated to be engaged in some form of economic activity, out of which 186 million were engaged in child labour to be abolished (including in its worst forms).\textsuperscript{53} Around 141 million children aged...
between fifteen and seventeen years were estimated to be engaged in economic activity, of which 59 million were engaged in child labour to be abolished (including in its worst forms). About 8.4 million children were involved in the unconditional worst forms of labour; most of them in forms of forced and bonded labour. In total, approximately 350 million children aged from five to seventeen were economically active and 245.5 million children were child labourers. On average, one child in every six between five and seventeen years old was a child labourer.\(^{54}\)

The new estimates from 2004 suggest that 191 million children aged between five and fourteen years were engaged in some form of economic activity, out of which 166 million were child labourers and 74 million children were engaged in hazardous work.\(^{55}\) In the larger group of children aged five to seventeen, 317 million children were economically active.\(^{56}\) In this group, 218 million can be regarded as child labourers and 126 million children were engaged in hazardous work.\(^{57}\)

Thus, there has been an overall decrease in child labour. The number of child labourers in both age groups (five to fourteen and five to seventeen) fell by 11 per cent.\(^{58}\) In the category of hazardous work, the decline amounts to 26 per cent for the group aged between five and seventeen and 33 per cent for those aged between five and fourteen. Taking into account the population rate, the numbers of child labourers have fallen from 16 per cent of the whole child population in 2000 to 13.9 per cent in 2004.\(^{59}\)

According to the estimates made in 2000, at a regional level, in absolute terms, Asia had approximately 60 per cent of the world’s economically active children aged between five and fourteen, sub-Saharan Africa 23 per cent, the Middle East and North Africa 6 per cent, Latin America and the Caribbean 8 per cent, the transition economies 1 per cent and developed countries 1 per cent.\(^{60}\) Although there might have been a small change in numbers due to the decline of economically active children in Latin America and the Caribbean, the overall distribution of child labour with the highest number of child labourers in Asia remained the same.\(^{61}\)

\(^{54}\) Ibid., p. 20.
\(^{56}\) Ibid.
\(^{57}\) Ibid.
\(^{58}\) Ibid.
\(^{59}\) Ibid.
In 2000, taking account of the population rate, sub-Saharan Africa had the highest economic activity participation rate of 29 per cent of children aged five to fourteen. The corresponding rate in Asia was 19 per cent, in Latin America and the Caribbean 16 per cent, in developed countries 2 per cent and in transition economies 4 per cent.

These numbers fell slightly in Asia to 18.8 per cent of the whole child population in this region being economically active in 2004 and to 26.4 per cent of children being economically active in sub-Saharan Africa. There was however a rapid decline to 5.1 per cent of the whole child population in Latin America and the Caribbean being economically active in 2004. Thus, although the different growth in child population might cause different activity rates, there is some reason to assume that the global reduction of child labour is mostly due to the decrease in child labour in Latin America and the Caribbean. As will be seen later, much of the decline occurred in the garment industry in Central America.

As to the types of work done by children, 69 per cent of economically active children are assumed to work in agriculture.

According to estimates made by UNICEF in 2005, only approximately 5 per cent of all child workers aged between five and fourteen are employed in export-sector industries. However, this still means that 9.55 million children are economically active in the export industry. Reliable data are however hard to find since children may still be employed in the informal economy and produce soccer balls at home or in factories set up for the World Cup 2006 for example. In India, it is estimated that approximately 100,000 children work in small carpet workshops, mostly in Uttar Pradesh and Rajasthan. Child labour occurs in the cocoa-growing areas of West Africa for the global market,
especially in Ghana and Côte d’Ivoire. According to some recent estimates, there are still 300,000 children labouring in the cocoa industry of West Africa, of which 12,000 are caught up in bonded labour. The phenomenon of child labour in the export sector will be of importance when discussing the effectiveness of trade-related policy measures.

Taking into account the size of the difference between the estimates of 2000 and 2004, there seems to have been a reduction, especially in Latin America and the Caribbean. Therefore, in the following sections of the work, existing tools for combating child labour will be analysed in order to find out whether they are appropriate and sufficient or call for a new legal framework.

E. CAUSES OF CHILD LABOUR

In order to devise strategies for solving the problem of child labour, the roots of child labour have to be analysed. Explanations for the presence of child labour can be broadly grouped into supply-side and demand-side factors.

I. Supply-side factors

1. Slow demographic transition

Slow demographic transition in some parts of the world contributes to a continued supply of children available for the labour market. In 1999, in the least developed countries, 49 per cent of the population were children. HIV/AIDS worsens the situation since it affects the most productive age groups of men and women the hardest. This creates pressure on these age groups so that children have to enter the workforce.

2. Migration

Migration caused by natural disasters or armed conflicts increases children’s vulnerability and thereby makes it more probable that they will become victims of child labour. In addition, migration from the

---

74 ILO, A Future without Child Labour, p. 51.
75 Ibid.
76 Ibid.
poorer rural areas to the more prosperous rural or urban areas draws children into the labour market.\footnote{ILO/IPEC, S. Khair, Child Labour in Bangladesh, A Forward Looking Policy Study (Geneva: International Labour Office, 2005), p. 10.}

3. Poverty

Poverty is the main contributor to child labour.\footnote{ILO, Child Labour, Targeting the Intolerable, p. 17; UNICEF, The State of the World’s Children 1997, p. 27; M. Swaminathan, ‘Economic Growth and the Persistence of Child Labour: Evidence from an Indian City’, World Development, 20 (1998), 1513–28, 1513; UNICEF, End Child Exploitation, p. 12.} Poor households need the money that their children are able to earn. Since poor households spend the major part of their income on food, the income provided by working children is critical to their survival. Child labourers often have the role of risk management in the household.\footnote{Grootaert, Kanbur, ‘Child Labour, An Economic Perspective’, 191.} However, evidence shows that not all poor households have recourse to child labour.\footnote{ILO, A Future without Child Labour, p. 50.} Most importantly, poverty does not necessarily cause child labour. For example, Kerala in India, which is a poor state, has virtually abolished all child labour.\footnote{ILO, Child Labour, Targeting the Intolerable, p. 17.}

4. The role of social protection

Poverty is closely related to the role of social protection. In many societies, large parts of the population are involved in the informal economy and not covered by the public provision of social security.\footnote{ILO, A Future without Child Labour, p. 52.} In this situation, children serve as social insurance for periods when sickness and ageing affect the older generations in the family.

5. Education

The overall condition of the education system contributes to the supply of child labour.\footnote{UNICEF, The State of the World’s Children 1997, p. 29; UNICEF, End Child Exploitation, p. 17.} There are often discrepancies between the minimum age for employment and the end of compulsory schooling in national legislation.\footnote{ILO, A Future without Child Labour, p. 56.} If the minimum age for employment is lower than the end of compulsory education, this leads to incredibility in government policies to achieve education for all. In most developing countries, education is underfunded. In Bangladesh, there is a severe deficiency
in proper schooling facilities.\textsuperscript{85} Thirty per cent of children in developing countries who enrol in primary school do not complete it.\textsuperscript{86} In India, between 73 per cent of boys and 80 per cent of girls drop out of primary and middle school education because of scarce and inaccessible schooling facilities.\textsuperscript{87}

6. Attitudes and poor law enforcement

Another key determinant of child labour is parental, societal and governmental attitudes towards child labour resulting in poor enforcement of laws.\textsuperscript{88} As mentioned above, the specific rights attached to the status of childhood change according to the cultural background.

In the Industrial Revolution in Europe, child labour was perceived as legal and morally acceptable.\textsuperscript{89} The percentages for ten to fourteen year old children in employment in the third quarter of the nineteenth century are comparable to those in many parts of the developing world today.\textsuperscript{90} In Britain, the ending of child labour was accompanied by a new evaluation of childhood.\textsuperscript{91}

Likewise, in African culture, there exists the cultural belief that even if the work is too hard for the child, there is nothing to worry about because hard work will make the child a tougher adult.\textsuperscript{92} In India, it is an entrenched social pattern rather than a cultural belief that in certain areas children of certain families will be engaged in hazardous occupations such as leather tanning.\textsuperscript{93} Many members of the middle class believe that there is a distinction between the children of the poor and

\textsuperscript{85} ILO/IPEC, Khair, \textit{Child Labour in Bangladesh}, p. 11.
\textsuperscript{91} Ibid., p. 52.
\textsuperscript{93} ILO, \textit{Child Labour, Targeting the Intolerable}, p. 18.
their own children: children born to work with their bodies and children born to work with their minds. In rural areas in Bangladesh, people are sceptical about the utility of education. Apathy, caste and class bias, obstruction of enforcement efforts, corruption and disregard for the problem of child bondage among members of the Indian Government are reasons for the failure of the enforcement of the Child Labour Act and the Bonded Labour Act of 1986. In general, a huge amount of work remains to be done in sensitising officials and community leaders to the problem of child labour. Departments with scarce human and financial resources will seldom have child labour at the top of their agenda. In most parts of the world, girls are discouraged from staying at school beyond puberty because they must either work or marry.

7. Inadequate laws

Inadequate laws also contribute to the prevalence of child labour. In many countries that have ratified international conventions prohibiting child labour, relevant laws are inconsistent and contradictory. Often employers find a loophole when being accused of using child labour. While almost all countries have enacted laws providing for minimum age legislation, they often exclude sectors such as agriculture, domestic service, family undertakings and the informal sector where many children are engaged. For example, in the US Fair Labor Standards Act of 1938 or the Indian Child Labour (Prohibition and Regulation) Act of 1986, major loopholes consist of exceptions for family productions.

8. Discrimination against minorities

Finally, on the supply side, discrimination against minorities plays a role. In Latin America, indigenous children tend to start working

---

95 ILO/IPEC, Khair, Child Labour in Bangladesh, p. 11.
97 ILO, The End of Child Labour: Within Reach, para. 152.
98 Ibid.
100 Ibid., p. 16.
101 Ibid., p. 17.
103 For the Indian example, see Jaiswal, Child Labour, p. 84 et seq. and p. 126.
instead of going to school. The same holds true for children from Dalit families in South East Asia or Roma families in South East Europe.

II. Demand-side factors

On the demand side, the structure of the labour market and the role of technology have traditionally been perceived as the two main determinants of child labour. These factors have been classified as structural or root causes of child labour. They include factors such as wages, skills and vulnerability of children and the role of technology.

1. The nimble fingers and lower costs argument

The most common explanation of why employers hire child labour is the lower cost and the irreplaceable skills afforded by children (the ‘nimble fingers’ argument).

As to the ‘nimble fingers’ argument (that only children with small fingers have the ability to make e.g. fine hand-knotted carpets), several ILO and UNICEF studies concluded that this argument was entirely fallacious in a number of hazardous industries, including carpet-making, glass factories, the mining of slate, limestone and mosaic chips, lock making and gem and diamond polishing. Children do not have skills that adults cannot match. Thus, child labour is not irreplaceable.

However, it is not costless to replace children with adult workers. It is indeed true in most cases that child labourers are paid less than adults. Yet ILO studies related to costs conducted in India suggest that, as a portion of the final price of carpets or bangles to the consumer, any labour-cost saving realised through the employment of children is unexpectedly small – less than 5 per cent for bangles and between 5 and 10 per cent for carpets. It is estimated that very small levies on

105 Ibid.
106 Ibid.
108 ILO, A Future without Child Labour, p. 47.
109 ILO, Child Labour, Targeting the Intolerable, p. 18.
111 UNICEF, End Child Exploitation, p. 16.
112 ILO, Child Labour, Targeting the Intolerable, p. 18; ILO/IPEC, Is Child Labour Really Necessary in India’s Carpet Industry?, p. 16.
114 ILO, Child Labour, Targeting the Intolerable, p. 18.
the consumer price would be sufficient to reduce the incentive to employ child labour; i.e. the increase in carpet purchase prices would be several times smaller than a typical state sales tax of around 7 per cent.\textsuperscript{115} This implies that children are not necessarily irreplaceable in an economic sense. However, in the Indian example, the Indian carpets made by adults would be at a slight competitive disadvantage to very close substitutes such as Persian-style carpets from countries such as the People’s Republic of China, Pakistan and Iran.\textsuperscript{116} Therefore, a global strategy is needed in order to avoid ‘beggar-thy-neighbour’ competition.

2. The vulnerability of children

Beyond the risk of being at a competitive disadvantage, there seems to be another major non-pecuniary reason for hiring children: the vulnerability of children. Children are less aware of their rights and easier to intimidate. Hence they are easier to exploit.\textsuperscript{117}

3. The role of technology

The role of technology is another determinant of child labour. In the manufacturing industries in Thailand, for example, there has been some tendency to move upwards on the technological ladder as firms try to preserve export markets with higher value-added products.\textsuperscript{118} Those higher value-added products tend to contain a lower proportion of child labour. As in the Industrial Revolution, where the mechanisation of spinning and weaving led to a reduction in the demand for child labour, the introduction of wheelbarrows in Bogotà displaced children who carried rocks piece-by-piece.\textsuperscript{119} Yet the role of technology should not be overestimated since, in the garment sector, the introduction of sewing machines has made possible home production that led to girls working at home.\textsuperscript{120}

\textsuperscript{115} Ibid.
\textsuperscript{116} ILO/IPEC, Is Child Labour Really Necessary in India’s Carpet Industry?, p. 16.
\textsuperscript{117} UNICEF, The State of the World’s Children 1997, p. 27.
\textsuperscript{119} Grootaert, Kanbur, ‘Child Labour, An Economic Perspective’, 196.
ECONOMIC CONSEQUENCES OF CHILD LABOUR

Child labour is not only detrimental to the development of the child concerned but also to the economy of the state where the child labour occurs. Children are paid less and, in extreme situations, they receive symbolic payment in the form of food and clothing for their families. Consequently, child labour brings down wages, which exacerbates adult unemployment. In addition, child labour perpetuates poverty in instances where their jobs deprive them of an education and ruin their health. This generally decreases their potential for earning a living in later life, which clearly degrades society’s stock of human capital.

STRATEGIES FOR COMBATING CHILD LABOUR

I. Introduction

Poverty is a major reason for the existence of child labour. Yet, tackling economic exploitation of children does not have to wait until world poverty has been brought to an end. Indeed, mitigation of child labour may precede large-scale economic growth. It is often argued by developing countries that child labour laws are ineffective and that they are more an effect of the abolition of child labour than the cause. This might be true in some cases, as a Colombian case study demonstrates. However, examples from the industrialisation in Europe prove that laws sometimes did have an immediate and substantial effect on the amount of child labour. The following section will discuss legislation and other policy measures for combating child labour.

II. Action against child labour

1. Legislation

National legislation plays a fundamental role because it sets principles for policy action, serves as a deterrent to the economic exploitation of

---

121 ILO/IPEC, Khair, Child Labour in Bangladesh, p. 14.
122 Ibid., p. 15.
123 Ibid.
children, being the basis for both preventive measures and punitive action against violators, and clarifies the society’s values and commitments towards children.128 Considering that societal attitudes are a key determinant of child labour, legislative measures raising awareness are all the more important.

Moreover, the British Factory Act of 1833 has been proven effective in reducing child labour in the textiles industry.129 The Factory Act was however only effective because it was the outcome of a large public campaign, targeting all classes of society and employing every means of publicity.130

2. Education

Since many cases of child labour are the result of the bad quality of educational systems, education is perceived as a key solution to the elimination of child labour.131 Considering however that many families cannot afford to pay enrolment fees, educational measures have to be accompanied by social protection measures.

For example in India, compulsory schooling is the primary policy instrument by which the state effectively removes children from the labour force.132 The National Child Labour Projects initiated in India in 1995 also showed that, for the successful enrolment of children in schools, it is vital to provide them with meals and to offer support to their parents.133

3. Further policy measures

Finally, it should be noted that higher wages earned by adults may make the removal of children from the labour force possible.134 However, as indicated above, higher wages alone are not sufficient to eradicate child labour.135 Higher wages as a sole explanation for the end of child labour in industrial Europe is subject to many doubts.136

128 ILO, Jankanish, Happels, Action against Child Labour, p. 44.
130 Ibid.
131 ILO, Jankanish, Happels, Action against Child Labour, p. 5; Cunningham, Viazzo, ‘Some Issues’, p. 19.
134 Cunningham, Viazzo, ‘Some Issues’, p. 16.
135 According to Weiner, The Child and the State in India, p. 113, there are far too many instances in history where states compelled education prior to a reduction in the need for unskilled labour or a rise in the family income.
Social mobilisation, public-awareness raising, prevention and rehabilitation measures should complement the described measures.

4. International action

Having considered key elements of national strategies, international action to complement these strategies will be discussed. As explained above, governments often lack the political will to enforce child labour laws. They also often lack the necessary financial and human resources for enforcing laws, removing children from factories and providing for rehabilitation and education. Thus, international action is needed to prompt governments to implement national policies and to generate technical and financial assistance. When implementing educational policies, it is important to adapt to local needs and realities of child labourers including their families. In addition, when replacing children with adult workers in export industries, slightly higher prices have to be paid by consumers in import countries.\textsuperscript{137} To avoid ‘beggar-thy-neighbour’ policies of developing countries, a global strategy is needed.

International action should thus adopt a multi-sectoral approach, providing for standard setting, policy intervention in the form of technical cooperation programmes providing for educational and rehabilitation measures.

One key question to be discussed during the course of this study is whether trade or non-trade measures should be used to prompt government action. Trade measures could include labelling, import bans or consumer boycotts of products made with child labour. Such measures could however prove detrimental to the former child labourers who will then lose their jobs.

H. CONCLUSION OF CHAPTER 1

The concept of childhood and child labour is culturally and historically relative. Not all work done by children is intolerable. The main international institutions in this context, the ILO and UNICEF, differentiate between light work or beneficial work and exploitative child labour or child labour that has to be abolished. Child labour can be defined as a form of denial of the right to education and of the opportunity to reach full physical and psychological development. There are eight main forms of child labour, including \textit{inter alia} work in hazardous occupations and

\textsuperscript{137} ILO, \textit{Child Labour, Targeting the Intolerable}, p. 19 et seq.
industries, domestic work, street children, child labour in the informal sector, debt bondage, prostitution, child soldiers and other illicit activities. According to the estimates made by the ILO in 2004, 218 million children aged between five and seventeen can be regarded as child labourers and 126 million children in this group are engaged in hazardous work. According to estimates made by UNICEF approximately 5 per cent of all child workers aged between five and fourteen are employed in export-sector industries. This equals 9.55 million economically active children in the export industry.

The main causes of child labour are household poverty, inadequate educational systems, parental and governmental attitudes towards child labour including lack of political will to enforce child labour laws, low wages and inadequate laws. Taking these factors into account, strategies for combating child labour have to be multi-sectoral including legislation, policy intervention, improvement of educational systems and social protection programmes. Since national governments are often not capable of implementing adequate national action plans, international action is needed to complement these efforts. How international action is and should be framed, and whether it should include trade or non-trade measures, will be examined in the following chapters.

2 The prohibition of child labour in international law

A. INTRODUCTION

Since international legislation provides the basis and framework for international and national preventive measures and punitive action, the content and scope of international child labour standards will be analysed first. The following section examines which international treaty norms prohibit exploitative child labour as defined by the ILO and UNICEF, and what state obligations they impose. This includes the question of to what extent states are responsible in relation to private parties. Additionally, the question arises whether the prohibition of exploitative child labour forms part of customary law or can be classified as *ius cogens*.

It should be noted that conventions are binding for states parties that have ratified the relevant convention. By contrast, declarations and recommendations are not legally binding but may constitute important supplements and clarifications concerning conventions. As so-called ‘soft law’, recommendations can be relevant with regard to the process of the formation of customary or treaty law.

B. UN CONVENTIONS AND PROTOCOLS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

I. The Slavery Convention

The Slavery Convention of 1926 was adopted under the auspices of the League of Nations and can be called the first modern international

3 Ibid.

1. Wording

Art. 1 (1) of the Slavery Convention defines slavery as:

The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

Art. 1 (2) defines the slave trade as:

... all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

The Convention distinguishes forced labour, stipulating in Art. 5 that forced labour may only be exacted for public purposes and requiring states parties:

to prevent compulsory or forced labour from developing into conditions analogous to slavery.

Art. 2 of the Convention provides that the states parties undertake, so far as they have not already done so, to prevent and suppress the slave trade and to bring about progressively and as soon as possible the complete abolition of slavery in all its forms.

2. The definition of slavery

The definition of slavery has caused controversy since the beginning of the abolition process. There are differences of opinion about which practices should be categorised as slavery and thus designated for elimination. It might reasonably be assumed from the 1953 Report of the Secretary-General that the drafters of the Convention had in mind a concept of authority of the master over the slave, comparable to that of

---

dominica potestas in Roman law.\textsuperscript{7} The elements of ownership and the destruction of the juridical personality of the victim were central to this definition of slavery. Traditional slavery coming within the definition of the Convention was referred to as ‘chattel slavery’ on the grounds that the owners of such slaves were able to treat them as if they were possessions, like livestock or furniture, and to sell or transfer them to others.\textsuperscript{8} This form of slavery has disappeared as a legitimate system of labour in all parts of the world although it may exist clandestinely.\textsuperscript{9}

Before the Convention came into force, the Temporary Slavery Commission in 1924 had identified various forms of slavery.\textsuperscript{10} The list included:

1. (c) Slavery or serfdom (domestic or predial);
2. Practices restrictive of the liberty of the person, or tending to acquire control of the person in conditions analogous to slavery, as for example:
   (a) Acquisition of girls by purchase disguised as payment of dowry, it being understood that this does not refer to normal marriage customs;
   (b) Adoption of children with a view to their virtual enslavement, or the ultimate disposal of their persons;
   (c) All forms of pledging or reducing to servitude of persons for debt or other reason . . . [and]
3. System of compulsory labour, public or private, paid or unpaid.\textsuperscript{11}

It is argued that by referring to ‘any or all of the powers of ownership’ (emphasis added) in its definition of slavery, and setting forth as its stated purpose the ‘abolition of slavery in all its forms’ (emphasis added) the Slavery Convention covers not only chattel slavery but also the other forms of slavery listed in the Report of the Temporary Slavery Commission.\textsuperscript{12} Thus, although the Slavery Convention did not specifically mention child labour, certain forms of child labour as the above mentioned form of domestic enslavement were meant to be included in the definition of slavery in the Convention.

\textsuperscript{8} UN Sub-Commission on the Promotion and Protection of Human Rights, Contemporary Forms of Slavery, E/CN.4/Sub.2/2000/3, para. 18.
\textsuperscript{9} Lassen, ‘Slavery and Slavery-like Practices’, 205.
\textsuperscript{10} UN Sub-Commission on the Promotion and Protection of Human Rights, Contemporary Forms of Slavery, E/CN.4/Sub.2/2000/3, para. 9.
\textsuperscript{11} Ibid.
\textsuperscript{12} Ibid., para. 10.
However, in 1949 the Economic and Social Council (ECOSOC) appointed an Ad Hoc Committee of Experts on Slavery, which found that the definition did not cover the full range of practices related to slavery and that there were other equally repugnant forms of servitude that should be prohibited.\footnote{Ibid., para. 13.} This led to the adoption of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. To what extent the new convention prohibits child labour as a contemporary form of slavery will be discussed below.

3. The definition of the slave trade

Although slavery has existed in many permutations and in countless societies for the last two thousand years, the prohibition of slavery and the slave trade developed as a direct response to the institutionalisation of slavery and the slave trade as it existed in the Americas from the seventeenth century to the nineteenth century.\footnote{A. Y. Rassam, ‘Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law’, \textit{Virginia Journal of International Law}, 39 (1999), 303–52, 317.} Until the 1960s, sex trafficking and forced prostitution were often popularly referred to as ‘white slavery’.\footnote{Ibid, 319.} Yet the international understanding of the terms, as evidenced in UN documents since at least the 1970s, rejects this discriminatory notion by increasingly including in the definition of slavery and the slave trade modern forms of slavery such as traffic in persons and the exploitation of the prostitution of others, child prostitution and the sale of children.\footnote{UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, \textit{Contemporary Forms of Slavery, Report of the Working Group on Contemporary Forms of Slavery on its Twenty-second Session}, forty-ninth session, 11 July 1997, E/CN.4/Sub.2/1997/13, para. 84.} Whether forms of child labour such as trafficking in children for begging, soliciting and prostitution and the commercial sexual exploitation of children are prohibited by the international instruments will be discussed further below.

II. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was concluded in
1956 and entered into force in 1957.\(^\text{17}\) As of 1991, 106 states had ratified the Supplementary Convention.\(^\text{18}\)

1. Wording

Art. 1 of the Supplementary Convention reads:

Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926:

a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or length and nature of those services are not respectively limited and defined;

b) Serfdom, that is to say, the status or condition of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

c) Any institution or practice whereby:
   i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any person or group; or
   ii) The husband of a woman, his family, or his clan has the right to transfer her to another person for value received or otherwise;
   iii) A woman on the death of her husband is liable to be inherited by another person;

d) Any institution or practice whereby a child or young person under the age of 18 is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

2. The definition of slavery and practices similar to slavery

The Supplementary Convention leaves open the question raised during the drafting process, which was whether or not the institutions and practices described actually fall within the scope of the definition of slavery contained in the 1926 Slavery Convention.


\(^{18}\) OHCHR, *Contemporary Forms of Slavery*.
The Supplementary Convention does not contain a definition of the notion ‘practices similar to slavery’. It is important not to interpret the term in such a manner as to include all existing human rights violations. Such an approach would render the term so broad as to be meaningless and thereby reduce the effectiveness of the work against slavery.

Art. 1 lit. d of the Supplementary Convention refers to children. This provision was implemented with the particular practice of ‘sham adoptions’ in mind. A ‘sham adoption’ occurs when a family, generally in financial difficulty, gives or sells a child to a richer family, nominally to be adopted but in reality to work in the rich family’s household without enjoying either the same status or the same treatment as ordinary children in the household into which they are adopted. A similar practice occurs when children are sent to the households of relatives or others who are expected by the child’s parents to give special attention to their education but in reality exploit their labour.

In order to find out whether the provision also covers other forms of exploitation of child labour, it has to be interpreted in accordance with the principles of treaty interpretation of public international law. These are contained in the Vienna Convention on the Law of Treaties (VCLT). The first principle stated in Art. 31 (1) of the VCLT provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty . . .

The practices enumerated in Art. 1 of the Supplementary Convention have two common elements: lit. a and b use the term ‘condition’ or the juridical ‘status’ of a person arising out of certain practices. By contrast, lit. c and d describe only institutions or practices whereby it is allowed to dispose of a woman and children or their labour.

According to the second principle of Art. 31 (1) of the VCLT, the terms of a treaty have to be interpreted in their context and in the light of its object and purpose. According to Art. 31 (2) of the VCLT, the context includes the Preamble and Annexes to the treaty.

When interpreting Art. 1 lit. a–d in their context and in the light of the Supplementary Convention’s object and purpose to complete the abolition of slavery practices whether or not contained in the Slavery

20 Ibid.
21 Ibid.
Convention, it becomes clear that the destruction of one’s juridical personality is the central element to the enumerated practices. Since the wording does not explicitly mention the destruction of the juridical personality, it is not the legal status or condition in its formal sense that matters but, on the one hand, the degree of control of the master over the other person, and, on the other hand, the degree of dependency of the victim on the other person. It is also inherent to all the enumerated practices that the victim is economically exploited. Lit. c does not mention economic exploitation explicitly, but it becomes clear from the context that lit. c refers to practices whereby the violator usually disposes of the woman and her labour.

In conclusion, a slavery-like practice in the meaning of Art. 1 of the Supplementary Convention can be defined as a practice whereby a person is economically exploited by another person on whom the victim is dependent. The degree of ownership and control is decisive in distinguishing between slavery-like practices and other human rights violations.

Having analysed what elements constitute a slavery-like practice, the question is whether child labour is a slavery-like practice. UNICEF and the ILO condemn exploitative child labour – i.e. child labour that hampers the child’s development physically, in its cognitive context and emotionally. Hence the types of child labour that should be prohibited according to UNICEF and the ILO are characterised by the first element of the definition of a slavery-like practice, which is economic exploitation. Since children are more vulnerable than adults and de facto and de iure dependent on their parents, it can be assumed that, when they are economically exploited by their parents or with the consent of their parents, the degree of dependency necessary for work to be qualified as a slavery-like practice will be attained in almost all cases. In this sense, one author has included child labour in its definition of slavery-like practices.

23 Ibid.
24 Ibid.
25 Ibid.
26 See above p. 18.
In conclusion, the forms of exploitative child labour described in the first chapter, namely industrial and plantation work, domestic service, forced and bonded labour, commercial and sexual exploitation, street work, forced use of children in armed conflicts, children in illicit activities, work for the family and trafficking in children, constitute in almost all cases a slavery-like practice prohibited by the Supplementary Convention. With regard to the categories distinguished by the ILO, all three categories, i.e. labour that is performed by a child at too young an age and is thus likely to impede the child’s education and psychological development, labour that jeopardises the physical, mental or moral well-being of a child and the unconditional worst forms of child labour, are prohibited by the Supplementary Convention.

This conclusion is confirmed by the practice of the relevant UN organs. Using resolutions and reports of UN organs for treaty interpretation is a method that has been used in a series of important advisory opinions to judgments of the International Court of Justice (ICJ) when deciding highly controversial issues. Yet two points arise. Firstly, constitutional members who were outvoted in the organs concerned may not be bound by the practice. Secondly, the practice of political organs involves elements of politics and opportunism. However, it cannot be denied that the standards set by the UN organs are built on a consensus of their members and have a highly integrative effect that is able to improve the evolution of human rights standards. As mentioned above, according to Art. 31 (1) of the VCLT a treaty has to be interpreted in the light of its object and its purpose. According to Art. 31 (3) lit. c of the VCLT, any relevant rule of international law applicable in the relationship between the parties can be taken into account. The purpose of every human rights treaty is the effectiveness of the protection of international human rights. Thus, standards set by the UN organs that are able to define possible violations of the relevant treaty, thereby improving the effectiveness of the treaty in protecting international human rights, should be used in the process of interpretation. Yet, one has to be cautious not to extend the scope of the relevant norm beyond the definition found through interpretation in accordance with Art. 31 (1) of the VCLT.

30 Ibid.
31 Tretter, ‘Sklavereiverbote’, p. 566.
32 Ibid.
The relevant standards in relation to slavery and slavery-like practices are those set by the Working Group on Contemporary Forms of Slavery. The Working Group’s documentation and recommendation regarding the contemporary forms of slavery are not binding. However, its analysis reflects global consideration of these issues by state representatives, non-governmental organisations and leading international scholars. In 1993 the Commission on Human Rights adopted a Programme of Action for the Elimination of the Exploitation of Child Labour drafted by the Working Group on Contemporary Forms of Slavery. In paragraph 3 it stipulates that the most odious forms of child exploitation including child prostitution, employment in dangerous occupations and debt bondage should be prioritised. While paragraph 3 focuses on illicit child labour, paragraph 5 addresses the most dangerous forms of child labour and the elimination of work by children under ten years of age, with a view to the total elimination of child labour.

In paragraph 20 the Programme of Action calls on states to review their legislation with a view to the absolute prohibition of employment of children in cases such as employment before the normal age of primary schooling, work in dangerous or unhealthy conditions and activities linked with prostitution or trafficking in the production of illicit drugs.

It should be noted that not only the unconditional worst forms of child labour are mentioned but also work at too young an age and before the normal age of primary schooling. This provides further evidence that all three categories distinguished by the ILO should come within the prohibition of slavery-like practices under the Supplementary Convention.

In its Resolution 1999/17, para. 43, the Sub-Commission on the Promotion and Protection of Human Rights requested the Secretary-General to invite states to inform the Working Group on Contemporary Forms of Slavery of measures adopted to implement the Programme of Action and to submit a report thereon to the Sub-Commission at its fifty-second session. As a consequence, governments of states from all parts of the

---

33 Rassam, ‘Contemporary Forms of Slavery’, 317.
34 UN Commission on Human Rights, Programme of Action for the Elimination of the Exploitation of Child Labour.
world reported on the above-mentioned forms of child labour. In its sessions the Working Group discussed child labour, paying special attention to reports on bonded labour in Nepal, India and Pakistan and on child prostitution.


Finally, in its Fact Sheet No. 14 on slavery, the Office of the High Commissioner for Human Rights (OHCHR) includes most types of child labour presented in Chapter 1 when describing modern forms of slavery.

3. State obligations

According to Art. 1, states parties are under an obligation to bring about progressively and as soon as possible the abolition of certain practices similar to slavery, whether or not they are covered by the Slavery Convention of 1926. Besides introducing the necessary legislative and administrative measures, the states parties shall make certain acts ancillary to slavery and servitude criminal offences. In accordance with Art. 3, to convey or attempt to convey slaves from one country to another by whatever means of transport is a criminal offence.

This wording makes it clear that states parties not only have to refrain from exercising practices similar to slavery but also to ensure that those practices are abolished. Hence, these obligations extend to violations committed by private parties. States have to enact the necessary legislative and administrative measures to ensure that these violations do not occur. With respect to child labour, since lax enforcement of laws is a major

---

36 See for example replies received from Kuwait and Mexico, UN Commission on Human Rights, Contemporary Forms of Slavery, E/CN.4/Sub.2/2000/22.
37 See for example UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Contemporary Forms of Slavery, E/CN.4/Sub.2//1997/13, para. 49.
39 OHCHR, Contemporary Forms of Slavery.
cause of child labour, it is arguable that states are under an obligation
to provide for necessary labour inspections in private enterprises to
combat child labour. In this sense it is held that the prohibition of
slavery imposes governmental responsibility to ensure it is observed by
everyone.\(^{40}\)

4. Conclusion

Bearing in mind that the concept of slavery emerged under the slave
trade in the Americas, situating slavery and the slave trade in its
modern, global context allows broader interpretations of categories
under international law with respect to slavery-like practices. The types
of child labour designated as exploitative by UNICEF and the ILO\(^ {41}\)
constitute a slavery-like practice prohibited by the Supplementary Con-
vention. By the same token, all the three categories distinguished by the
ILO come within the scope of the Supplementary Convention. State
obligations extend to the prevention and suppression of violations com-
mitted by private parties.

III. The Universal Declaration of Human Rights – Art. 4

The Universal Declaration of Human Rights (UDHR) was adopted by the
General Assembly on 10 December 1948.\(^ {42}\) It was adopted without a
dissenting vote.\(^ {43}\)

1. Wording

Art. 4 of the UDHR provides:

No one shall be held in slavery or servitude; slavery and the slave trade shall be
prohibited in all their forms.

2. Scope and content of the norm

a) The definition of slavery

There was a consensus from the beginning that anti-slavery standards
should be incorporated into the UDHR.\(^ {44}\) Therefore, the definition of

\(^{40}\) O. Schachter, *International Law in Theory and Practice* (Dordrecht/Boston/London, Martinus

\(^{41}\) See above p. 19 et seq.


\(^{43}\) Ibid.

\(^{44}\) N. Lassen, ‘Article 4’ in G. Alfredsson, E. Asbjorn (eds.), *The Universal Declaration of Human
Rights, A Common Standard of Achievement* (The Hague/Boston/London: Martinus Nijhoff
slavery contained in the Slavery Convention of 1926 may also be applied in the context of the UDHR. Art. 1 of the Slavery Convention reads:

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

The notion of ‘slavery’ was meant to include trafficking in women and children.45

Because the UDHR is not a treaty but a declaration, the principles of treaty interpretation are applicable a maiore ad minus.46 Preceding treaties such as the Slavery Convention may be used as supplementary means of interpretation within the meaning of Art. 32 of the VCLT.47 The travaux préparatoires are also only a supplementary means of interpretation according to Art. 32 of the VCLT. Yet, since it also follows from the wording and the objective that the term ‘slavery’ contained in Art. 4 of the UDHR includes trafficking in children, this does not lead to a different conclusion in this case.

However, the question is whether all forms of child labour are included in the definition of slavery. Having classified child labour as a slavery-like practice under the Supplementary Convention and bearing in mind that, traditionally, the notion of slavery was construed narrowly, referring only to chattel slavery,48 it is more appropriate to examine whether the term ‘servitude’ contained in Art. 4 of the UDHR can be read to include exploitative child labour.

b) The definition of servitude
It was agreed that the prohibition of servitude should be included, regardless of whether the servitude was voluntary or not.49 The notion

---

46 The main difference between a declaration and a treaty is that the latter is intended to create legal relations. This difference of course has to be borne in mind when applying the rules of the VCLT, in particular those regarding invalidity, termination and suspension of treaties. There is however no reason why the rules of treaty interpretation should not be applied to other instruments of international law provided that the non-binding nature of such instruments is taken into account. This applies a fortiori to documents of a non-diplomatic character.
48 See above p. 37.
of ‘servitude’ was considered to cover systems of forced, compulsory or ‘corrective’ labour.\(^{50}\)

In contrast, no mention was made in the drafting process as to whether modern forms of slavery such as economic exploitation of child labour should come within the prohibition.

Assuming that it is a common idea that the same term should have the same meaning when applied in different treaties, it is generally acceptable to draw on other treaties on the same subject when interpreting treaties.\(^{51}\) The same should apply for soft law instruments such as declarations.

Art. 8 (2) of the International Covenant on Civil and Political Rights (ICCPR) also uses the term ‘servitude’. As will be demonstrated below, the term ‘servitude’ in Art. 8 (2) of the ICCPR has to be read to include slavery-like practices prohibited by Art. 1 of the Supplementary Convention.\(^{52}\) Since the Supplementary Convention prohibits the exploitation of child labour as one form of contemporary slavery, the notion of ‘servitude’ in Art. 4 of the UDHR might be interpreted to include exploitative child labour as defined by UNICEF and the ILO.\(^{53}\)

Referring to the ICCPR should also be allowed for another reason: it has been suggested that subsequent treaties between the same parties can be referred to as evidence for following state praxis as mentioned in Art. 31 (3) lit. b of the VCLT.\(^{54}\) This rule should apply a fortiori in the case of the UDHR and the ICCPR since the drafting of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^{55}\) had the aim of transforming the principles of the UDHR into binding, detailed rules of law.\(^{56}\)

3. The legal nature of the UDHR

The Preamble of the UDHR states that it is ‘a common standard of achievement’. It was adopted as a non-binding resolution of the General Assembly, but its precise legal status remains controversial.

\(^{50}\) Ibid.


\(^{52}\) See the analysis of the terms ‘slavery’ and ‘slavery-like practices’ under Art. 8 of the ICCPR p. 54 et seq.

\(^{53}\) See above p. 18.

\(^{54}\) Matscher, ‘Vertragsauslegung durch Vertragsrechtsvergleichung’, p. 564.

\(^{55}\) Both covenants will be presented below.

The minimalist approach holds that the UDHR is not more than a non-binding resolution of the General Assembly.\textsuperscript{57}

An alternative approach consists of treating the UDHR and the body of soft law built upon it as an authoritative interpretation of the obligation contained in Art. 55 (c) and 56 of the UN Charter.\textsuperscript{58} Art. 56 reads:

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Art. 55 (c) provides that the United Nations shall promote:

universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Finally, many legal writers argue that the entire UDHR\textsuperscript{59} or at least something like a ‘hard core’ of human rights obligations\textsuperscript{60} has become part of international customary law.

The discourse is of practical relevance since the ICJ has found:

. . . in the case of general or customary law rules and obligations, which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.\textsuperscript{61}

Customary law rules are thus also binding on states that are not party to the relevant treaty.\textsuperscript{62} Furthermore, customary law is directly applicable in those states whose domestic legal systems automatically incorporate customary international law.\textsuperscript{63} Since the applicable law of international


\textsuperscript{62} Meron, \textit{Human Rights and Humanitarian Norms as Customary Law}, p. 80.

\textsuperscript{63} Sieghart, \textit{The International Law of Human Rights}, p. 53.
organisations is international law, international organisations are in principle obliged to apply rules of customary law.

Whilst it is commonly accepted and indicated by the ICJ in the *Barcelona Traction* case that the prohibition of slavery and the slave trade forms part of customary law, controversy remains as to slavery-like practices or servitude. According to some legal scholars, not all of the practices that are treated as slavery-like practices are part of customary law. Thus, it is important to examine how customary law comes into existence and which provisions of the UDHR form part of customary law.

It is commonly agreed that customary law requires evidence of two components, namely state practice and *opinio iuris* – a sense of legal obligation on the part of the state performing the practice. Yet this is where the controversy arises – what exactly is state practice and *opinio iuris* and how much of the two elements is needed to turn a rule into customary law? Thus, it is appropriate to define first which criteria should be used to prove that customary international law has come into existence before examining whether the UDHR forms part of customary law.

According to the traditional understanding, customary law was considered to come about through the emergence of a general, uniform, consistent and settled actual state practice, more or less gradually joined by a sense of legal obligation. Thus, the emphasis was on the enforcement of a rule by state organs.

In later decisions, the ICJ also relied on mere claims of states, opinions of government officials and resolutions passed by international organs when looking for evidence for state practice, i.e. not only on what states do but also on what states say. The sources to obtain evidence for state

---

64 Shaw, *International Law*, p. 918.
65 The ICJ stated in *Barcelona Traction* (*Barcelona Traction, Light and Power Company, Ltd.* (*Belgium v. Spain*), Judgment, Second Phase, ICJ Reports 1970, 3–358, para. 34: ‘Such obligations derive, for example, in contemporary international law, from outlawing the acts of aggression, and genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights have entered into the body of general international law.’
68 See for example Shaw, *International Law*, p. 58.
69 *Lotus* (*France v. Turkey*) in PCIJ Series A, 2 1927, Judgment No. 10, 4–33, 8, 28.
70 *Fisheries Jurisdiction* (*United Kingdom of Great Britain and Northern Ireland v. Iceland*), Judgment, ICJ Reports 1974, 47, 56–8, 81–8, 119–20, 135, 161; *Nicaragua (Case Concerning UN C O N V E N T I O N S A N D P R O T O C O L S A N D T H E U D H R*
practice have become more numerous. According to some scholars, evidence may be found in policy statements, opinions by government officials, legal treatises, international and national judicial decisions, recitals of treaties etc. and the general practice of international organs etc. 71

Other legal writers go even further, holding that practice no longer has any constitutive role to play in the establishment of customary law; rather it serves a purely evidentiary function. They rely solely on \textit{opinio iuris}, as expressed in non-binding resolutions and declarations, creating a sort of ‘instant’ customary law. 72

The latter view has to be rejected on the ground that, especially in the field of human rights, there are too many discrepancies between what states actually do, i.e. the everyday-life violations of human rights in many states, and what they declare in international fora. 73 Instead one has to be cautious as to the weight one gives to evidence such as claims, statements and resolutions of international organs. Their weight may vary according to the circumstances of the case and the actual behaviour of states in relation to the rule concerned. Whilst in the \textit{Nicaragua} judgment, the ICJ accepted the consent of the parties to certain General Assembly resolutions as the manifestation of an appropriate \textit{opinio iuris} without looking for positive evidence of ‘external’ state practice in general, 74 this may not be the case in general with General Assembly resolutions in the area of human rights. In contrast to the \textit{Nicaragua} case, where the court only found minor inconsistencies in the behaviour of states, it is probable that in the field of human rights, major inconsistencies in the general state practice may prevent the creation of a customary rule. Finally, the very notion of ‘custom’ refers to time, which means that ‘instant custom’ is a contradiction in terms. 75

Recognising the lack of actual state practice in the field of human rights, Schachter proposes that, in this area, the following evidence should be used to determine state practice and \textit{opinio iuris}: incorporation of human rights provisions in national constitutions; UN resolutions


74 \textit{Nicaragua} (Case Concerning Military and Paramilitary Activities in and against Nicaragua).

75 Malanczuk, \textit{International Law}, p. 46.
and declarations and practices by other international bodies condemning human rights violations; a ‘criticism test’ according to which state practice is obtained from critical statements of government officials condemning human rights violations; the ICJ dictum that obligations *erga omnes* include those derived ‘from the principles and rules concerning the basic rights of the human person’; the duty of all states to observe the UDHR; and national decisions referring to the UDHR as binding law.

Whilst at first sight, this approach appears to be more convincing, the question remains why exactly in the field of human rights it should be sufficient to rely on the practice of international organs to find evidence for customary law. It is a rather weak argument that evidence is rarely to be found in the traditional patterns of state practice. However, since Schachter does not include the prohibition of slavery-like practices in his list of customary human rights norms, it is beyond the scope of this work to discuss his view in detail.

Having found that traditional methodology for determining human rights as customary law fails to render a clear definition of slavery as protected by customary international law, Rassam suggests resolving this ambiguity by employing normative criteria of ‘non-discrimination on the basis of gender’ and ‘increased participation’ in legal discourse. She follows a value-based methodological approach proposed by some legal writers including feminist scholars. Taking into account the special needs of women and the traditionally disadvantaged groups of people, she argues that evolving customary law should include categories for the practices of sex trafficking, forced prostitution, debt bondage, forced labour and the exploitation of immigrant domestic workers. Asserting that de facto human rights violations due to a lack of state implementation of generally accepted obligations under international law contradict the notion of customary international law, she mainly relies on the argument that categorising contemporary forms of slavery

---

76 *Barcelona Traction (Barcelona Traction, Light and Power Company, Ltd.)* para. 33.
78 Ibid., p. 338.
79 Rassam, ‘Contemporary Forms of Slavery’, 342 et seq.
81 Rassam, ‘Contemporary Forms of Slavery’, 351.
within the parameters of customary law would help the human rights movement tremendously.  

Although this approach seems appealing, it does not resolve the lack of state practice as evidence for customary law. It is open to doubt whether the concept of custom should be reshaped so fundamentally in a manner that disregards its intrinsic limitations. The question arises of what use it is to define customary law in a different manner when states do not observe these customary norms. Additionally, it remains doubtful whether domestic courts would apply those newly defined customary norms.

In conclusion, state practice remains relevant for human rights norms to become part of customary law. It is arguable that some provisions of the UDHR have evolved into customary law. There is a great consensus that the prohibition of slavery has entered into the category of customary international law in the light of existent state practice. However, looking at the actual state practice, contemporary forms of slavery such as the exploitation of child labour cannot yet be included in the list of customary human rights norms. Thus, to the extent Art. 4 of the UDHR prohibits contemporary forms of slavery, it is not yet part of customary law.

Finally, one has to discuss whether the UDHR is an authoritative interpretation of Art. 55 (c) and 56 of the UN Charter and as such a binding obligation on all states parties to the UN. While this approach seems to be more convincing, it is not of much relevance since the Charter leaves a wide discretion to states concerning the speed and means of fulfilling their pledge. It cannot be said that governments or courts have accepted the UDHR as an instrument with obligatory force. Additionally, the fact that the international covenants were adopted with the clear intention to give legal effect to the rights enumerated in the UDHR remains a convincing argument to deny obligatory force to the UDHR.

---

82 Ibid., 345 et seq.
84 Note the pervasive existence of exploitative child labour described in Chapter 1.
86 Malanczuk, International Law, p. 213.
87 Schachter, International Law, p. 337.
88 Ibid.
4. Conclusion

In the light of the ICCPR and the Supplementary Convention on the Abolition of Slavery, Art. 4 of the UDHR should be interpreted as prohibiting the exploitation of child labour as defined by the ILO and UNICEF.\(^89\) Thus, the main types of child labour described in Chapter 1 are prohibited by Art. 4.\(^90\)

Whilst some provisions of the UDHR may have become part of customary law, the prohibition of exploitation of child labour as one form of contemporary slavery under Art. 4 of the UDHR has not yet reached that status. Thus, the prohibition is not a binding obligation for those states that are not party to a treaty providing for the prohibition of child labour. At present, most states do not consider the UDHR as obligatory.

IV. The International Covenant on Civil and Political Rights – Art. 8

The International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly on 16 December 1966. As of July 2008, 162 states had ratified the ICCPR.\(^91\)

1. Wording

The text of Art. 8 of the ICCPR reads as follows:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;
(b) Paragraph 3 (a) shall not be held to preclude in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
(c) For the purpose of this paragraph the term ‘forced or compulsory labour’ shall not include:
   (i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or a person during conditional release from such detention;
   (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

\(^89\) See above p. 18.
\(^90\) For the main types of child labour see above p. 19 et seq.
(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
(iv) Any work or service which forms part of normal civil obligations.

The text of Art. 2 (2) of the ICCPR reads as follows:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

The text of Art. 4 (2) of the ICCPR reads as follows:

No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

2. Scope and content of the norm
   a) The definition of slavery
      The term ‘slavery’ in Art. 8 (1) of the ICCPR may be defined in the sense of Art. 1 (1) of the Slavery Convention of 1926, as the ‘status or condition of a person over whom any or all of the powers of ownership are exercised’.
      A definition of slavery and the slave trade was avoided, but it is clear from the travaux préparatoires that the term ‘slavery’ was understood in its narrow, traditional sense, i.e. the destruction of the juridical personality.92 The definition thus refers to traditional forms of slavery such as treatment of human beings as mere chattels. Contemporary forms of slavery such as child labour are thus not referred to.
      Equally the term ‘slave trade’ has to be construed in its narrow sense. A French proposal to substitute for ‘slave trade’ ‘trade in human beings’ (a phrase covering traffic in women for sexual exploitation as well as slaves) was not accepted.93

   b) The definition of servitude
      Child labour as a slavery-like practice could come within the meaning of the term ‘servitude’. In the light of the Supplementary Convention of

93 Bossuyet, Guide to the Travaux Préparatoires, p. 165.
1956, it seems reasonable to speak of slavery-like practices when referring to servitude.94 Art. 7 of the Supplementary Convention defines ‘a person of servile status’ as a person in the condition or status resulting from any of the institutions or practices mentioned in its Art. 1, i.e. a slavery-like practice. The various slavery-like practices prohibited by the Supplementary Convention are enumerated above. As demonstrated above, child labour as condemned by UNICEF and the ILO constitutes a slavery-like practice under the Supplementary Convention. Thus, child labour constituting a slavery-like practice under the Supplementary Convention arguably comes within the definition of servitude contained in the ICCPR.

This method of treaty interpretation is arguably in accordance with the rules of treaty interpretation contained in Art. 31 of the VCLT.95 According to Art. 31 (3) lit. c of the VCLT, any relevant rule of international law applicable in the relations between the parties shall be taken into account when interpreting a treaty. Hence taking into account other treaties on the same subject in the process of interpretation should be permitted, unless the treaty itself says the contrary.96

It is however an issue of concern whether that rule may be applied only to treaties concluded between the same parties. It is subject to much debate whether the term ‘the same parties’ contained in Art. 31 (3) lit. c means that all parties to the treaty to be interpreted have to be parties to the treaty referred to or the parties to the particular conflict or only one party to the conflict.97

Referring to the pacta tertiis rule contained in Art. 34 of the VCLT, it might be argued that Art. 31 (3) lit. c of the VCLT was intended to allow for reference only to those agreements that clearly reflect the common intentions of all parties. According to the pacta tertiis rule, a treaty may not create obligations for non-parties to the treaty. Hence one could conclude that all parties to the treaty to be interpreted have to be party to the treaty referred to. Another view differentiates between treaties with erga omnes obligations and treaties with inter partes obligations,
concluding that treaties with *inter partes* obligations may be interpreted by referring to rules that are only applicable between the parties to the particular conflict.98

There is however another solution to the problem. Exploring the usage of the word ‘parties’ throughout Art. 31 of the VCLT,99 one acknowledges that Art. 31 (2) lit. a of the VCLT refers to ‘all the parties’ while Art. 31 (2) lit. b of the VCLT relates to documents made by ‘one or more parties’ and accepted by ‘the other parties’. This suggests that the more general term ‘parties’ refers to an uncertain number of parties.100 One may conclude that the treaty referred to merely has to be accepted by a majority of parties. In *US–Shrimps*, it was sufficient that the relevant treaty was acknowledged by the international community.101 Referring to the creation of rules of customary law, it has also convincingly been argued that, at least in cases where the treaty to be considered is ratified by a majority of parties and other parties did not protest, this treaty may be referred to.102

In 1991, 106 parties had ratified the Supplementary Convention, i.e. a majority of states. The Supplementary Convention may thus be referred to.

In addition, it has rightly been argued that treaties on the same subject can be said to reflect the ‘ordinary meaning’ of the terms of a treaty.103

Referring to the travaux préparatoires in accordance with Art. 32 of the VCLT, they reveal that ‘slavery’ and ‘servitude’ in paragraph 2 of Art. 8 of the ICCPR were understood as two different concepts.104 The term ‘servitude’ was meant to be applicable to all conceivable forms of dominance and degradation of human beings by human beings.105 Whereas the notion of ‘slavery’ was regarded as a relatively limited and technical notion that implied the destruction of the juridical personality of the

---

98 For a good presentation of this view cf. Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen*, p. 376 et seq.
100 Ibid.
102 Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen*, p. 382 et seq.
103 Matscher, ‘Vertragsauslegung durch Vertragsrechtsvergleichung’, p. 560 et seq. citing the term of forced or compulsory labour in ILO Convention 1930, No. 87 and 98, the ECHR, the ICCPR and the ICESCR.
victim, servitude was a more general idea covering all possible forms of one person’s domination of another.\(^{106}\)

In the drafting process, a US proposal to substitute ‘servitude’ with ‘peonage or serfdom’ was turned down for fear that this wording would excessively narrow the scope of application.\(^{107}\) The drafters wanted to prohibit servitude in any form, whether involuntary or not.\(^{108}\) This conclusion is also confirmed by the specific comments of the Human Rights Committee (HRC).\(^{109}\) In 1992, the HRC decided that, at the end of each state party’s report, specific comments would be adopted referring to the country in question and such comments would both express the satisfaction and the concerns of the HRC as appropriate.\(^{110}\)

In its Comments on Art. 8 of the ICCPR regarding Italy the HRC noted with appreciation that the judiciary has begun to treat offences concerning trafficking women and others for the purpose of prostitution as acts that can be assimilated to slavery and contrary to international and national law.\(^{111}\) In its Concluding Comments on Brazil, the HRC confirmed that Art. 8 obliges states parties to enforce laws prohibiting forced labour, child labour and child prostitution and to implement programmes to prevent and combat such human rights abuses. In its opinion, it is imperative that persons who are responsible for, or who directly profit from, forced labour, child labour and child prostitution, be severely punished under law.\(^{112}\)

Child labour as defined by the ILO or UNICEF thus comes within the meaning of servitude in Art. 8 (2) of the ICCPR. As under the Supplementary Convention, all three categories, i.e. also child labour at too young an age, should be encompassed. Thus, the main types of child labour described in Chapter 1 are ruled out by this prohibition.

c) The definition of forced or compulsory labour

The ICCPR formally distinguishes between ‘servitude’ and ‘forced or compulsory labour’, Art. 8 (3) lit. a. Although the two categories overlap,


\(^{107}\) Bossuyet, Guide to the Travaux Préparatoires, p. 167.

\(^{108}\) Ibid.

\(^{109}\) For the UN treaty-based human rights implementation mechanism see below Chapter 3 section B II.

\(^{110}\) See references in Shaw, International Law, p. 236.


they cannot be treated as equivalent as the prohibition of forced or compulsory labour recognises permissible exceptions and derogations. The fundamental feature of forced or compulsory labour is involuntariness, whereas slavery and servitude are also prohibited in the event of voluntariness.\textsuperscript{113} In accordance with Art. 31 (3) lit. c of the VCLT, the definition in Art. 2 (1) of ILO Convention No. 29 – according to which forced or compulsory labour is considered to be ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’ – may also be used when interpreting Art. 8 of the ICCPR.\textsuperscript{114} The European Commission of Human Rights has observed that historically the term was associated with labour conditions in non-self-governing territories, and the purpose of the prohibition in a number of studies, recommendations and conventions was to end slavery, colonial oppression and the exploitation of manpower.\textsuperscript{115} Therefore, the Commission concluded that the concept of ‘forced or compulsory labour’ cannot be interpreted only in terms of the literal meaning of the words. With regard to the relevant ILO conventions it developed two requirements to be fulfilled to constitute forced or compulsory labour: firstly, that the work or service is performed by the worker against his will; and secondly, that the requirement that the work or service be performed is unjust and oppressive, or that the work or service itself involves unavoidable hardship.\textsuperscript{116} But in the light of the relatively far-reaching exceptions the term ‘forced or compulsory labour’ should be understood broadly.\textsuperscript{117} Since the additional requirements do not appear in the wording of the text, the term’s objective requirements are satisfied when the state or a private party orders personal work or service and punishment or a comparable sanction is threatened if the order is not obeyed.\textsuperscript{118} The subjective element is the involuntariness of the victim’s work.

As regards child labour, it has been found that child labour as defined by the ILO and UNICEF constitutes a contemporary form of slavery falling within the definition of servitude. Since slavery-like practices

\textsuperscript{113} Dinstein, ‘The Right to Life’, 126.
\textsuperscript{114} Nowak, \textit{CCPR Commentary (1993)}, p. 150; Sieghart, \textit{The International Law of Human Rights}, p. 231.
\textsuperscript{116} Ibid.
\textsuperscript{117} Nowak, \textit{CCPR Commentary (1993)}, p. 150.
\textsuperscript{118} Ibid.
are determined by a certain degree of ownership and control over the victim, the question of voluntariness becomes superfluous when determining slavery-like practices. If the victim is de facto dependent on its master, its will does not matter anymore. Equally, there is no need for the menace of a penalty. Thus, although the two concepts of forced labour and slavery-like practices are not the same, slavery-like practices comprise the necessary elements constituting forced labour and should be considered to come within the meaning of the term ‘forced labour’ contained in Art. 8 (3) lit. a of the ICCPR.

This view is confirmed by other legal authors who have held that Art. 8 (3) lit. a prohibits all forms of forced labour beyond slavery and slavery-like practices,\(^{119}\) and that the notion of ‘servitude’ was considered to cover systems of forced, compulsory or ‘corrective’ labour.\(^{120}\) Hence, child labour can be said to come within the meaning of forced labour.

It should however be clear that child work, i.e. work by children above the age of fifteen that is not hazardous, is not covered by this prohibition of forced labour.

d) Exceptions and exemptions

Art. 8 (3) lit. a of the ICCPR is subject to various exceptions and exemptions contained in Art. 8 (3) lit. b and c. However, since child labour comes within the notion of servitude, which is prohibited by Art. 8 (2) that does not allow exceptions, the exceptions or exemptions of Art. 8 (3) do not apply in the case of child labour. Otherwise, the absolute prohibition of servitude would be circumvented. Here again, it should be stressed that, in case otherwise tolerable child work occurs under conditions amounting to forced labour, the exceptions apply.

3. State obligations

The state obligations under the ICCPR display two principal features: firstly, they are absolute – that is they are not expressed as being limited by the resources available to the state, or by reference to the means to be employed in performing them; secondly, they are immediate – that is, each state is bound to take the necessary steps to secure the human rights and fundamental freedoms concerned from the moment that the treaty comes into force for that state.\(^{121}\) Already in 1925, the Permanent

\(^{119}\) Ibid., p. 149.

\(^{120}\) Lassen, ‘Article 4’, p. 106.

Court of International Justice described as ‘self-evident’ the principle that ‘a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken’. In this sense, the HRC has commented that the obligation for states parties under Art. 2 (2) of the ICCPR is not confined to mere respect for human rights but requires specific activities on their part to enable individuals to enjoy those rights. Apart from constitutional and legislative enactments it is important that individuals should know what their rights are, and that all administrative and judicial authorities should know what obligations their state party has assumed.

Thus, states are also obligated to prevent violations of the prohibition by private parties with legal or other positive measures. In this sense, the prohibition in Art. 8 of the ICCPR has a horizontal effect.

In relation to child labour, one might legally require that states are obliged to ensure the effective administrative enforcement of the prohibition of child labour through adequate labour inspections of private enterprises.

Art. 4 (2) of the ICCPR declares the prohibition of slavery and servitude as non-derogable. Thus, in time of public emergency that threatens the life of the nation and the existence of which is officially proclaimed, the states parties may not take measures derogating from Art. 8 (1) and (2).

4. Conclusion

Whereas the notion of ‘slavery’ in Art. 8 (1) of the ICCPR has to be construed in its narrow traditional sense, ‘servitude’ in Art. 8 (2) is a broader term and includes slavery-like practices such as the forms of child labour condemned by the ILO and UNICEF. Child labour also comes within the meaning of the term ‘forced or compulsory labour’ in Art. 8 (3) lit. a of the ICCPR.

The obligations of the states parties under Art. 8 are immediate and absolute. The prohibitions of Art. 8 have horizontal effect in the sense that:

---


124 Ibid.


126 Ibid.

127 See above p. 19 et seq.
that states parties have to prevent violations by private parties by legal and other measures. This may take the form of labour inspections in private enterprises.

V. *The International Covenant on Civil and Political Rights – Art. 24 (1)*

1. Wording

Art. 24 (1) states:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor on the part of his family, society and the state.

2. Scope and content of the norm

Whilst all rights contained in the ICCPR are applicable to children, Art. 24 especially refers to children by explicitly requiring positive measures of protection. Art. 24 (1) of the ICCPR does not set forth specific rights of the child; it guarantees a right to necessary measures of protection by the child’s family, the society and the state.

In 1989, the HRC issued General Comment 17 on Art. 24 of the ICCPR in which it stated that the measures required by Art. 24 of the ICCPR could also be economic, social and cultural. It held that every possible economic and social measure should be taken to prevent children from being exploited by means of forced labour or prostitution, or by the use of illicit trafficking of narcotic drugs or by any other means.

In addition, in its Concluding Comments on India, the HRC expressed its concern that, despite actions taken by the state party, there had been little progress in implementing the Child Labour Prohibition and Regulation Act of 1986.

Since Art. 24 of the ICCPR protects the child ‘as a minor’, it may be assumed that Art. 24 of the ICCPR refers to persons up to the age of fourteen or fifteen, i.e. not to juvenile persons.

---

131 Ibid.
3. State obligations

Art. 24 of the ICCPR equally obliges the states parties, the society and the family. The obligation on the family and the society stresses the horizontal effects of this provision, but it can only be made binding indirectly, that is by corresponding governmental domestic measures.\(^{134}\) That means that the state has a comprehensive duty to prevent interference by its authorities and private parties alike, including a child’s own parents (e.g. in the event of child abuse or neglect), and to enact positive statutory, administrative or other measures in all culpable or non-culpable situations in which a child requires special protection.\(^{135}\)

Interpreting Art. 24 in a way that ensures the effective protection of human rights, states are under an obligation to provide for rehabilitation and educational measures to eliminate child labour. However, since this involves rights under the ICESCR, a violation of Art. 24 (1) of the ICCPR only occurs in cases of completely inadequate protection or discriminatory treatment.\(^{136}\)

4. Conclusion

In sum, Art. 24 of the ICCPR *inter alia* obliges states parties to provide for economic and special measures to protect children from economic exploitation. Such measures comprise measures concerning the rehabilitation and education of former child labourers.

VI. The International Covenant on Economic, Social and Cultural Rights – Art. 10 (3)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted in 1966 and entered into force in 1976. As of July 2008, 159 states had ratified the ICESCR.\(^{137}\)

1. Wording

The text of Art. 10 (3) reads as follows:

Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from

\(^{134}\) Ibid., p. 424.


\(^{137}\) OHCHR, www2.ohchr.org/english/bodies/ratification/3.htm.
economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Art. 2 (1) of the ICESCR describes the duties incumbent on states parties in the realisation undertaken by states as regards the implementation of rights. The text reads as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, 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.

Art. 5 (2) of the ICESCR reads:

No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

2. Scope and content of the norm

Although in the drafting process, the view was expressed that provisions relating to child labour would be the responsibility of the ILO, the majority felt that a provision protecting children from economic exploitation was necessary. Art. 10 (3), second sentence of the ICESCR is thus the first human rights treaty provision clearly referring to the protection from economic exploitation of children. Art. 10 (3), third sentence may be considered as the definition of economic exploitation within the meaning of Art. 10 (3). It explicitly refers to work that is harmful to the morals or health of children and hampers their normal development. It thus differentiates between exploitative child labour and tolerable child work in accordance with the ILO and UNICEF. Already in the drafting process, there was a consensus that the notion of ‘child’ varied from country to country and that not every type of child work had necessarily to be considered as illegal. The scope of the prohibition

thus corresponds to the definition of child labour used by the ILO and UNICEF presented in Chapter 1. Consequently, forms of child labour defined as exploitative by the ILO and UNICEF can be said to come within the prohibition of Art. 10 (3) of the ICESCR. With regard to the categories distinguished by the ILO, all three categories, i.e. labour that is performed by a child at too young an age and thus likely to impede a child’s education, that jeopardises the physical, mental or moral well-being of a child and the unconditional worst forms of child labour, are prohibited by the Covenant. It should however be mentioned that Art. 10 (3) also refers to young persons.

The Committee on Economic, Social and Cultural Rights in its reporting guidelines acknowledges that the information in states’ reports under Art. 10 (3) of the ICESCR may overlap with information presented in states’ reports made under the CRC. When comparing the scope of Art. 32 of the CRC and Art. 10 (3), it becomes obvious that Art. 10 (3) may be regarded as a predecessor of Art. 32 of the CRC.

3. State obligations

Insofar as international human rights law differentiates between the obligations to respect, protect and fulfil, economic, cultural and social rights may impose all of these obligations on states depending on the right concerned. The obligation to protect implies the protection of individual rights from violation by third parties, as such an obligation with horizontal effect – often known as ‘Drittwirkung der Grundrechte’. Art. 10 (3) of the ICESCR is such an obligation since it expressly stipulates that children and young persons should be protected from economic and social exploitation. In particular, employment of children that amounts to economic exploitation should be punishable by law. In addition, states should provide for a minimum age for employment below which employment of children is punishable by law. This is a clear recognition that the responsibility of states comprises the protection of the individual from third party violation. In this regard it is

---

142 Ibid., p. 111.
143 Ibid., p. 112.
also notable that Art. 5 (1) of the ICESCR explicitly prohibits states as well as other private groups from engaging in any activity aimed at the destruction of the rights recognised by the Covenant.

Art. 2 (1) of the ICESCR provides for the progressive realisation of the rights to the maximum of each party’s available resources. However, in its General Comment 3 the Committee explicitly stated that Art. 10 (3) required immediate implementation and was suited to judicial determination.\(^{144}\) Thus, in accordance with the wording of Art. 10 (3), states should immediately take judicial remedies upon the enforcement of existing legislative or administrative measures regarding the prohibition of economic exploitation of children and the minimum age of employment.

The requirement to fulfil the obligation ‘by all appropriate means’ has been interpreted to leave the initial decision as to what measures are appropriate with the states parties concerned.\(^{145}\) Although the adoption of legislative measures is specifically foreseen by the Covenant, the Committee has stressed that this is by no means exhaustive.\(^{146}\) Other measures would include administrative, financial, educational and social measures.\(^{147}\) Thus, in the case of child labour, states should also adopt adequate administrative measures such as labour inspections of private enterprises. Other appropriate measures might include, in particular, educational measures and rehabilitation measures for former child labourers.

In this regard, it should be noted that the phrase ‘to the maximum of its available resources’ is not to be understood as an excuse for states parties to delay the realisation of rights but as a mere recognition that many states do not have sufficient resources to undertake the large-scale action required by the Covenant immediately.\(^{148}\) By contrast, the Committee regards the failure to provide for basic subsistence needs as a prima facie violation of the ICESCR, relying thereby on a ‘minimum threshold approach’.\(^{149}\) Most importantly, the phrase ‘to the maximum of its available resources’ also refers to international resources available

---


\(^{145}\) Ibid., para. 4.

\(^{146}\) Ibid.

\(^{147}\) Ibid., p. 15, para. 7.


\(^{149}\) Committee on Economic, Social and Cultural Rights, ‘General Comment No. 3’, HRI/GEN/1/Rev.7, p. 15, para. 10.
from the international community through international cooperation and assistance. 150 With regard to international cooperation, the Committee mentions the obligations contained in Art. 55 and 56 of the Charter of the UN and the Declaration on the Right to Development, without explaining in detail how states should fulfil their obligation to cooperate and assist. 151 There is a general consensus that developing states are entitled to ask for assistance, but not claim it as a legal right. 152 Neither does the Committee expect a specific form of aid nor prescribe to whom that aid should go. 153 However, it could be argued that a state party violates its obligation if the amount of aid it provided to other states parties declines over a number of years. 154 These findings are of particular importance in the case of child labour occurring mostly in developing countries that suffer from resource constraints.

Finally, it should be noted that the ICESCR does not provide for a non-derogation clause similar to Art. 4 of the ICCPR. Art. 5 (2) of the ICESCR merely states that no derogation from fundamental human rights is permissible under the pretext that the Covenant protects these rights to a lesser extent.

4. Conclusion

Art. 10 (3) of the ICESCR was the first explicit treaty law prohibition of economic exploitation of child labour in international law. The forms of child labour condemned by the ILO and UNICEF that are described in Chapter 1 fall under the prohibition of Art. 10 (3) of the ICESCR. Since these categories are rather general, the exact definition of the types of exploitative child labour is left to the states parties.

State obligations under Art. 10 (3) also refer to non-state actors. States have to make employment amounting to economic exploitation punishable by law and to provide for minimum age regulations under which the paid employment of children will be punishable by law. Administrative measures may comprise labour inspections of private enterprises and educational and rehabilitation measures for former child labourers.

Although state obligations under the ICESCR are progressive and qualified, Art. 10 (3) requires immediate implementation and is suited to judicial determination.

150 Ibid., para. 1.
151 Ibid., para. 14.
153 Ibid.
154 Ibid., p. 150.
Most importantly, it should be noted that the ICESCR requires states to fulfil their obligations through international cooperation. It can be argued that these obligations are violated if the amount of aid provided to other states parties declines over a number of years.

VII. The Convention on the Rights of the Child – Art. 32

The Convention on the Rights of the Child was unanimously adopted by the UN General Assembly on 20 November 1989, and entered into force on 2 September 1990.\textsuperscript{155} As of July 2008, 193 states had ratified the Convention.\textsuperscript{156} It is signed by the US and Somalia. The right of children to be protected from economic exploitation first appeared in the Declaration on the Rights of the Child of 1924 and was reiterated and expanded in the Declaration on the Rights of the Child of 1959.

1. Wording

The text of Art. 32 of the CRC reads as follows:

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular
   a) provide for a minimum age or for minimum ages for admission to employment;
   b) provide for appropriate regulation of the hours and conditions of employment;
   c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

The text of Art. 39 of the CRC reads as follows:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading punishment; or armed conflicts. Such recovery and reintegration


\textsuperscript{156} OHCHR, \url{www2.ohchr.org/english/bodies/ratification/11.htm}. 
shall take place in an environment which fosters the health, self-respect and dignity of the child.

Art. 4 of the CRC reads:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

2. Scope and content of the norm

A legal definition of the term ‘child’ is contained in Art. 1 of the CRC. According to that article, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier. This age of eighteen is higher than the age assumed under Art. 24 of the ICCPR. Since the age of eighteen is arguably old in many cultures to be considered a child, the national law of majority may set a lower age.

Art. 32 of the CRC follows the approach of Art. 10 (3) of the ICESCR, which incorporates a general prohibition on the employment of children under a certain age and the employment of children in work constituting a threat to their health or morals. The CRC prohibits economic exploitation and the following types of work:

- hazardous work;
- work that interferes with the child’s education;
- work that is harmful to the child’s health; and
- work that is harmful to the child’s physical, mental, spiritual, moral or social development.

Thus, it is not the prohibition of work per se that is the focus of international law but its abuse. The two legislative approaches differentiate between work and economic exploitation. These legislative approaches underline the fundamental difference between the right to work and being obliged to work, and are in accordance with the definition of child labour as presented in Chapter 1.

The Convention does not render a legal definition of the word ‘exploitation’. Exploitation means taking unjust advantage of another for one’s own advantage or benefit. It covers situations of manipulation,

---

158 Ibid.
misuse, abuse, victimisation, oppression or ill-treatment.\textsuperscript{159} Exploitation happens when the human dignity of the child or the harmonious development of the child’s personality is not respected.\textsuperscript{160} Work that interferes with the child’s education, its health and its physical, mental, moral and social development is exploitative.\textsuperscript{161} Thus, despite the use of the word ‘and’, the second half of Art. 32, paragraph 1, first sentence, can be read to define the term ‘economic exploitation’ in relation to children. As already mentioned, UNICEF has provided a list of elements of exploitative child labour. The definition of economic exploitation corresponds to the definition of exploitative child labour as presented by UNICEF and the ILO.

In contrast to Art. 10 (3) of the ICESCR, Art. 32 (1) of the CRC uses the term ‘work’, which covers both employment and work not within an employment relationship. Thus, it would seem that Art. 32 is broader in its scope of application. However, Art. 32 (2), which relates to the national implementation of this provision, is confined to the concept of employment. The CRC’s travaux préparatoires reveal that during the course of the drafting of Art. 32 (2) lit. a, it was suggested that reference should be made to an obligation of states parties to provide for minimum ages for admission to employment ‘or work’.\textsuperscript{162} In response to this proposal, one speaker mentioned that the establishment of a minimum age should not prevent the participation of children, under the direction of their parents and so as not to interfere with their education, in culturally related family hunting, fishing or agricultural activities not regularly employing unrelated workers. Family subsistence activities should not be prohibited as such.\textsuperscript{163} Following this opinion, many delegations expressed their support, deeming it more appropriate that the subparagraph in question be confined only to the concept of admission to employment because it does not apply to work in or for the family.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{160} Ibid.
\item \textsuperscript{161} van Bueren, The International Law of the Rights of the Child, p. 264.
\end{itemize}
The approved text only refers to ‘employment’. Nevertheless, in its general guidelines for periodic reports to be submitted by states parties, the Committee on the Rights of the Child explicitly mentions work both in the formal and the informal sector. In its periodic reviews of state reports, it has expressed its concerns that, for example, in Venezuela children are still involved in labour activities, particularly in the informal sector, including domestic workers, and in the family context. Furthermore, the ILO Minimum Age Convention, which has to be taken into account according to Art. 32 (2) (see below) consequently refers to employment ‘or work’, i.e. not only work within an employment. On the other hand, Art. 32 (2) is not restricted by the standards of the Minimum Age Convention according to which states may legally exclude certain sectors from the scope of application of Convention No. 138, e.g. family and agricultural work. Hence, Art. 32 (1) enshrines a general recognition of the right of the child to be protected against economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s development, wherever it occurs.

When compared to Art. 10 (3) of the ICESCR, the scope of application of Art. 32 (1) is broader because it prohibits ‘any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development’. Art. 10 (3) of the ICESCR only prohibits ‘work harmful to their morals or health or dangerous to life or likely to hamper their normal development’. Thus, in contrast to Art. 32 of the CRC, it is not sufficient in all cases that there is a likeliness of harm.

Furthermore, the CRC instead of relating to the ‘normal’ development of the child, refers to the individual development of each child. This broadens the scope of application, but can also give rise to controversies as to when the development of a child will be hampered.

According to Art. 32 (2) of the CRC, states parties shall implement the right to be protected from exploitation by introducing minimum age legislation with due regard to the relevant international instruments. The main international instrument introducing minimum ages is the

168 Ibid.
ILO Convention concerning Minimum Age for Admission to Employment No. 138. Since this Convention will be examined in detail below, only a few issues should be raised here. Art. 3 of the ILO Minimum Age Convention No. 138 provides that states parties shall determine which types of work are likely to jeopardise the health, safety or morals of young persons. Notably, states parties have to determine those types of work only after consultation with organisations of employers and workers. Recommendation No. 146, that supplements Convention No. 138, gives guidance on the criteria which should be applied to the determination of hazardous employment or work. It states the need to take full account of relevant international labour standards and to pay special attention to dangerous substances, agents or processes (ionising radiations), the lifting of heavy weights and underground work. It further states that a periodic review of the types of employment or work designated as hazardous should be undertaken, especially in the light of advancing scientific and technological knowledge, and in consultation with employers’ and workers’ organisations.

Art. 5 (3) of the ILO Minimum Age Convention No. 138 prohibits states parties from excluding certain activities from the application of the Convention: mining and quarrying; manufacturing; construction works; work in electricity, gas and water; sanitary services; transport, storage and communication; and work on plantations and in other agricultural undertakings mainly producing for commercial purposes. This indicates that these types of work because of their nature are considered to be particularly harmful for the child’s development. Since these types of work correspond to the types of child labour designated as exploitative by UNICEF and the ILO, it can be argued that the Minimum Age Convention attempts to determine certain types of work per se as exploitative. As such, these types of work come within the prohibition of exploitative child labour of Art. 32 of the CRC. In conclusion, the types of child labour listed by the ILO and UNICEF definitely come within the scope of Art. 32 of the CRC. It is however left to the discretion of states to define exactly what types of work fall within the prohibition of economic exploitation. With regard to the categories distinguished by the ILO, all three categories, i.e. labour that is performed by a child at too young an age and thus is likely to interfere with a child’s education, that jeopardises the physical, mental or moral well-being of a child and the unconditional worst forms of child labour, are prohibited by the CRC.

3. State obligations

As far as the implementation of the right to be protected from economic exploitation is concerned, Art. 32 of the CRC explicitly stipulates that states parties not only have to provide for appropriate penalties or other sanctions but also for appropriate regulation of the hours and conditions of employment and for a minimum age(s) for admission to employment with due regard to the relevant international instruments. Since Art. 2 of the ILO Minimum Age Convention obliges states parties to provide for a minimum age not less than the age of completion of compulsory schooling, the CRC reiterates the important link between the minimum legal age for admission to employment or work and the minimum age for the end of compulsory education. Hence, Art. 32 (2) takes full account of the definition of exploitation in Art. 32 (1), which explicitly refers to the child’s education.

As to conditions of employment, the relevant international instruments are the ILO conventions prohibiting employment of children in certain occupations at night, those requiring medical examinations and those prohibiting children from specific dangerous occupations such as the Occupational Safety and Health Convention No. 152. 169a

By stipulating that states parties shall take legislative, administrative, social and educational measures to ensure the implementation, the CRC follows a multi-pronged strategy in combating child labour. This approach is in full accordance with the scientific knowledge presented by UNICEF and the ILO, stressing the importance of education as a key factor in eliminating child labour.170 Administrative measures could include labour inspections of companies. The wide range of measures is proof of the fact that states parties have the obligation to prevent and suppress violations of the right to protection from economic exploitation by private parties. The obligation thus has horizontal effect. Similar to the ICCPR and the ICESCR, Art. 32 of the CRC can be read to require states parties to ensure that private enterprises are inspected for child labour.

In its General Comment on general measures of implementation of the CRC, the Committee on the Rights of the Child also stressed the need to develop a comprehensive national strategy or national plan of action

169a See below p. 87 et seq.
for children.\textsuperscript{171} It also stated that while implementation is an obligation for states parties, it needs to engage all sectors of society, including the children themselves as well as civil society.\textsuperscript{172}

In addition, Art. 39 of the CRC stipulates that there is a duty under the CRC to provide recovery and reintegration for exploited children.

With regard to financial resources, it should be noted that Art. 4 of the CRC, like Art. 2 (1) of the ICESCR, also refers ‘to the maximum of its available resources’ when obliging states to undertake the necessary measures. However, as in the case of Art. 2 (1), this phrase is by no means an escape clause for less resourced countries. Poor countries should at least endeavour to fulfil the minimum core obligations.\textsuperscript{173}

Most importantly, as under the ICESCR, states may fulfil their obligations within the framework of international cooperation, i.e. they should be supported with development assistance when needed. This interpretation was put forward by the World Declaration and Plan of Action from the World Summit for Children.\textsuperscript{174} In its General Comment, the Committee also encouraged states to provide and to use technical assistance in the process of implementing the Convention.\textsuperscript{175} It also stated that the WTO should ensure that its activities related to international cooperation and economic development give primary consideration to the best interests of children and promote the full implementation of the CRC.\textsuperscript{176}

Finally, it should be noted that lacking a non-derogation clause such as Art. 4 (2) of the ICCPR, the rights recognised in the CRC are non-derogable.

4. Conclusion

Art. 32 of the CRC is broader in its field of application than its predecessors and, therefore, contributes to a better protection of the child. It follows the approach of Art. 10 (3) of the ICESCR focusing on the prohibition of economic exploitation rather than establishing a general prohibition of child work. The types of child labour condemned by UNICEF and the


\textsuperscript{172} Ibid., paras. 56–9.


\textsuperscript{174} Ibid., p. 303.

\textsuperscript{175} Committee on the Rights of the Child, General Comment No. 5, CRC/GC/2003/5, para. 63.

\textsuperscript{176} Ibid., para. 64.
ILO can be considered to be ruled out by the prohibition of economic exploitation of children according to Art. 32 of the CRC. The same holds true for the three categories of child labour distinguished by the ILO. Although the ILO Minimum Age Convention and its Recommendation No. 46 give some guidance, states still have some discretion as to what types of work under which circumstances they define as exploitative child labour.

Both Art. 10 (3) of the ICESCR and Art. 32 (2) of the CRC oblige states to implement the rights to be protected from exploitation by introducing minimum age legislation and to provide for appropriate conditions of employment with due regard to the relevant international instruments. The main international instrument introducing minimum ages is the ILO Minimum Age Convention. This is particularly important since it reflects the definition of child labour where it refers to labour that is performed by a child who is under the minimum age specified in national and international standards.

Additionally, in the light of Art. 5 (3) of the ILO Minimum Age Convention No. 138, Art. 32 of the CRC can be read to prohibit the engagement of children in: mining and quarrying; manufacturing; construction works; work in electricity, gas and water; sanitary services; transport, storage and communication; and work on plantation and other agricultural undertakings.

In contrast to Art. 10 (3) of the ICESCR, not only employment but any work that is likely to be hazardous or to interfere with the child’s development comes within the prohibition of the CRC.

The required state obligation is an obligation to protect, i.e. an obligation with horizontal effect where the state is required to suppress violations from third parties. In particular, Art. 32 of the CRC obliges its states parties to pursue a multi-pronged strategy in combating child labour providing for appropriate legislative, administrative, social and educational measures. Implementation has to be in accordance with the relevant international instruments such as the ILO Minimum Age Convention No. 138. This is particularly important with regard to the minimum age for the end of compulsory schooling since adequate basic education is a major tool when combating child labour.

Most important is the reference to assistance of the international community when implementing the CRC. It should also be noted that the Committee stresses that the WTO has due regard to the best interests of the child when carrying out its activities.

The high number of ratifications is proof of a widespread acceptance. However, given the state of economic development and social conditions
in their countries, some states expressed their doubts concerning the national implementation during the drafting process.\textsuperscript{177}

VIII. \textit{The Convention on the Rights of the Child – Art. 34}

1. Wording

The text reads as follows:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

\begin{itemize}
  \item[a)] the inducement or coercion of a child to engage in any unlawful sexual activity;
  \item[b)] the exploitative use of children in prostitution or other unlawful sexual practices;
  \item[c)] the exploitative use of children in pornographic performances and materials.
\end{itemize}

2. Scope and content of the norm

Although Art. 10 of the ICESCR includes by implication specific forms of sexual exploitation such as prostitution, the CRC is the first international treaty to place a comprehensive duty on states parties to protect the child from all forms of sexual exploitation and abuse.\textsuperscript{178}

Art. 34 of the CRC puts the emphasis on three aspects of the sexual exploitation of children: the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; and the exploitative use of children in pornographic performances and materials. No international instrument actually defines prostitution. However, it has been generally viewed as any sexual act offered for reward or profit.\textsuperscript{179}

Lit. a covers both sexual exploitation and abuse. The qualification ‘unlawful’ is introduced because in some states sexual emancipation is reached at an earlier age than full majority.\textsuperscript{180} When analysing the scope of this paragraph, one may refer to Art. 1 (1) of the Suppression of Traffic

\begin{flushright}
\textsuperscript{178} van Bueren, \textit{The International Law of the Rights of the Child}, p. 276.
\textsuperscript{180} van Bueren, \textit{The International Law of the Rights of the Child}, p. 276.
\end{flushright}
Convention according to which states have agreed to punish any person who ‘procures, entices or leads away for the purposes of prostitution another person even with the consent of that person’. The inclusion of voluntary prostitution is important because many children are induced to give their consent in order to send money back to their families to help them to survive.  

The term ‘pornography’ refers to any representation of any degrading sexual practice for the purposes of pleasure or profit, and can involve much commercial activity.  

However, the insertion of the word ‘unlawful’ in lit. a and b appears to be a failure since this implies that the engagement of children in sexual activities and the exploitative use of children could be other than unlawful. Supposing ‘unlawful’ refers to the age of sexual emancipation, children under the age of majority could legally be exploited. Therefore, the Convention has to be interpreted in the light of the Suppression of Traffic Convention, the Preamble of which states that prostitution is ‘incompatible with the dignity of the human person and endangers the welfare of the individual’. However, there is a strong argument that unless children under the age of eighteen who are prostitutes are considered to be de facto exploited, issues of legal child prostitution can be raised.

3. State obligations

In addition to the obligation of protecting children from sexual exploitation and sexual abuse by making it a criminal offence, states parties are obliged to take all appropriate measures to prevent prostitution. The obligation thus has horizontal effect since states have to prevent and punish third party violations. As mentioned in Art. 16 of the Suppression of Traffic Convention, these measures include educational, health, social and economic measures. Under both Art. 16 of the Suppression of Traffic Convention and Art. 39 of the CRC, states parties are under an obligation to provide recovery and reintegration.

4. Conclusion

The main achievement of Art. 34 of the CRC is that it focuses states parties’ attention on sexual exploitation, which many states would often

---

183 Ibid.
184 Ibid., p. 277.
prefer to remain underground. The main disadvantage lies in the qualification of sexual activities and sexual exploitation as ‘unlawful’ to be prohibited under the CRC. Although one may argue that, in the light of the Suppression of Traffic Convention, prostitution of children under the age of eighteen is per se unlawful, there is a strong argument that with the consent of the child that is sexually emancipated, prostitution would be legal under the CRC. It is however noteworthy how far state obligations reach – they cover preventive measures such as education as well as punitive action.

IX. The Convention on the Rights of the Child – Art. 35

1. Wording

Art. 35 of the CRC states:

States Parties shall take all appropriate national, bilateral and multinational measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

2. Scope and content of the norm

The sale and trafficking in children may be defined as the involuntary separation of child and family amounting to an unlawful interference with family life. It mainly occurs in relation to inter-country adoption, forced labour and sexual exploitation. Art. 35 of the CRC applies to all forms of trafficking, whether within one state or across borders and thereby complements Art. 11 of the CRC, which only applies to international abductions. The trafficking of children for the sale of their organs is clearly implied in the prohibition.

3. State obligations

Under Art. 35 of the CRC, states parties are not only obliged to penalise offenders after the trafficking has occurred but also to prevent trafficking. As such, the obligation has horizontal effect.

4. Conclusion

In contrast to the Suppression of Traffic Convention, Art. 35 of the CRC does not link the prohibition of the sale of and traffic in children to

---

185 Ibid., p. 281.
186 Ibid.
187 Ibid.
188 Ibid., p. 280.
prostitution. Since Art. 35 of the CRC is the first international provision prohibiting trafficking in children for the purpose of adoption, it is of major importance. Another significant achievement is the fact that it also aims at prevention of the sale of and traffic in children. In conclusion, the CRC constitutes the first broad and sufficiently binding framework for the potential effective control of international trafficking in children.


The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography was adopted by the General Assembly in May 2000. The Protocol clarifies and enlarges the scope of Art. 34 and 35 of the CRC, being the first international instrument containing a definition of the terms ‘sale of children, child prostitution and child pornography’. It focuses primarily on implementation measures to be introduced by states parties but also provides for international cooperation as a new form of enforcement. As such the Protocol constitutes progress in combating sexual exploitation of children.

XI. The Convention on the Rights of the Child – Art. 38

1. Wording

The text reads as follows:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years in the armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

2. Scope and content of the norm

The aim of the norm is to make humanitarian law explicitly applicable to children. Art. 38 (1) contains this aim referring to existing rules of international humanitarian law that apply to children.

There are some issues of concern. It is for example deplorable that only children below the age of fifteen shall not take a direct (not including indirect participation) part in hostilities. Only children at the age of eighteen should be recruited into the armed forces. In relation to Art. 38 (4), some authors doubt how this very general provision can be implemented.190

3. State obligations

States parties have the obligation to respect humanitarian rules, to ensure their application, to refrain from certain acts and to take all ‘feasible’ measures to ensure that children do not take direct part in hostilities, and that they are not negatively affected by an armed conflict. Art. 38 thus contains the human rights obligation to respect and to protect. As mentioned several times previously, the obligation to protect relates to third party violations, which is most important where non-state parties are involved in a conflict. It was however criticised that states parties only have the obligation to take ‘feasible’ measures instead of necessary measures.191

4. Conclusion

It is to be welcomed that the CRC explicitly makes humanitarian law applicable to children. The degree of protection does not however go beyond the existing rules. Art. 38 of the CRC fails to protect children effectively against the dangers of armed conflict. Its main function is to make states pay attention to the suffering of children in armed conflicts. State obligations extend to third party violations.

XII. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts was adopted in May 2000.192

190 Dorsch, Rechte des Kindes, p. 240.
191 Ibid., p. 233.
The Protocol relates to Art. 38 of the CRC on children in armed conflicts, providing for stricter and more detailed obligations on states parties than Art. 38.

Being more specific than Art. 38 of the CRC and raising the minimum age of compulsory and voluntary recruitment, the Protocol constitutes progress in relation to the issue of child soldiers.

XIII. The scope of the prohibition of exploitative child labour under UN conventions, protocols and the UDHR

1. Scope and content of the norms

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Art. 4 of the UDHR, Art. 8 (2) and (3) lit. a as well as Art. 24 of the ICCPR, Art. 10 (3) of the ICESCR and Art. 32 of the CRC prohibit the economic exploitation of children. The main forms of child labour designated as exploitative by the ILO and UNICEF clearly come within this prohibition. With regard to the categories distinguished by the ILO, all three categories, i.e. labour that is performed by a child at too young an age and that is likely to impede a child’s education, that jeopardises the physical, mental or moral well-being of a child and the unconditional worst forms of child labour, are prohibited by these international instruments.

The Supplementary Convention, Art. 4 of the UDHR and Art. 8 (2) of the ICCPR prohibit child labour as one form of contemporary slavery. Child labour is also covered by the definition of ‘forced or compulsory labour’ contained in Art. 8 (3) lit. a of the ICCPR.

Art. 10 (3) of the ICESCR explicitly prohibits the economic exploitation of children. Art. 32 of the CRC follows the approach of Art. 10 (3) of the ICESCR while broadening its scope. A child is defined as a person under the age of eighteen. However, national laws may set the age of majority at an earlier age. Art. 32 of the CRC differentiates between tolerable work and unlawful exploitation, defining exploitation as any work that is likely to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development. Whilst not being explicit on the types of work to be prohibited, in the light of the ILO Minimum Age Convention No. 138, Art. 32 of the CRC can be read to prohibit the engagement of children in: mining and quarrying; manufacturing; construction works; work in electricity, gas and water; sanitary services; transport, storage and communication; and work on plantations and other agricultural undertakings. It covers both employment and work wherever it occurs.
Addressing specific forms of exploitation, Art. 34 of the CRC prohibits sexual exploitation of children and Art. 35 of the CRC the sale and trafficking of children for any purpose or in any form. The latter articles are supplemented by the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography. Finally, Art. 38 of the CRC obliges its states parties to protect children from armed conflicts. The Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts elaborates on Art. 38 of the CRC.

2. State obligations

Whilst one could think that state obligations vary a lot under the covenants and conventions, they are in fact very similar. They only differ as to their specificity.

All human rights treaties prohibiting the exploitation of child labour impose on their states parties the obligation to respect and to protect, that is to act by adopting protective measures. Whilst the main distinction between the state obligations under the ICCPR and the ICESCR is that state obligations under the ICCPR are absolute and immediate and those under the ICESCR progressive and dependent on available resources, the obligation to protect from economic exploitation is in both cases immediate and suited to judicial determination.

Regarding the scope of obligations, all treaties mentioned impose the obligation to take the necessary legislative and administrative measures to protect children from economic exploitation. That means that states parties also have to protect children from violations by third parties such as private enterprises. Protective measures include penal sanctions and labour inspections of private companies by government agents.

The CRC obviously provides for the widest range of state measures to be taken, i.e. legislative, administrative, social and, most importantly, educational measures. In particular, states parties shall provide for minimum age legislation, regulation of conditions of employment and penal sanctions in accordance with the relevant ILO conventions. By linking the minimum age for admission to employment to the minimum age for the end of compulsory education, the CRC underlines the importance of adequate education as a means of combating child labour. In this sense, a failure of states to provide for basic education could be qualified as a failure to follow the obligations imposed by Art. 32 of the CRC. Finally, Art. 39 of the CRC obliges states parties to provide recovery and reintegration of exploited children.
It should be stressed that both the ICESCR in Art. 2 (1) and the CRC in Art. 4 provide that less resourced states should be supported through international cooperation, i.e. development assistance, when fulfilling their state obligations. This has been stressed by the Committee on the Rights of the Child. It also stated that the WTO and other international organisations should ensure that primary consideration should be given to the best interests of children when carrying out their activities.

The Optional Protocol on Involvement of Children in Armed Conflicts provides for the adoption of rehabilitation measures and technical and financial cooperation between states.

The protection of children from economic exploitation is a non-derogable right. Whilst Art. 4 (2) of the ICCPR states that explicitly, in the other human rights treaties this is made clear by the lack of a non-derogation clause.

It is widely recognised that the prohibition of slavery has become part of customary law. However, the prohibition of slavery-like practices including child labour has not yet reached the status of customary law due to the lack of state practice.

C. ILO CONVENTIONS AND THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK

I. Convention concerning Forced or Compulsory Labour No. 29

The Convention concerning Forced or Compulsory Labour No. 29 was adopted by the International Labour Conference in 1930. As of September 2008, 173 states had ratified it.193

1. Scope and content of Convention No. 29

a) The definition of forced and compulsory labour

The general undertaking of the Convention is to suppress forced or compulsory labour in all its forms.194

Art. 2 of the Convention reads:

For the purposes of this Convention the term ‘forced or compulsory labour’ shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

Thus, an element of coercion on the one hand and involuntariness on the other hand are cumulative criteria fundamental to the definition. During the drafting process, it was made clear that the penalty in question need not be in the form of penal sanctions but might take the form also of a loss of rights or privileges. Art. 25 of the Convention explicitly states that the illegal exaction of forced or compulsory labour shall be punishable as a penal offence.

While the legal notion of forced labour more or less remains, the context has evolved, covering new issues of forced labour. The worldwide movement to combat exploitative child labour has exposed practices involving forced labour in situations of domestic service to bonded labour in brick kilns. The ILO report on forced labour from 2001 states that children are particularly vulnerable to contemporary forms of forced labour. It states that slavery and slavery-like systems such as forced labour are a peremptory norm in international law. While the latter issue will be revisited at the end of the chapter, attention should be drawn to the first statement: it also equates slavery-like systems with forced labour. Since child labour in this work has been found to be a slavery-like practice under the Supplementary Convention on Slavery and as such comes also within the definition of servitude and forced labour under the ICCPR, for reasons of coherency the same should hold true here.

In this regard, it should be noted that already the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) raised the question whether, and if so, under what circumstances a minor can be considered to have offered himself 'voluntarily' for work or service, whether the consent of the parents is needed in this regard and whether it is sufficient, and what the sanctions for refusal are. In this context, it should be pointed out that all child


197 Ibid., p. 12.

198 Ibid., p. 2.

199 Ibid., p. 12.

labour in theory could be considered not to be voluntary since children are more vulnerable and rarely in a position to give ‘free consent’.\textsuperscript{201} They are de facto and de iure dependent on their parents. In accordance with the laws on majority and legal capacity, the consent of the parents is needed. However, it is doubtful whether it is sufficient since, in cases of exploitative labour, parents certainly act against the will and best interests of their children. In the light of the principle of the best interests of the child contained in Art. 3 of the CRC, the consent of the parents cannot be deemed sufficient in cases of exploitative child labour where the child does not give its consent. Consequently, in cases of exploitative child labour as examined in Chapter 1, the child cannot be regarded as having offered itself voluntarily. The element of coercion can be deemed to be inherent in situations of economic exploitation where the victim is dependent on his master.\textsuperscript{202} In a similar vein, the ILO in its second Global Report on Forced Labour has made clear that slavery-like practices within the meaning of the Supplementary Convention on Slavery overlap with forced labour situations.\textsuperscript{203}

In conclusion, exploitative child labour condemned by the ILO and UNICEF falls under the definition of forced or compulsory labour of ILO Convention No. 29. Cases where children are coerced into labour through abductions, drugging or debt bondage are special forms of forced labour. These will be addressed in the section on the Worst Forms of Child Labour Convention. As will be seen below, Art. 3 (a) of this Convention also equates forced labour with slavery-like practices.

With regard to certain youth schemes, the International Labour Conference observed that schemes involving the compulsory participation of young people (e.g. as part of their military service) in activities directed towards the development of their country violated Convention No. 29.\textsuperscript{204} Nonetheless, it found that two cases were compatible with the two conventions on forced labour: education and training schemes for unemployed young people within a definite period after the end of compulsory education; and in cases where young people have accepted


\textsuperscript{202} See above p. 41 et seq.

\textsuperscript{203} ILO, \textit{A Global Alliance against Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work} (Geneva: International Labour Office, 2005), p. 8.

an obligation to serve for a definite period as a condition of being enabled to acquire education or technical qualifications of special value to the community for development. It submitted that there could be more exceptions subject to certain criteria.

b) Exemptions
According to Art. 2 (2) lit. a–e of the Convention, some forms of work are not encompassed by the term ‘forced or compulsory labour’. This includes work in virtue of compulsory military service, lit. a, work as part of normal civic obligations, lit. b, work exacted as a consequence of a conviction, lit. c, work in cases of emergency, lit. d, or minor communal services, lit. e. However, since child labour can be said to be a form of contemporary slavery under Art. 8 (2) of the ICCPR, and can as such not be subject to exemptions and exceptions under Art. 8 (3) lit. b and c of the ICCPR, neither may it be subject to exemptions under Art. 2 (2) of ILO Convention No. 29. This would circumvent the absolute prohibition of slavery-like practices of Art. 8 (2) and undermine the coherence of international law. Tolerable child work is however subject to these exemptions.

2. State obligations
A country that has ratified Convention No. 29 has the legal obligation to apply the provisions of the Convention in law and in practice.

The basic obligation ‘to suppress the use of forced or compulsory labour in all its forms’ includes for the state party both an obligation to abstain and to act.\textsuperscript{205} Firstly, the state must neither exact forced labour nor tolerate its exaction, and it has to abolish any law and statutory or administrative instruments that provide or allow for the exaction of forced or compulsory labour, so that any such exaction, be it by private persons or public servants, is illegal according to national law.\textsuperscript{206} Thus, the obligation to suppress forced or compulsory labour has horizontal effect. This is confirmed by Art. 4 and 5 of the Convention, which explicitly forbid the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations and any concession granted to such private parties involving forced or compulsory labour. Secondly, in accordance with Art. 25 of the Convention, the state has to provide for appropriate penalties for the exaction of forced or compulsory labour and the strict enforcement of such penalties.

\textsuperscript{205} ILO, ‘Forced Labour in Myanmar’, 59.
\textsuperscript{206} Ibid.
The Convention is one of the fundamental conventions of the ILO.\footnote{ILO, Child Labour, Targeting the Intolerable, p. 27.} This means that the Convention embodies one of the four internationally recognised labour standards states agreed upon in the Declaration of the World Social Summit in Copenhagen in 1995.\footnote{UN, Report of the World Summit for Social Development Copenhagen, 19 April 1995, A/CONF.166/9, Annex I.; Bartolomei de la Cruz, von Potobosky, Swepton, The International Labour Organization, p. 129.}

3. Conclusion

Approximately seventy years after its adoption, Convention No. 29 can be said to call for the immediate abolition of forced or compulsory labour without allowing states parties to resort to transitional provisions.

Exploitative child labour comes within the definition of forced or compulsory labour. The definition of forced or compulsory labour is subject to various exceptions such as compulsory military service, prison labour or minor communal services, which however do not apply in the case of child labour as defined by the ILO and UNICEF.

The obligations contained in the Convention have horizontal effect obligating states parties to suppress forced or compulsory labour performed by private parties.

II. Convention concerning the Abolition of Forced Labour No. 105


1. Scope and content of Convention No. 105

Convention No. 105 supplements Convention No. 29. It provides for the abolition of forced or compulsory labour in a defined number of cases. As Convention No. 105 does not define forced or compulsory labour, the Committee of Experts on the Application of Conventions and Recommendations held that the definition of Convention No. 29 could serve to determine what constitutes forced or compulsory labour within the meaning of the new convention.\footnote{ILO, Abolition of Forced Labour, para. 39.} Art. 1 of Convention No. 105 specifies cases where forced or compulsory labour should be abolished.
Since poverty is a major cause of child labour, the provision relating to forced or compulsory labour as a method of mobilising and using labour for purposes of economic development is of special relevance when analysing the legal context of child labour. In this context, the Committee of Experts pointed out that this provision only applies where recourse to forced or compulsory labour has a certain quantitative significance and is used for economic ends.  

2. State obligations

According to Art. 2 of Convention No. 105, states parties undertake to take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in Art. 1. Complementing Convention No. 29, these provisions have to be read to contain for the state party both an obligation to abstain and to act. Firstly, the state must neither exact forced labour nor tolerate its exaction, and it has to abolish any law and statutory or administrative instruments that provide or allow for the exaction of forced or compulsory labour, so that any such exaction, be it by private persons or public servants, is illegal according to national law. States parties have to provide for adequate administrative means to suppress forced or compulsory labour. The Convention is one of the fundamental ILO conventions.

3. Conclusion

ILO Convention No. 105 is intended to supplement ILO Convention No. 29. It provides for the abolition of forced or compulsory labour in specific cases. It extends the scope of the earlier convention, not providing for the exceptions of Art. 2 of Convention No. 29. Child labour falls within the scope of Art. 1, provided that the forced or compulsory labour is performed for a purpose contained in Art. 1 of the Convention.

Convention No. 105 has horizontal effect to the extent it obliges states parties to suppress forced or compulsory labour exacted by third parties.

III. Conventions concerning conditions of work and employment

The ILO Conventions concerning conditions of work and employment of children can be divided into three categories: those which prohibit the
employment of children in certain occupations at night; those which require regular medical examinations; and those which prohibit child labour in specific dangerous occupations. Among these, the most important are the following: Night Work of Young Persons (Non-Industrial Occupations) Convention No. 79, 1946; Night Work of Young Persons Convention (Industry) Convention (Revised) No. 90, 1948; Medical Examination of Young Persons (Non-Industrial Occupations) Convention No. 78, 1946; and Medical Examination of Young Persons (Industry) Convention No. 77, 1946. Since most provisions contained in these conventions are self-explanatory, these conventions will not be examined here. The earlier ILO conventions on dangerous occupations have been replaced by the ILO Minimum Age Convention No. 138 and will thus not be examined here.

IV. Minimum Age Convention No. 138 and Recommendation No. 146

The Convention concerning Minimum Age for Admission to Employment No. 138 was adopted by the International Labour Conference in 1973. As of September 2008, 150 states had ratified it.213 The Convention is intended to replace the various earlier ILO treaties concerning minimum ages, which were limited to specific sectors.214 It is applicable to all forms of work and employment.

1. Scope and content of Convention No. 138

a) The total abolition of child labour

Art. 1 obliges states parties 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 to a level consistent with the fullest physical and mental development of young persons. Thus, the treaty was not intended as a static instrument establishing a fixed minimum standard but as a dynamic treaty encouraging progressive improvement. Accordingly, the term ‘child’ is not defined. The Preamble of the Convention refers to the ‘total abolition of child labour’.

214 Cf. Preamble and Art. 10 of the Minimum Age Convention, which list all relevant ILO treaties. According to Art. 10 of the Convention, one principle for replacement is that obligations of the new Convention only replace obligations of earlier treaties if the new obligations encompass the obligations of earlier treaties as regards the minimum age for the category of work covered by the earlier treaty.
The objective of the total abolition of child labour could be understood as aiming at abolishing any form of child work or labour. However, the many exceptions and reservations of the Minimum Age Convention concerning the prohibition of child work reflect the distinction between tolerable child work and exploitative child labour contained in the Convention. The Convention explicitly distinguishes between the concept of hazardous and light work. In addition, by requiring states parties to engage in a progressive raising of the minimum ages, the ultimate definition of prohibited child labour is specifically left open to expansion. Hence, it can be argued that the goal of the total abolition of child labour simply refers to universal ratification and effective implementation of the standards of the ILO Minimum Age Conventions. As explained above, the International Labour Office understands the term ‘child labour’ as referring not to all work done by children but rather to work that is prohibited by ILO standards. In this sense, it has been stated that the Minimum Age Convention was introduced to prevent the exploitation of child labour by setting minimum ages.

b) Fixing a minimum age

The basic principle of Convention No. 138 is the fixing of a minimum age for admission to employment or work. But rather than fixing one minimum age, it is more appropriate to speak of various minimum ages depending on the type of employment or work. It is the interaction of the child’s age with the type and conditions of work that determines the boundaries of child labour to be abolished.

According to Art. 2 (4) of the Convention the minimum age should not be less than the age for compulsory schooling and in no event less than fifteen and in pursuance of Art. 1 of Convention No. 138, it should be progressively raised. Where a state party has an insufficiently developed economy and educational facilities, Art. 2 (4) allows a minimum age of fourteen. The provision is intended as a transitional measure to enable developing states to accede to the Convention. Taking into account

216 Ibid., 395.
the general character of the instrument applicable to all countries, it is also possible for a state to set its minimum age above fifteen.

The linking of the concept of compulsory schooling and the minimum age for child work is important since education is an important tool when combating child labour. This makes it impossible for children to be legally employed whilst under a legal obligation to attend school. Additionally, if schooling were not to end before children were legally entitled to work, there might be an enforced period of idleness, particularly in states where only the minimum of education is available. Most importantly, the link to compulsory schooling reflects the definition of exploitative child labour of UNICEF and the ILO referring to work that interferes with basic education.

It is also to be welcomed that the minimum age not only applies to employment but also to any type of work performed by children.

c) Hazardous work
Art. 3 (1) of Convention No. 138 sets a higher minimum age of eighteen for hazardous work, ‘which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons’. The word ‘likely’ indicates that it is not only the work per se that may jeopardise the health, safety or morals of young persons but also the circumstances in which it is carried out. According to Art. 3 (2) of the Convention, the types of employment or work concerned shall be determined by national laws or regulations or by the competent authority, leaving it to the individual countries to determine the content of these activities. In any case, consultations must be made with the organisations of employers and workers concerned. Recommendation No. 146 gives guidance on the criteria that should be applied to the qualification of employment or work as hazardous. The forms of exploitative child labour described in Chapter 1 definitely come under the definition. These also include the unconditional worst forms of child labour such as sale and trafficking, debt bondage, commercial exploitation etc.

220 Ibid., p. 266.
221 ILO, Child Labour, Targeting the Intolerable, p. 27.
222 A list of hazardous occupations and processes in national legislation is contained in: ILO/IPEC/SIMPOC, Every Child Counts, Appendix 3: for example mining, work in quarries, carpet weaving etc.
223 See the text of Recommendation No. 146 at www.ilo.org/ilolex/english/recdisp1.htm.
224 See above p. 19 et seq.
Art. 3 (3) of the Convention provides that a lower age of sixteen may be authorised if the health, safety and morals of the young persons concerned are fully protected and they have received adequate specific instruction or vocational training in the relevant branch of activity. Additionally, consultations must be held with the organisations of employers and workers concerned before enacting such laws. It has to be noted that Art. 3 (3) concerns employment or work that does not come within the definition of hazardous work as defined by Art. 3 (1). It rather takes into account that there are types of work that are not encompassed by the definition of Art. 3 (1), but still require a minimum age above the general minimum age of Art. 2 (3) of the Convention. 225

According to Art. 4 (1) of the Convention, it is possible to exclude from the application of this Convention limited categories of employment or work in which ‘special and substantial problems of application arise’. But work that is likely to jeopardise the health, safety or morals of children cannot be excluded, Art. 4 (3) of Convention No. 138. During the preparatory work, the drafters thought of domestic service in private households and some types of work carried out without the employer’s supervision, for example homework. 226 The reasons for the above mentioned exclusions were the practical difficulties of enforcing laws in the categories in questions, not the absence of possible exploitation or abuse in these situations. 227 Hence, although in theory the Convention is applicable to all forms of work and employment, in practice it focuses on waged employment, excluding family work, domestic service and work in family undertakings.

Art. 5 of the Convention gives developing countries the possibility of limiting the scope of its application initially by specifying the branches of activity or types of undertakings to which the Convention will apply. Nevertheless, according to Art. 5 (3), the Convention has to apply at least to the following sectors: mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings (excluding family and small-scale holdings mainly producing for local consumption and not regularly employing hired workers). Since these types of work correspond to the types of works qualified as hazardous by UNICEF and the ILO, it can be argued that the drafters

227 Ibid.
considered these types of work as particularly dangerous and, therefore, wanted to guarantee that the Convention at least applies to these forms of work. Art. 5 (3) of the Convention corresponds to Art. 4 (3), which guarantees that work that is likely to jeopardise the health, safety or morals of young persons cannot be excluded from the application of the Convention. It is thus possible to argue that Art. 5 (3) of Convention No. 138 enumerates types of work that are likely to jeopardise the health, safety or morals of young persons, i.e. exploitative. The prohibition to exclude these types of work from the application of the Convention is another proof of the fact that the Convention focuses on exploitative child labour.

d) Exceptions in Art. 6 and Art. 8
Several other provisions allow for exceptions: Art. 6 of the Convention provides that the Convention does not apply when work is done in schools or training institutions; and Art. 8 exempts work done in artistic performances. Both exceptions require consultations with the organisations of employers and workers concerned before states enact laws providing for such exceptions.

e) Light work
Art. 7 of Convention No. 138 also exempts ‘light work’, which may be done by children who are at least thirteen years old. Light work is defined as work that is not likely to be harmful to the health or development of children and not such as to prejudice their attendance at school or their participation in vocational orientation or training programmes. Hence, this definition of light work corresponds to the concept of light or beneficial work as defined by UNICEF and the ILO described in Chapter 1. As stated above, according to findings of research by IPEC, light work is work that is not hazardous in nature and that does not exceed fourteen hours per week.228

However, it is left for the states parties to determine the categories of work permitted under Art. 7 of the Convention as well as the number of hours during which and the conditions in which such employment or work may be undertaken. In general, light work encompasses two categories: the assistance of children in the family economy; and the engagement of children outside of school hours in order to earn some extra money or to gain experience.229

228 See above p. 19.
Art. 7 (4) of Convention No. 138 allows states parties that have fixed the general minimum age at fourteen to set the minimum age for light work at twelve. The fact that there is a minimum age provision for light work suggests that the use of children under this age is, objectively and irrespective of the type of work in question, intolerable child labour. The Convention has received much criticism from representatives of developing countries for setting a minimum age below which work shall not be tolerated. Considering however the increased numbers of ratifications in recent years, the resistance of developing countries seems to have declined. Most importantly, the ILO has stated in its Global Report on Child Labour from 2002 that work such as household chores, work in family undertakings and work undertaken as part of education is excluded from minimum age legislation. To rule otherwise would trivialise the genuine deprivation of childhood faced by millions of child labourers. Thus, the activities mentioned may be carried out by children under the age of twelve. Such an interpretation of Art. 7 of the Convention is arguably more in line with the position of developing countries and suitable for a global consensus.

2. State obligations

Art. 9 of Convention No. 138 requires the competent authority to take all necessary measures, including the provision of appropriate penalties, to ensure the effective enforcement of the provisions of the Convention. Penalties are those for violations of national law giving effect to the Convention and have to be defined in national legislation. As the other conventions on child labour examined above, this Convention thus has horizontal effect.

Since penalties are not sufficient in themselves to ensure the enforcement of labour legislation, Art. 9 (1) of the Convention provides that all necessary measures should be taken. Such measures may include labour inspection services by training inspectors to detect and remedy abuse with regard to child labour. Furthermore, according to Art. 9 (2) national laws and regulations shall define the persons responsible for compliance with the provisions of Convention No. 138. Art. 9 (3) provides that employers should keep records as to the names and ages of persons under the age of eighteen.

The Convention is one of the fundamental conventions of the ILO.

---

230 Myers, ‘The Right Rights?’, 47.
231 ILO, A Future without Child Labour, p. 10.
232 ILO, Child Labour, Targeting the Intolerable, p. 28.
3. Conclusion

The Minimum Age Convention No. 138 represented a significant change in the ILO approach to child labour by creating a general instrument applicable to all forms of work and employment instead of being limited to specific sectors. It is intended to be a dynamic instrument encouraging progressive improvement. Although the Convention states as its aim the total abolition of child labour, it provides for many exceptions and reservations, thereby distinguishing between tolerable child work and exploitative child labour. It is one of the most important instruments when combating child labour.

The main obligations of the Convention provide that states parties shall set a minimum age for admission to work at the age of fifteen with the exception for light work at the age of thirteen. Most importantly, the Convention stipulates that the minimum age shall not be less than the end of compulsory schooling. This reflects the definition of child labour as work that is exacted at too early an age and work that interferes with basic education.233

Hazardous work can only be exacted at the age of eighteen. Such work is defined in Art. 3 (1) of the Convention as work that is likely to jeopardise the health, safety or morals of a young person. Hazardous work is, for example, mining and quarrying, construction and work on plantations and other agricultural undertakings except for family and small-scale holdings.

With regard to the categories of child labour referred to in Chapter I, the Convention applies to all of the three categories, that is labour performed under the minimum age and is thus likely to impede a child’s education; hazardous work; and the unconditional worst forms of labour. With respect to types of child labour, all the forms of child labour listed by the ILO and UNICEF are prohibited by the Minimum Age Convention.

States parties may also limit the scope of application regarding certain economic sectors or branches.

Despite its flexibility, in 1996, only forty-six states had become party to the Convention.234 This might be due to the complex and comprehensive regulatory regime introduced by the Convention.

233 See above p. 18.
Recommendation No. 146 is important for the implementation of ILO Convention No. 138 because it gives guidance on how to implement the Convention, for example when determining hazardous work.

V. Convention on the Worst Forms of Child Labour No. 182

The Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour No. 182 was unanimously adopted in 1999 and came into force in 2000. As of August 2008, 169 states had ratified it. 235

1. Scope and content of Convention No. 182

a) The relationship to ILO Convention No. 138

While there was a consensus that the Minimum Age Convention No. 138 remained the fundamental international standard on child labour, growing international opinion emerged underlining the need to proceed immediately with the abolition of the most intolerable forms of child labour, namely the employment of children in bonded conditions, in dangerous and hazardous work, the exploitation of very young children and the commercial sexual exploitation of children. 236 Since both Conventions No. 138 and No. 182 refer to work that is likely to jeopardise health, safety or morals of children, there has been some debate on the relationship between the two conventions. 237 This issue will be discussed below when commenting on the Preamble and Art. 3 of Convention No. 182.

The Preamble establishes the relationship with other ILO conventions and international standards on child labour. In the drafting process, the International Labour Office replaced the phrase ‘Convention . . . concerning the Minimum Age for Admission to Employment, 1973, which remain the fundamental instruments on child labour’ by the phrase ‘Convention . . . concerning the Minimum Age for Admission to Employment, 1973, which remain the fundamental instruments with a view to achieving the total abolition of child labour’, although it has been pointed out that the aim of the new convention was not the total abolition of child labour and that the adjective would be confusing. 238 In this context, the International Labour Office noted that the Minimum

236 ILO, Targeting the Intolerable, p. 20 and p. 34.
237 ILO, Child Labour, p. 19.
238 Ibid., p. 29.
Age Convention focused on child labour in contrast to child work, which referred to all work done by children including work not to be abolished. Nevertheless, the Conference retained the original proposal, thereby avoiding confusion as to the aim of the new convention.

b) The term ‘child’

Convention No. 182 applies to all children under the age of eighteen in conformity with the general age stipulated in the UN CRC and the minimum age for hazardous work in Art. 3 of Convention No. 138. The words ‘for the purposes of this Convention’ indicate that the definition does not offer a general definition of the term ‘child’.

c) The worst forms of child labour

Art. 3 lit. a–d of Convention No. 182 define the ‘worst forms of child labour’. The definition refers to all forms of slavery, the use of children in prostitution, pornography, illegal activities and hazardous work – that is work that is likely to jeopardise the health, safety or morals of children. In contrast to the Minimum Age Convention, Convention No. 182 does not prohibit light work under the age of thirteen (or twelve). Neither does the latter convention prohibit work that interferes with compulsory education. The International Labour Office has noted that the subparagraphs of Art. 3 of Convention No. 182 are not mutually exclusive and that any particular type of work could fall within one or more of the categories.

Thus, whereas Convention No. 138 applies to all of the three categories of child labour referred to in Chapter 1 including child labour performed by children under the minimum age specified for the particular kind of work, Convention No. 182 focuses on hazardous work and the unconditional worst forms of child labour.

It should be noted that, in this context, the notion of slavery-like practices in lit. a is used in a slightly different way than under the Supplementary Convention on Slavery or Art. 8 (2) of the ICCPR. Here, it does not seem to encompass all forms of exploitative child labour. According to the wording of lit. a, slavery-like practices are only meant to refer to extreme cases such as the unconditional worst forms of child labour, i.e. trafficking, debt bondage, forced labour and forced recruitment.
of children for use in armed conflicts, where almost all of the powers attaching to the right of ownership are exercised. This can be explained by the fact that the aim of the Convention is to focus on the worst forms of child labour. While it is important to draw attention to extreme cases such as debt bondage and trafficking of children, which definitely come within the meaning of slavery-like practices, it is also important to keep in mind that child labour that is harmful to a child’s physical, mental and moral well-being and hinders their education amounts to exploitation \(^{241}\) and should be deemed a slavery-like practice or servitude in the sense of the Supplementary Convention or the ICCPR.\(^{242}\) In accordance with the findings of UNICEF, the ILO and the Working Group on Contemporary Forms of Slavery, child work at too young an age should also be deemed as exploitative child labour and a contemporary form of slavery within the meaning of the relevant UN conventions. This is important because the provisions of the ICCPR and the Supplementary Convention provide for non-derogable, absolute prohibitions, which will contribute to the effective abolition of child labour. It should also be kept in mind that Art. 8 of ICCPR and the Supplementary Convention are general prohibitions of slavery-like practices while ILO Convention No. 182 concentrates on the worst forms of child labour. By its nature, it differentiates more between the different forms of child labour.

After a long discussion in the drafting process about whether a special reference should be made to the issue of child soldiers, the prohibition of forced or compulsory recruitment of children for use in armed conflicts has been incorporated into Art 3 lit. a.\(^{243}\) This is to be welcomed in light of the hardship of child soldiers. The ‘sale and trafficking’ is not meant to cover issues such as adoptions.\(^{244}\)

In relation to Art. 3 lit. b, it has been suggested that a special reference should be made to the exploitation of children through the Internet.\(^{245}\) However, the standards focus on the exploitation of children with regard to prostitution and pornography regardless of the means of dissemination or consumption, which is left to the national lawmaker.\(^{246}\)

\(^{241}\) See the analysis of Art. 32 of the CRC above p. 67.
\(^{242}\) See above p. 42 and p. 57.
\(^{244}\) Ibid., p. 60.
\(^{245}\) Ibid.
\(^{246}\) Ibid.
Art. 3 lit. c refers to illicit activities. The word ‘illegal’ has been replaced by the word ‘illicit’ to be consistent with the wording of the relevant UN drug treaties and the CRC, which refers to the prevention of the ‘use of children in the illicit production and trafficking’ of the mentioned drugs.\(^{247}\)

There has been some debate about the scope of Art. 3 lit. d, which refers to hazardous work.\(^{248}\) Questions arose about the relationship between the Minimum Age Convention and Convention No. 182.\(^{249}\) Both conventions prohibit work that by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals. Since Convention No. 182 focuses on the ‘worst forms of child labour’, it is more specific and goes further than Convention No. 138. In contrast to the Minimum Age Convention, Convention No. 182 does not contain any exceptions as to the branches of economic activity. In this sense, the scope of the new convention is broader. Moreover, Convention No. 182 does not contain an automatic exclusion for training situations similar to Art. 6 of Convention No. 138. Rather, adequate training or full protection can be qualified as a circumstance in which the work is carried out.\(^{250}\) Likewise, Convention No. 182 does not provide for exceptions as to artistic performances as does Convention No. 138. Finally, according to the new convention, there is no separate provision authorising certain work from the age of sixteen provided that there is the required protection and training. This is due to the fact that under these circumstances, the work is not hazardous any more. In this context, it should be noted that paragraph 4 of Recommendation No. 190 allows for work as from the age of sixteen on condition that the health, safety and morals of the children are fully protected, and that the children have received adequate specific instruction or vocational training in the relevant branch of activity.

The term ‘health’ is to be read as to include physical and mental health in line with the dictionary definition as the state of being well in body and mind and referring to a person’s mental and physical condition.\(^{251}\) In the drafting process, it was suggested that work that prevents a child from taking advantage of available education should be included in the definition of the worst forms of child labour.\(^{252}\)

---

\(^{247}\) Ibid., p. 61.

\(^{248}\) Ibid., p. 59.

\(^{249}\) Ibid., p. 62.

\(^{250}\) Ibid., p. 64.

\(^{251}\) Ibid., p. 65.

\(^{252}\) Ibid., p. 66.
The proposal was rejected on the grounds that lack of access to basic education would not be comparable to the crude abuses targeted by Convention No. 182.\textsuperscript{253}

The exclusion of the lack of education from the definition of the worst forms of child labour and thus from hazardous work is another difference in scope when comparing the Convention to the Minimum Age Convention. As mentioned above, the link between the minimum age to admission for work or employment and the end of compulsory schooling in Art. 2 (3) of Convention No. 138 reflects the definition of child labour presented by UNICEF and the ILO as work that interferes with a child’s basic education. In addition, according to Art. 4 of the Minimum Age Convention, states parties may only exclude beneficial work that does not interfere with a child’s education.

The term ‘work’ is intended to cover any type of work including activities and occupations.\textsuperscript{254}

Depending on the impact on the child, the forms of child labour described by the ILO and UNICEF\textsuperscript{255} correspond to the forms enumerated in Art. 3 lit. a to lit. d of the Convention and are consequently prohibited by this provision. In contrast to the Minimum Age Convention, only two of the categories distinguished by the ILO are encompassed by the definition of Convention No. 182, namely labour that jeopardises the physical, mental or moral well-being of a child and the unconditional worst forms of child labour. As mentioned above, labour that impedes education is not included.

d) Determining hazardous work

Art. 4 of the Convention obligates states parties firstly to determine the types of work that are likely to jeopardise the health, safety or morals of children, and to list them in national legislation; and secondly, to see where these are actually carried out by children so that the measures of the Convention can be appropriately targeted; and thirdly, to re-examine the determination periodically. Although it is left to the states parties to determine which types of work may come under the provision, they are not completely free in this process since they have to consult organisations of employers and workers and to take into account relevant international standards, in particular paragraph 3 and 4 of the Worst Forms of Child Labour Recommendation.

\textsuperscript{253} Ibid., p. 67.
\textsuperscript{254} Ibid., p. 66.
\textsuperscript{255} See above p. 19 et seq.
According to these provisions, special consideration must be given to work that exposes children to physical, psychological or sexual abuse; work underground, underwater, at dangerous heights or in confined spaces; work with dangerous machinery, equipment and tools, or work that involves the manual handling or transport of heavy loads; work in an unhealthy environment, which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels or vibrations damaging to their health; work under particularly difficult conditions such as work for long hours or during the night; or work where the child is unreasonably confined to the premises of the employer. The list is not exhaustive and it is assumed that national conditions will determine more specifically which work meets the criteria of Art. 3 of the Convention. However, it is expected that most of the work listed would necessarily be deemed a worst form of child labour.

2. State obligations

The basic obligation of states parties is to take measures to prohibit and immediately eliminate the worst forms of child labour, Art. 1 of Convention No. 182. It was the rationale for the Convention that there are forms of child labour that cannot be tolerated and, therefore, cannot be subject to progressive elimination. Consequently, states parties are obligated to take immediate measures. This is consistent with Art. 7 of the Convention, which refers to time-bound measures. Effective elimination of child labour requires both immediate and time-bound measures, e.g. provision for penal sanctions as immediate measures and rehabilitation and social integration as time-bound measures.

Art. 5 to 8 of the Convention provide for enforcement and implementation measures.

Art. 5 of the Convention obligates states parties to monitor the implementation. The International Labour Office pointed out that the monitoring body could involve representation from civil society. The Office suggested that it could evaluate national programmes and make proposals for change.

Art. 6 of the Convention provides for the design and implementation of programmes of action to eliminate as a priority the worst forms

---

256 ILO, *Child Labour*, p. 112.
257 Ibid., p. 34.
258 Ibid., p. 35.
259 Ibid., p. 80.
of child labour. In contrast to Art. 4 of the Convention, these programmes must be implemented in consultation with employers’ and workers’ organisations, taking into account the views of other concerned groups.

Art. 7 of the Convention calls for all necessary measures to ensure the effective enforcement of the provisions giving effect to the Convention. The intent of Art. 7(1) is that there have to be sanctions, but that the types of sanctions could be, as appropriate, penal or other sanctions. Recommendation 190 proposes that, at least for the unconditional worst forms of child labour, there should be penal sanctions. While other measures are important, the potential deterrent effect of sanctions has to be taken into account along with punishment for severe violations of the basic human rights. The other measures to be taken complement penal sanctions including identifying and implementing measures to prevent children from entering into such activity, removing them from it and providing for their rehabilitation. The original reference to ‘free basic education’ was replaced by the phrase ‘to ensure access to free basic education’ indicating that where a system of free basic education is lacking, such a system has to be created. However, the reference leaves open the question of what free basic education includes. Yet, the importance of education as a tool for combating child labour is underlined through its repeated mention: firstly it is mentioned in the introduction of Art. 7 (2) and secondly, in Art. 7 (2) lit. c. The approach chosen reinforces and goes beyond the deterrent and punishment functions of criminal law to engage societies in addressing the root causes of the problem and the needs of the victim.

Art. 8 of the Convention provides for international cooperation and assistance for, inter alia, social and economic development and poverty eradication programmes. This is an important and new provision in an ILO convention since it stresses the need for concerted efforts by all states parties to eliminate child labour occurring anywhere in the world. It is of particular relevance when the phenomenon has an international dimension, such as trafficking in children or of pornography and ‘sex tourism’. Only the ICESCR contains a similar obligation.

260 Ibid., p. 98.
261 ILO, Targeting the Intolerable.
262 ILO, Child Labour, p. 99.
263 ILO, Targeting the Intolerable.
In conclusion, the Convention provides for the widest range of state obligations, obviously extending to third party violations. The Convention is one of the fundamental ILO conventions.\footnote{Cf. para. 2 of the ILO Declaration on Fundamental Principles and Rights at Work described below p. 103 et seq.}

3. Conclusion

The Worst Forms of Child Labour Convention reflects the growing international consensus on the need for immediate action to combat the worst forms of child labour. It gives a clear signal about which forms of exploitation states should give priority to eliminating.\footnote{UN Sub-Commission on the Promotion and Protection of Human Rights, \textit{Contemporary Forms of Slavery}, E/CN.4/Sub.2/2000/3/Add.1, para. 73.} The Convention is characterised by plain language and clear structure. In conjunction with Recommendation No. 190, it firstly defines the worst forms of child labour and secondly provides for enforcement measures of the provisions giving effect to the Convention.

Whilst the Minimum Age Convention refers to all three of the categories of child labour to be abolished, that is child labour performed under a minimum age and thus likely to interfere with basic education, labour that jeopardises the physical, mental or moral well-being of a child and the unconditional worst forms of child labour, Convention No. 182 focuses on the two latter categories including hazardous work and forms of child slavery, trafficking, debt bondage and other forms of child labour, forced recruitment for use in armed conflict, prostitution and pornography, and illicit activities. In contrast to Convention No. 138, Convention No. 182 explicitly enumerates the unconditional worst forms. With regard to the worst forms of child labour, Convention No. 182 is broader in scope than Convention No. 138, not providing for the same exceptions. However, it does not include the lack of education in its definition of worst forms of child labour.

The main types of exploitative child labour described by the ILO and UNICEF can be said to come within the prohibition of the worst forms of child labour prohibited by Art. 3 lit. a–d.

With respect to implementation, it is much more specific and contains some new provisions such as the reference to international cooperation. It stresses the need to complement the potential deterrent effect of penal sanctions providing for measures concerning the prevention of children from entering into child labour, their removal and
rehabilitation. Most importantly in this context, it refers to free basic education as a means of prevention and rehabilitation.

Recommendation 190 supplements the Convention giving detailed information on the determination of child labour and implementation measures. It is an important instrument for countries who have not ratified the Convention.

VI. The ILO Declaration on Fundamental Principles and Rights at Work

The ILO Declaration on Fundamental Principles and Rights at Work was adopted on 18 June 1998.  

1. Scope and content of the Declaration

The Declaration constituted the third step by the ILO in taking up the challenges of globalisation. Commitment 3 of the Declaration of the World Social Summit in Copenhagen 1995 and Paragraph 54 lit. b of the Programme of Action were the first steps enumerating basic workers’ rights protected in ILO conventions, encompassing the prohibition of forced labour and child labour, freedom of association and the right to organise and bargain collectively, equal remuneration for men and women for work of equal value and non-discrimination in employment. In the WTO Ministerial Conference held in Singapore in 1996, states renewed their commitment to observe these internationally recognised labour standards. They recalled that the ILO was the competent body to set and deal with these standards. Accordingly, in 1998, the International Labour Conference incorporated these workers’ rights into a new Declaration. Paragraph 2 reads that the International Labour Conference:

Declares that all members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are subject of those Conventions, namely:

(a) freedom of organization and the effective recognition of the right to organize and bargain collectively;
(b) the elimination of all forms of forced and compulsory labour;

---

The Declaration thus designates the conventions embodying the enumerated rights and principles as fundamental ILO conventions. It does not contain new obligations, but recalls that all members by virtue of their membership have to respect, promote and realise the principles contained in these conventions.

It recognises in para. 3 the obligation of the ILO to assist its members to attain these objectives by offering technical cooperation and advisory services to promote and ratify the fundamental conventions; by assisting those members not yet in a position to ratify to respect, promote and realise the principles that are the subject of those conventions and to help the member states to create a climate for economic and social development. As such, it reaffirms broad principles.

Since the Declaration was adopted following the adoption of the Singapore Ministerial Declaration in which states had explicitly stated that labour standards should not be used for protectionist purposes, paragraph 5 of the Declaration refers to the trade issue and reiterates the words of the Ministerial Declaration.

In order to give effect to the Declaration, it contains a promotional Follow-up. In line with the promotional objective of the Declaration, the Follow-up is different from the implementation mechanisms of the ILO conventions. It focuses on technical cooperation in order to help member states to implement or ratify the fundamental conventions. Since implementation of labour standards will be dealt with in the next chapter, the Follow-up system will not be explained here in detail.

2. The new approach taken by the Declaration

In recent years, a fierce debate between legal scholars has emerged as to whether the promotional approach taken by the Declaration undermines the traditional ILO approach focusing on the implementation of its conventions. The debate centred on the excessive reliance on

---

principles rather than rights, the choice of four core labour standards, the increasing use of the Declaration in regional trade agreements and by private actors, and its weak Follow-up system. At this point, the debate will only be taken up to the extent it has a bearing upon the legal nature of the prohibition of child labour. The arguments relating to its Follow-up system will be assessed in the chapter on implementation.

According to Alston, the Declaration focusing on four core labour standards and promotional techniques was adopted under pressure from the US and enabled the ILO to respond to the trade and labour debate and demands for a social clause. In his view, it was the first step in loosening the links between the core standards and the ILO’s supervisory machinery. His main critique with respect to international labour law is that the Declaration has caused a transformation of the international labour rights regime, emphasising compliance with principles rather than rights, focusing on four arbitrarily chosen core labour standards, thereby relegating non-core rights to second-class right, and blurring the relationship of the core labour standards to the ILO conventions. In his view, referring to principles in relation to these four labour standards is a step back since these standards have long been recognised as human rights. In addition, by blurring the legal relationship to the ILO conventions and their supervisory system, the Declaration would liberate the core labour standards from the ILO’s constructive jurisprudence in relation to those rights and governments and private actors would be free to determine the content of these labour standards themselves. In sum, the new approach would lead to a decentralisation process and marginalisation of the ILO.

Maupain and Langille counter these arguments by stating that the term ‘principles’ is in accordance with the terminology of the Declaration of Philadelphia, that the emphasis on compliance with principles was necessary because compliance with rights is subject to a ratification process, that there was no danger that the content of

---

270 Alston, ‘“Core Labour Standards”’, 469 et seq. and 460.
271 Ibid.
272 Ibid., 476 et seq.
273 Ibid., 477.
274 Ibid., 490–4.
275 Ibid., 509.
277 Ibid., 451.
the core labour standards would become flexible because the relevant ILO conventions are the anchor of the core labour standards, and that the choice of standards was deliberate because they are enabling rights, being preconditions to real market participation. As such, they are process rights rather than focusing on outcomes. Maupain sees the new approach as complementary to the traditional approach. According to Langille, the Declaration is a new model to address the real problems and free the ILO from its marginalised role.

Both sides put forward appealing arguments. However, in relation to child labour, some of them are not compelling. For example, the danger that reliance on compliance with principles would detach the prohibition from its content as defined by the relevant ILO conventions is not so evident in the context of child labour given the high number of ratifications of both conventions. In fact, the number of ratifications of ILO Convention No. 138 has tripled since 1998.

Alston is however right to question the use of the Declaration by private actors in principle without knowing the relevant ILO conventions determined by the ILO jurisprudence. As will be seen below, the ILO Declaration is indeed reflected in an ever-growing number of corporate voluntary initiatives on human rights and labour standards. Thus, there is indeed some risk that the content of the prohibition of child labour could be diluted through private initiatives. However, this risk also exists without having the ILO Declaration in place. With respect to the prohibition of child labour, the Declaration has at least the merit of having caused the integration of this standard into most of the existing private initiatives.

A convincing approach is taken by another author who argues that by relying on principles, the Declaration has solved the dilemma of the missing hierarchy of positive norms in international law. Emerging from legally binding norms, it highlights the need for transnational legislation based on consensus.

---

278 Ibid., 450.
279 Langille, ‘Core Labour Rights Standards’, 430.
280 Ibid., 429.
281 Maupain, ‘Revitalization Not Retreat’, 463
283 Maupain, ‘Revitalization Not Retreat’, 455.
284 The Declaration is reflected in many multi-stakeholder codes, see below p. 359 et seq.
As regards the choice of labour standards, here again it should be noted that with respect to the prohibition of child labour, the dispute does not have to be decided since this standard is included in the choice of standards. It should however be noted that indeed the choice may be pragmatic rather than conceptual. Child labour and forced labour could be seen as outcome orientated. The general question of whether the new approach will lead to a marginalisation of the ILO will be commented upon in the chapter on implementation.

3. Conclusion

The Declaration was adopted in response to the commitment of the ministers of the WTO Ministerial Conference in Singapore in 1996 to observe internationally recognised labour standards and their decision that the ILO was the competent body to deal with these standards. As such, it is considered to confirm the four core labour standards and to make a further statement that these standards must not be abused for the purpose of trade regulation. However, it does not put an end to the debate about whether these standards should be incorporated into WTO law.

With respect to the prohibition of child labour, in the light of the high number of ratifications of the ILO conventions on child labour and the widespread reference to these conventions by private initiatives, the risk of transforming the traditional rights-based approach into a lighter approach focusing on principles and detached from the ILO jurisprudence is not so great.

VII. The scope of the prohibition of child labour under ILO conventions, recommendations and the ILO Declaration on Fundamental Principles and Rights at Work

1. Scope and content of the norms

ILO Conventions No. 29 and No. 105 prohibit forced and compulsory labour. Convention No. 105 complements Convention No. 29 and prohibits, for example, forced or compulsory labour as a method of mobilising and using labour for purposes of economic development. Recalling that one of the root causes of child labour is poverty, this is particularly relevant in relation to child labour. As will be seen below, such cases

occur in Myanmar. Both conventions can be deemed to cover child labour. Thus, the types of child labour enumerated in Chapter 1 are prohibited by these conventions, in the case of Convention No. 105 only under certain conditions.

The ILO Conventions on Night Work and Medical Examinations complement the Minimum Age Convention No. 138 to the extent they, as their names suggest, set forth certain conditions under which child work is permitted. While the Conventions on Night Work fix various periods for permitted night work for various minimum ages, the Convention on Medical Examination requires a medical examination of children.

ILO Convention No. 138 is the main international standard on child labour. It calls for the total abolition of child labour through universal ratification and effective implementation of its provisions. It is a dynamic instrument requiring the progressive raising of the minimum age. Most importantly, it does not prohibit all work done by children but differentiates between tolerable child work and exploitative child labour. It fixes a minimum age for tolerable light work and prohibits hazardous work under the age of eighteen. The types of child labour enumerated by UNICEF and the ILO are prohibited by this Convention.

With regard to the categories of child labour referred to in Chapter 1, Convention No. 138 applies to all of the three categories, that is labour performed under the minimum age and thus likely to impede a child’s education, hazardous work and the unconditional worst forms of labour. By setting the minimum age no less than the age for the end of compulsory schooling, Convention No. 138 reflects the definition of child labour presented by UNICEF and the ILO as work that interferes with a child’s education.

The Worst Forms of Child Labour Convention elaborates on Convention No. 138 focusing on the worst forms of child labour. While including in its definition of worst forms all the types of child labour enumerated by UNICEF and the ILO, it does not refer to all the three categories distinguished by the ILO. Thus, it does not refer to work exacted at too young an age and thus likely to interfere with a child’s education. This category was considered not to contain abuses as crude as the other categories. On the other hand, this Convention is more explicit on the unconditional worst forms of child labour and broader in scope regarding hazardous work, not providing for the same exceptions as Convention No. 138.
2. State obligations

State obligations contained in ILO conventions are more detailed than those of the UN conventions. States parties to the ILO conventions have for example to suppress all forced or compulsory labour by penal sanctions. Further, they have to ensure that the requirements set up by the Minimum Age Convention are adequately implemented through all necessary means including legislation and administrative means such as labour inspection services by training inspectors, record keeping of names by private employers etc.

The Worst Forms of Child Labour Convention is the most specific on state obligations. Besides penal sanctions and other administrative measures it also provides for time-bound measures such as rehabilitation and social integration. Special mention should also be made of the obligation to prevent the engagement of children in the worst forms of child labour. Most important is the reference to free basic education as an important tool when combating child labour. Where an effective system is lacking, such a system has to be created. Of particular importance is also the provision for international cooperation and assistance. While referring to child labour as an international phenomenon, when it comes to trafficking in children and sex tourism, it also refers to international assistance in terms of aid provided by some states parties to other states parties in order to eradicate poverty and provide for social and economic development.

The various ILO conventions are complemented by recommendations.

3. The ILO Declaration on Fundamental Principles and Rights at Work

With respect to the prohibition of child labour as one of the core labour standards contained in the ILO Declaration on Fundamental Principles and Rights at Work, two things should be mentioned. Firstly, the Declaration has drawn the attention of the international community and global business to the importance of prohibition of child labour as defined by ILO Conventions No. 138 and 182. Whilst the Declaration was adopted by a fragile consensus in 1998, this consensus grew significantly as indicated by the recently increased number of ratifications of ILO Conventions No. 138 and 182.\(^{287}\)

\(^{287}\) As of 2008, ILO Convention No. 138 has been ratified by 150 states in contrast to 46 ratifications in 1996, see [www.ilo.org/ilolex/english/convdisp1.htm](http://www.ilo.org/ilolex/english/convdisp1.htm) and above p. 88. ILO Convention No. 182 has been ratified by 169 states see above p. 95.
Secondly, in the case of the prohibition of child labour, there is only little danger that the scope of this fundamental right will be weakened by the emphasis on principles.

D. THE PROTECTION FROM EXPLOITATIVE CHILD LABOUR AS CUSTOMARY LAW

As examined in the context of Art. 4 of the UDHR, the prohibition of contemporary forms of slavery has not yet become part of customary law due to lack of state practice. Accordingly, neither can child labour as one contemporary form of slavery be qualified as customary international law.

E. THE PROTECTION FROM EXPLOITATIVE CHILD LABOUR AS A GENERAL PRINCIPLE OF LAW

Art. 38 of the Statute of the International Court of Justice lists ‘general principles of law recognized by civilized nations’ as the third source of international law. It is commonly held that this source was inserted in order to close the gap that may be uncovered in international law and to circumvent the problem of *non liquet*.

There are different views as to the meaning of this legal concept. The first view holds that general principles are rather a method of applying existing sources than an independent source of law. The second view holds that the concept is incapable of adding something to international law unless it reflects the consent of states. The most promising approach is that general principles do constitute an additional source of law but are of rather limited scope. Indeed, as recently demonstrated by Judge Simma in his separate opinion in the case concerning *Oil Platforms*, general principles may serve as an independent source of law and as such be used to overcome legal gaps in international law. Examining national case law and statutes of the US, Canada, France, Switzerland and Germany, he identified a principle common to these

---

291 Ibid.
national systems and applied this to the *Oil Platforms* case in order to overcome the problem of attribution and responsibility.\(^{293}\)

The same will be done here in order to find out whether the prohibition of child labour is a general principle of international law. At the same time, the compatibility of national statutes with ILO and UN conventions will be examined in order to define the possible scope of this principle with respect to ILO and UN conventions.

Section 212 of Chapter 8 (Fair Labor Standards) of Title 29 of the United States prohibits ‘any oppressive child labor in commerce or in the production of goods . . .’. Section 203 (l) defines oppressive child labour as either employment of children under the age of sixteen excluding family undertakings or non-hazardous work, or as employment done by children between sixteen and eighteen and declared to be hazardous or detrimental to their health and well-being. Employment of children between the age of fourteen and sixteen shall not be deemed oppressive child labour if the Secretary of Labor limits such employment to certain periods, such employment does not interfere with school and such employment is not detrimental to their health and well-being.

While this section follows the general approach of ILO Convention No. 138, fixing different minimum ages for different types of work such as non-hazardous and hazardous, it differs to the extent that it only covers employment and does not set a minimum age for light work.

Section 213 (c) (1) (A) exempts from this prohibition employment of children under the age of twelve in agricultural family undertakings or small-scale holdings outside school hours. Section 213 (c) (1) (B) exempts employment in agriculture outside school hours if the children are above the age of twelve or thirteen with the consent of their parents. Section 213 (c) (1) (C) allows such employment for children above the age of fourteen.

These provisions are also broadly in line with ILO Convention No. 138 except for the fact that work under the age of twelve in agricultural small-scale holdings is not allowed under this Convention. While agricultural work in family undertakings or certain small-scale holdings can be excluded from the scope of the Convention, the small-scale holdings mentioned in the Fair Labor Standards Act with less than 500 employees are probably not covered by this provision. Work under the age of twelve – the minimum age for light work according to the Convention – in

\(^{293}\) Ibid.
agricultural family undertakings can be deemed to be outside the scope of minimum age legislation.\textsuperscript{294}

Moreover, ILO Convention No. 182 does not allow for exclusion of any branches of economic activity when determining hazardous work. Hence, since the exemption for child labour in agricultural family undertakings does not prohibit hazardous work, it is in contrast to ILO Convention No. 182.

Section 213 (c) (2) prohibits employment of children in agriculture under the age of sixteen if the work is hazardous, except for family undertakings. Here again the prohibition of hazardous work does not cover the employment of children in family farms and is in contrast to ILO Convention No. 182.\textsuperscript{295}

Finally, Section 213 (c) (4) allows for a waiver of the application of the prohibition of child labour for children between ten and twelve years of age to be employed as hand harvest labourers in a time-limited agricultural operation paid by piece rate under certain conditions. These include \textit{inter alia} a particular short harvesting season, working conditions not detrimental to the well-being of the children and the non-availability of elder children. Despite these conditions, this provision is clearly in violation of the prohibition of light work under the age of twelve contained in Art. 7 of ILO Convention No. 138, exempting only agricultural family undertakings and small-scale farming from its scope.

Thus, while the US law broadly follows the principles of the ILO conventions, it still does not fully comply with them.

In Switzerland, which follows the monist approach,\textsuperscript{296} ILO Conventions No. 138 and 182 apply directly. In addition, Art. 4 of ‘Ordonnance 5 relative à la loi sur le travail’ prohibits work done by young persons that is by its nature or under the conditions under which it is carried out dangerous for the child’s health, development, its safety and physical and psychological development. It exempts vocational training. Art. 8 on light work states that children over the age of thirteen may be employed in non-hazardous occupations that do not interfere with school.

The German Young Persons (Protection and Employment) Act sets the minimum age for admission to work at fifteen. It sets a higher age of

\textsuperscript{294}See above, p. 93.


\textsuperscript{296}For an explanation of the dualist and monist theories, see Shaw, \textit{International Law}, pp. 100–2.
eighteen for work that is dangerous for the morals of young persons or exceeds their physical or psychological capacity. In accordance with Art. 7 of ILO Convention No. 138, it allows for light work above the age of thirteen. Light work is work that is not harmful to the health or development of children and does not interfere with school or vocational training. These provisions fully comply with ILO Conventions No. 138 and 182.

In France, the ‘Code du Travail’ prohibits work of young persons under the age of sixteen except for apprenticeship or vocational training. Minors of fourteen years of age are allowed to do work suitable to their age on holidays. The minimum age for work that is dangerous for the health, safety and morals of children or exceeding their capacities is set at the age of eighteen. These provisions reflect ILO Conventions No. 138 and 182.

This short study of comparative law shows that the prohibition of child labour is a principle common to most national systems. Noting that the US law does not fully comply with ILO Conventions No. 138 and 182 and differs slightly from the remaining law systems, the scope of this principle is not clear-cut and does not exactly correspond to the scope of these conventions. This is however in the nature of general principles, which are only elevated to concrete sources of international law through the international judge who decides the particular case. Already the term ‘principle’, which is defined in the Oxford Dictionary of the English Language as

a general law or rule adopted or professed as a guide to action; ... a fundamental motive or reason of action, esp. one consciously recognized and followed ... or the expression ‘on principle’, being defined in the Longman Dictionary of the English Language as

because of the principle involved rather than the details suggests that in contrast to a right or a norm, a principle is of a rather general character without a clear-cut scope. It will thus depend on the individual cases where the principle of the prohibition of child labour

297 It is rightly held that in order to prove that a principle is common to all jurisdictions, it is sufficient to examine the national laws of the different families such as Anglo-American case law and civil law systems, cf. Malanczuk, International Law, p. 49.
298 Ibid.
299 The Oxford Dictionary of the English Language (Oxford University Press, 1933), vol. VIII.
300 Longman Dictionary of the English Language.
will be applied, which age limits and which types of work will be prohibited. In the light of the high number of ratifications of the CRC and the ILO Conventions No. 138 and 182, judges will however only rarely have to have recourse to general principles.

F. THE PROTECTION FROM EXPLOITATIVE CHILD LABOUR

AS IUS COGENS

Having qualified the prohibition of child labour as a general principle of international law, the question arises whether it can be considered as ius cogens. This is of particular importance since a ius cogens character could have particular consequences regarding the implementation of child labour norms through trade measures.

Art. 53 of the VCLT reads:

A treaty will be void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a norm having the same character.

According to Art. 53 of the VCLT, a ius cogens norm is of superior value in the international law system. Art. 53 stipulates that to become ius cogens, a norm must first be a rule of international law and second be accepted and recognised as peremptory by the international community of states as a whole. The rule in question has to be based on a treaty norm or custom because of the hostile attitudes of many states regarding general principles of law. The Chairman of the Drafting Committee of the Vienna Conference on the Law of Treaties stated that it would be enough that a large majority of states accepted the rule as peremptory.

There is no consensus on the content of ius cogens norms. However, the International Law Commission (ILC) gave some examples such as the unlawful use of force, genocide, slave trading, piracy and treaties violating human rights. Ius cogens norms are normally those rules in which all states have a legal interest. The ICJ stated that erga omnes obligations

301 Shaw, International Law, p. 97.
of states are ‘obligations of a state towards the international community as a whole’, which are ‘the concern of all states’ and for whose protection all states have a ‘legal interest’. Those obligations derive for example from the protection of slavery. However, as examined above, the term slavery contained in the Slavery Convention cannot be equated with contemporary forms of slavery. Yet, the ILC stated that rules regulating the slave trade were contrary to ius cogens because of the general recognition of the total illegality of all forms of slavery. While it does not follow from this statement that the ILC necessarily regarded child labour as an illegal form of slavery and thus as ius cogens, it can be concluded that potentially other modern forms of slavery can be considered to be part of ius cogens.

As seen above, the human rights treaties prohibiting the exploitation of child labour are ratified by a large majority of states. The CRC is almost universally ratified. Thus, one could conclude that a majority of states have a legal interest in the protection from contemporary forms of slavery such as child labour. States are not likely to enter into treaties that deprive persons of the rights in question. However, while all ius cogens norms can be said to apply erga omnes, not all erga omnes rules have ius cogens character.

Looking at Art. 53 of the VCLT, the erga omnes application of the relevant rules rather represents a necessary condition for a norm to be part of ius cogens. In order to find out whether the prohibition of child labour in international law fulfils the necessary conditions, it has to be examined in more detail.

As examined above, exploitative child labour as defined by UNICEF and the ILO is a contemporary form of slavery prohibited inter alia by the Supplementary Convention on the Abolition of Slavery, Art. 8 (2) of the ICCPR, Art. 10 (3) of the ICESCR, Art. 32 and 34 of the CRC, ILO

305 The ICJ stated in the case Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), para. 33: ‘In particular, an essential distinction should be drawn between the obligations of a state towards the community as a whole and those of a state vis-à-vis another state in the field of diplomatic protection. By their very nature, the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations erga omnes.’

306 Ibid., para. 34.

307 See the analysis of the definition of slavery, slavery-like practices and servitude in relation to the Supplementary Convention, the UDHR and the ICCPR above p. 39 et seq., p. 45 et seq. and p. 54 et seq.


Conventions No. 29, 105, 138 and 182. These conventions are ratified by a majority of states, the Supplementary Convention providing for the relatively lowest number of 106 ratifications in 1991\footnote{See above p. 39.} and the CRC for the highest number of 193 ratifications.\footnote{See above p. 67.} The ILO Convention No. 138 is ratified by 150 states\footnote{See above p. 88.} and the ICCPR by 160 states.\footnote{See above p. 53.}

Additionally, all ILO members by virtue of their ILO membership should respect, promote and realise the principles contained in ILO Conventions No. 138 and 182, and ILO Conventions No. 29 and 105 on forced labour. Art. 4 of the UDHR is reflected in many national constitutions.

Consequently, the first two conditions relating to the existence of an international norm that is accepted and recognised by the international community are fulfilled.

The next question is whether the prohibition of child labour is regarded as peremptory by a majority of states. In this respect, it should be noted that the prohibition of slavery-like practices such as child labour under the Supplementary Convention, Art. 8 (2) of the ICCPR and Art. 32, 34, 35 and 38 of the CRC is non-derogable. There is however a difference between non-derogable rights and the concept of \textit{ius cogens}.\footnote{Künzli, \textit{Zwischen Rigidität und Flexibilität}, p. 75; T. Koji, ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights’, \textit{European Journal of International Law}, 12 (2001), 917–41, 931.} Whilst non-derogable rights do not have absolute validity because states may withdraw from the treaties providing for these rights, \textit{ius cogens} norms are not subject to this limitation.\footnote{Künzli, \textit{Zwischen Rigidität und Flexibilität}, p. 75.} In addition, different human rights treaties provide for different lists of non-derogable rights.\footnote{Koji, ‘Emerging Hierarchy in International Human Rights’, 920.}

Nevertheless, one may conclude from the qualification as non-derogable rights that states parties to the treaties in question consider these rights as norms from which no derogation is permitted within the meaning of Art. 53 of the VCLT, i.e. as peremptory norms. Thus, the qualification as non-derogable may elevate a norm that is universally accepted and recognised by the international community into the category of \textit{ius cogens}. In a similar sense, one legal author recognises that the concept of \textit{ius cogens} and non-derogable rights share the same
subjective element of qualification as non-derogable. She holds that non-derogable rights common to the four human rights treaties providing for non-derogation clauses are *ius cogens* norms in so far as they are intended to express fundamental value for human beings. It is also held that the fact that a right may not be derogated from may constitute evidence that the right concerned is part of *ius cogens*. Another author holds that some core rights contained in Art. 4 (2) of the ICCPR and other non-derogation clauses of other human rights treaties can be said to have *ius cogens* character. Since Art. 15 of the European Convention on Human Rights and Art. 27 of the American Convention on Human Rights also declare slavery-like practices as non-derogable, the protection from slavery and slavery-like practices would be included in the list of *ius cogens* norms set up by this author.

Another indication that the prohibition of slavery-like practices including the prohibition of child labour has *ius cogens* character is the reference to contemporary forms of slavery contained in the list of crimes against humanity according to Art. 7 (1) lit. c of the Rome Statute of the International Criminal Court (ICC) under the heading of ‘Enslavement’.

Art. 7 (2) lit. c of the Rome Statute reads:

‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children; . . .

Although this definition clearly follows the definition of slavery contained in the Slavery Convention of 1962, in accordance with legal literature it would be wrong to conclude that the jurisdiction of the Court over the crime of enslavement was necessarily limited to the traditional form of slavery. It is rightly argued that, given the horrors of the Second World War and the new forms of enslavement practised in the former Yugoslavia and Rwanda, it is hardly believable that the drafters wanted to limit the jurisdiction to only traditional forms of chattel slavery. The inclusion of trafficking as one contemporary form

\[317\] Ibid., 928.

\[318\] Ibid., 930.

\[319\] Shaw, *International Law*, p. 204.

\[320\] Künzli, *Zwischen Rigidität und Flexibilität*, p. 76.


\[322\] Ibid.
of slavery also demonstrates that modern forms of slavery were intended to come within the definition. Thus, exploitative child labour should in principle be regarded as being included in the definition of ‘enslavement’.

However, given the fact that the ICC will deal with the most serious crimes committed by individuals such as genocide, it might be questioned whether the first of the ILO categories of child labour, i.e. work done under the minimum age for that kind of work and thus likely to impede the child’s education and full development,\(^{323}\) comes within the ambit of Art. 7 (1) (c) of the Rome Statute. One has however to take into account that the ‘crime of enslavement’ is a ‘crime against humanity’, which has to be part of a widespread or systematic attack directed against the civilian population, Art. 7 (1). Whether child labour at too young an age might be part of such an attack and thus fulfil the criteria of a crime against humanity will not be decided here. It can however be concluded that most forms of exploitative child labour come under the definition of enslavement and may under certain circumstances fulfil the criteria of a crime against humanity.

Assuming that only the most serious crimes, which are condemned by the international community as a whole, were included in the list of crimes against humanity, the link between those crimes and \textit{ius cogens} norms is striking. In this sense, the Commentary to the Rome Statute refers to the Rapporteur of the Working Group on Contemporary Forms of Slavery who considers forced sexual activity and other practices as slavery and, as such, violations of the peremptory norm prohibiting slavery.\(^{324}\) Although the Rome Statute itself does not speak of \textit{ius cogens}, Art. 21 (3) of the Statute creates a sort of ‘super- legality’ by clearly authorising the ICC to hold a norm that is contrary to internationally recognised human rights to be \textit{ultra vires}.\(^{325}\) Given that the prohibition of economic exploitation of children is an internationally recognised human right, it comes within this special category. Finally, the International Criminal Tribunal for the Former Yugoslavia declared that crimes against humanity were also peremptory norms of international law of \textit{ius cogens}, i.e. of a non-derogable and overriding character.\(^{326}\)

\footnotesize
\(^{323}\) For the three ILO categories of child labour see above p. 18 et seq.


In sum, there is enough evidence to qualify the prohibition of child labour in international law as a norm of *ius cogens*. As a last step, the scope of the prohibition will be briefly recalled.

The scope of the prohibition is determined by the relevant UN conventions such as the ICCPR, the ICESCR and the CRC as well as by fundamental ILO conventions such as the Minimum Age Convention and the Worst Forms of Child Labour Convention. As stated above, the main forms of child labour distinguished by UNICEF and the ILO,\(^{327}\) and the three categories of child labour distinguished by the ILO, come within the purview of this prohibition. The CRC, which refers to the Minimum Age Convention that fixes various minimum ages for various types of work, and ILO Conventions No. 138 and No. 182 provide for the most detailed provisions regarding the prohibition of child labour.

It could be questioned whether the first category of child labour distinguished by the ILO, i.e. child labour performed at too young an age and thus likely to impede a child’s education and full development, comes within the purview of a prohibition of *ius cogens* character. This category is explicitly dealt with under the Minimum Age Convention, but not under the Worst Forms of Labour Convention. However, it should be recalled that such child labour also has been qualified as exploitative.\(^{328}\) Most importantly, this category has been qualified as a slavery-like practice under the Supplementary Convention on the Abolition of Slavery and Art. 8 (2) of the ICCPR.\(^{329}\) In addition, this category also comes within the prohibition of Art. 32 of the CRC, which refers to the Minimum Age Convention. The fact that the CRC is almost universally ratified is proof of the consensus among states on the need to eliminate this category of child labour. It should also be recalled that work such as household chores, work in family undertakings and work undertaken as part of education is excluded from minimum age legislation. The category referring to work at too young an age and likely to hinder a child’s education and development should thus form part of the *ius cogens* prohibition.

G. **CONCLUSION OF CHAPTER 2**

The prohibition of child labour is contained in numerous provisions of UN and ILO conventions and declarations. The most important UN

---

\(^{327}\) For the main types of child labour distinguished by UNICEF and the ILO see above p. 19 et seq.

\(^{328}\) van Bueren, *The International Law of the Rights of the Child*, p. 264; see also above p. 18 et seq.

\(^{329}\) See above p. 42 and 57.
instruments are the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Art. 4 of the UDHR, Art. 8 (2) of the ICCPR, Art. 10 (3) of the ICESCR and Art. 32 of the CRC. The most relevant ILO conventions are the two fundamental Conventions No. 138 and 182, i.e. the Minimum Age Convention and the Worst Forms of Child Labour Convention. It should however be mentioned that child labour also comes within the meaning of forced labour prohibited by ILO Convention No. 29. The ILO Declaration on Fundamental Principles and Rights at Work is of high political value and – as will be seen below – very relevant for trade measures on child labour.

With a view to possible state action against child labour, it is of particular importance that the prohibition of child labour in international law has the character of *ius cogens*. However, it does not form part of customary law.

All UN and ILO conventions follow the differentiation between tolerable child work and exploitative child labour. With the exception of the Worst Forms of Child Labour Convention, all conventions can be said to prohibit all three categories of child labour distinguished by the ILO, namely labour that is performed under the minimum age for this kind of work and thus likely to impede a child’s education and full development, hazardous work and the unconditional worst forms of labour. Equally, all the types of child labour enumerated by UNICEF and the ILO come within the prohibition contained in international law.

State obligations encompass the adoption of legislative, administrative, social and educational measures including provision for penal sanctions, minimum age legislation, other preventive measures, labour inspections of private parties, removal of children from the worst forms of child labour, adequate educational measures, and recovery, rehabilitation and reintegration of exploited children.

Most importantly, the ICESCR, the CRC and ILO Convention No. 182 also include international cooperation and assistance including social and economic development, poverty eradication programmes and universal education when referring to obligations to implement the respective convention. It is noteworthy that the Committee on the Rights of the Child has stated that the WTO shall have due regard to the best interests of the child when carrying out its activities.

Whilst all obligations are absolute and immediate, including those provided for by the ICESCR, ILO Convention No. 182 also provides for time-bound measures in the case of prevention, removal of children
from the worst forms of child labour, access to free basic education, children at special risk and the special situation of girls.

In conclusion, states not only have the obligation to refrain from exploiting children but also to protect them from violations committed by third parties and to fulfil certain obligations, such as to provide for free basic education and for other recovery, rehabilitation and social integration measures. This will be of particular importance when determining violations of state obligations and their legal consequences in terms of unilateral state measures such as reprisals. For not only positive state action but also omissions might constitute a breach of an international obligation.
3 UN and ILO implementation mechanisms for the prohibition of child labour

A. INTRODUCTION

Having examined the scope and content of international norms prohibiting child labour, the next question is how these norms are enforced. The following chapter will analyse the UN and ILO implementation systems with a view to asking whether they are still adequate for the elimination of child labour in their current form, or whether reforms are needed.

From a long-term perspective, the key question when assessing implementation systems would be what changes in law and practice occurred in a country after the respective implementation procedure took place. Accordingly, one would have to examine and compare national child labour legislation and the actual situation in the respective countries, and what changes have occurred over a certain period of time. This would require a sustained analysis of government responses to the recommendations of the implementation bodies. Some legal writers have traced the adoption of domestic legal reforms directly to the effort of UN human rights treaty bodies, but, as others have pointed out, identifying the origin of change in law and practice is complex, particularly where such change is gradual or long-term. This is not just because

many factors influence changes in law and practice, but also because
governments do not always identify what role international scrutiny
may have played in motivating changes. In development science, this
is referred to as the problem of impact assessment and attribution.

For these reasons and because a thorough impact assessment of the
UN and ILO implementation mechanisms is beyond the scope of this
work, the following analysis will focus on the characteristics and func-
tion of the current implementation systems, asking whether these
systems have the potential eventually to put an end to child labour.
A central question will be whether trade measures may be invoked
under the current systems and, if not, whether the option of taking
recourse to trade measures should be further analysed.

Some changes in law and practice attributable to efforts of the UN
and ILO implementation bodies will however be taken into account to
support the main findings.

Finally, it is important to mention that different views exist on how
the term ‘implementation’ should be defined. Some authors differen-
tiate between ‘enforcement’ and ‘implementation’, the latter usually
in relation to weaker mechanisms. For the purpose of this work, ‘imple-
mentation’ will be defined in a broad sense including ‘all measures
which aim at putting the substantive norms of human rights into
operation’. The term will be used interchangeably with enforcement.

B. THE UN HUMAN RIGHTS IMPLEMENTATION
MECHANISM

I. Introduction

The UN bodies implementing international law prohibiting child labour
eNSsCSe on the one hand, treaty-based bodies that are responsible
only for that specific treaty regime and, on the other hand, charter-based
bodies that have developed from Articles 55 and 56 of the UN Charter.
Treaty-implementing bodies only have jurisdiction with respect to states

3 Ibid., p. 307.
4 C. Roche, Impact Assessment for Development Agencies, Learning to Value Change (Oxford:
OxfamGB and Novib, 1999), p. 32 et seq.
Making and Human Rights, Human Rights in International Perspective, (Lincoln and London,
parties to a particular treaty whereas the responsibility of charter-based mechanisms potentially extends to all member states of the UN.\textsuperscript{7}

II. The treaty-based system

1. Introduction

The regime of the major international human rights treaties has functioned since the adoption of the treaties in the period from 1966 until 1989.\textsuperscript{8} The six existing treaty bodies have operated for varying lengths of time. The relevant treaty bodies for the right of the child to be protected from economic exploitation are the Human Rights Committee implementing the ICCPR, which first met in 1977, the Committee on Economic, Social and Cultural Rights implementing the ICESCR, which first met in 1987, and the Committee on the Rights of the Child implementing the CRC, which first met in 1991.\textsuperscript{9}

The following section will briefly describe the implementation systems according to the implementation provisions of the ICCPR, the ICESCR and the CRC, the working methods developed by the relevant committees, and consider the committees’ and states’ performance of their duties.

2. Implementation of the ICCPR

a) The Human Rights Committee

Art. 28 of the ICCPR provides for the establishment of a Human Rights Committee (HRC) consisting of 18 members. According to Art. 31 of the ICCPR, members shall be elected by the states parties to the ICCPR and shall serve in their personal capacity, Art. 28 of the ICCPR. It is thus not a political body. This is to be welcomed.

In general terms, the HRC can be said to be the guardian of the ICCPR.\textsuperscript{10} Yet, the exact role and its functions have been a matter of controversy – is it an organ for promotion or for supervision?\textsuperscript{11} Due to much debate between states during the drafting process, the wording of the ICCPR does not give an explicit answer and contains many gaps as

\textsuperscript{7} van Bueren, The International Law of the Rights of the Child, p. 383.
\textsuperscript{8} For the dates of adoption of the major human rights treaties see above Chapter 2.
\textsuperscript{10} Opsahl, ’The Human Rights Committee’, p. 396.
\textsuperscript{11} Ibid.
to the functioning of the HRC. Therefore, a creative HRC is needed to fulfil the role of the guardian of the ICCPR.

b) The reporting system
Art. 40 of the ICCPR provides the reporting system: states parties must undertake to submit reports on the measures they have adopted that give effect to the rights recognised in the ICCPR and on the progress made in the enjoyment of those rights. According to Art. 40 (1) lit. a of the ICCPR, the initial report is due within one year after the entry into force of the ICCPR and later reports are due for submission whenever the HRC so requests, Art. 40 (1) lit. b of the ICCPR. The reports must indicate the factors and difficulties affecting the implementation of the present Covenant, Art. 40 (2). Reports may be transmitted to the specialised agencies. The HRC must study the reports submitted by the states parties and make such ‘general comments as it may deem appropriate’. It may transmit these comments and the reports received to the Economic and Social Council (ECOSOC). According to Art. 40 (5) of the ICCPR, states parties may submit observations on reports to the HRC.

To date, the primary function of the HRC is the reporting system, affecting all states parties. Although the large majority of states parties have discharged their duty to submit initial reports, many reports were submitted after long delays. In these cases, the HRC is enabled to send reminders by its rules of procedure. However, in order to improve its enforcement power, the HRC has discussed various ways to respond to the long delays. Since many delays are caused by the lack of resources in developing countries, in 1985 it introduced a programme of Advisory Services including regional training seminars for national civil servants responsible for the preparation of reports, which appears to have been very successful.

In 1981, the HRC adopted a general decision on periodicity that requires reports every five years. The main rationale for that decision was to maintain a ‘constructive dialogue’ with the reporting state in order to deepen its knowledge of the country. By contrast, it was
hesitant to legally oblige states parties to submit additional written information in case a report was incomplete. Instead, it has encouraged the submission of ‘supplementary reports’, as they are termed in practice. This practice has proved useful. In 1994, the HRC began to include a separate list in its annual report indicating those states that have more than one report overdue. In order to improve the content of states’ reports, which often merely consisted of generalities, the HRC introduced guidelines for initial reports in 1977 and for subsequent reports in 1981. These guidelines made clear that the purpose of reporting also refers to the human rights situation in the country concerned, not only to the legislative acts or administrative and judicial decisions adopted by the state.

As to the examination of states’ reports, Art. 40 of the ICCPR only states that the HRC must study states’ reports and transmit such general comments as it may deem appropriate. However, it was soon agreed that states parties would send representatives to the HRC meetings to introduce their reports and answer questions by members of the HRC. Through this question and answer process, the HRC gained significant information from states parties.

The HRC needs additional information when examining states’ reports. Hence, the role of non-governmental organisations providing such information is crucial to the examination process. While members do not rely on such evidence for violations of the ICCPR, they use it as a basis for their own comments and questions.

From the beginning, there was much opposition to the idea that the HRC could criticise individual states parties or determine that they have not fulfilled their obligations of implementing the ICCPR.

---

19 Ibid., p. 400.
20 Ibid.
21 Ibid.
24 Ibid.
27 Ibid., p. 407.
28 Ibid., p. 408.
However, after some discussion, an agreement was reached in 1980, which provided for ‘General Comments’ by the HRC promoting cooperation between states, summarising the experience of the HRC in examining states’ reports and drawing the attention of states parties to matters referring to the improvement of the reporting procedure and the implementation of the ICCPR. A consensus was adopted that the aim of the HRC was to engage in a constructive dialogue with each reporting state, and that the comments would be non-country specific.29 Such General Comments guide states parties with respect to their reporting obligations and provide authoritative guidance on the ambit of individual articles.30 Although constituting non-binding but authoritative interpretations of the rights contained in the ICCPR, they are an ‘indispensable source of information for the interpretation of the Covenant and underscore the unique role of the Committee as guardian of the Covenant’.31 The General Comment on Art. 24 of the ICCPR is of particular importance for children, referring to economic exploitation as well as economic and social measures for protection.32 In addition, General Comments have considerable impact outside the UN system.33 These Comments have also been used in the development of new national laws.34

Finally in 1992, the HRC decided that at the end of the consideration of each state party’s report, specific comments would be adopted referring to the country concerned, which would express both the satisfaction and the concerns of the Committee.35 These specific comments are termed ‘Concluding Observations’ and refer to ‘positive aspects’, ‘principal subjects for concern’, as well as ‘suggestions and recommendations’.36 The restrictive wording of Art. 40 (3) of the ICCPR and the historical background suggest a limited role for the specialised agencies in the reporting process.37 In practice, they have a form of limited cooperation,

---

32 See for the scope of Art. 24 (1) of the ICCPR above p. 61 et seq.
34 Cohn, ‘The Early Harvest’, 298.
36 See for example Concluding Observations on Venezuela, Committee on the Rights of the Child, Report on the Twenty-second Session, CRC/C/90, para. 28 et seq.
reporting regularly on the interpretation and application of comparable provisions in their conventions. However, this is important for child labourers since their rights are protected by ILO conventions.

In sum, given the vague wording of the ICCPR and reluctance of states parties, the HRC has made considerable progress in a relatively short period of time, creating a reporting procedure that provides for Concluding Observations on states’ reports and General Comments on the scope of the rights contained in the ICCPR.

However, major deficiencies persist. As of September 2008, ninety-four states’ reports were overdue. The number of overdue reports is thus more than half of the number of states parties, which as of March 2007, was 162. Many states parties have more than one report overdue. Although the HRC has continued to seek new means of encouraging delinquent states to submit reports, the problem of delays remains. At the same time, the present supervisory system can only function because of the great number of delays.

In addition, the reports themselves are often inadequate, as they do not report on occurring human rights violations.

Another major shortcoming relates to the constructive dialogue. In their answers to written questions by the HRC, many state delegations either write long replies that contain no substantive information, or they write very short answers, neither of which can be used as a basis for discussion.

Another problem is that often HRC members are not well prepared to discuss state reports.

Finally, there is no follow-up procedure to assess changes in law and practice on the domestic plane. As a preliminary conclusion, it can therefore be stated that the system needs improvement.

---

40 See above p. 53.
44 Ibid.
c) Changes in law and practice

The following examples will illustrate the positive impact of the reporting procedure: in discussions in 1987, several states cited the consideration of reports as the basis for change. Senegal eliminated all restrictions on the rights to leave the national territory.45 The Mongolian representative stated that the HRC’s comments on its initial report had affected the revision of the country’s penal code.46 Another positive example is the abolition of the system of ‘faceless judges’ in Peru, which followed considerable pressure from the HRC.47

In relation to children, in its third state party report, Nicaragua highlighted the adoption of a National Strategic Plan for the Prevention and Elimination of Child Labour and the Protection of Child Workers, which identified the worst forms of child labour and prioritised commercial sexual exploitation in certain areas.48 It also pointed to progress made in defining the concept of a children’s ombudsman and the establishment of protection centres for children at high social risk by the Ministry for Education.49 Most importantly, by 2006, 245,320 children were provided with special protection (including placing the child in other institutions).50

As regards Costa Rica, the HRC welcomed the amendments to the Family Code, the Criminal Code and the Civil Code aimed at protecting children in matters relating to marriage.51

d) The interstate complaints procedure

Art. 41 provides for an interstate complaints procedure: states parties must make a declaration to enable the HRC to receive and consider communications from other states parties alleging a violation of the obligations under the ICCPR committed by them. Art. 41 provides that the HRC ‘shall make available its good offices to the states parties concerned with a view to a friendly solution of the matter’. If a friendly

---

46 Ibid., 300.
49 Ibid., paras. 669 and 698.
50 Ibid., para. 699.
solution is not achieved, Art. 42 of the ICCPR provides for the establishment of an ad hoc Conciliation Commission. This Commission submits a report on the matter that the states parties concerned may accept or not.

While intended to become the main method of implementation of the ICCPR, the interstate complaints procedure has not been used to date. Some observers have remarked that state complaints are impractical:

There is something almost naïve about a system that assumes that a government will gratuitously come to the help of foreigners at the risk of compromising its relations with other governments.

e) The individual complaints procedure
The First Optional Protocol to the Covenant on Civil and Political Rights from 1966 provides for an individual complaints procedure. This procedure is optional for the states parties to the Covenant and its ‘views’ do not have binding force. Having exhausted all available domestic remedies, individuals may submit communications to the HRC alleging violations of the rights recognised in the ICCPR. According to Art. 5 (1) and (4) of the Protocol, the HRC considers the communication in closed meetings and forwards its ‘views’ to the state party concerned. According to Art. 6 of the Protocol, the HRC must include a summary of its activities concerning the individual complaints procedure in its annual report to the General Assembly.

The individual complaints procedure under the Optional Protocol to the ICCPR has developed into the most effective of all complaints procedures administered by human rights treaty bodies. Several procedural amendments introduced by the HRC have contributed to this success.

Although not explicitly stated in the Covenant, the HRC never doubted that it should state its opinion on whether or not it considered that there had been a breach of the Covenant, thereby reinforcing its quasi-judicial nature. Whilst still searching for majority voting in the decision-making process, the HRC has in the meantime adopted the

---

practice of appending individual opinions to the HRC’s decision instead of insisting upon the adoption of a consensus. 56 Most importantly, recognising the importance of having a formal procedure for follow-up, in 1990 the HRC appointed a Special Rapporteur for the follow-up of views. 57 However, in 1999, in only five cases involving a finding of a violation of the ICCPR, satisfactory replies were received in the sense of acceptance of the HRC’s decision and the expression of the willingness to implement. 58

Despite these achievements, results are not perfect. Firstly, not all states are party to the Optional Protocol. 59 Secondly, according to estimates from the year 2000, 43 per cent of states parties have never been the subject of a single communication. 60 Thirdly, parties are still not entitled to make presentations at oral hearings. 61 Fourthly, one has to bear in mind that the average length of proceedings is three and a half years. 62 After such an amount of time, also taking into account the national proceedings, it is questionable if a favourable decision by the HRC is still capable of providing redress for the victim.

However, one has to keep in mind that an individual complaints procedure not only aims at corrective action, but also serves two other functions: bringing about changes to law and practice, and providing guidance to states parties on the ambit of the provisions of the relevant treaty. 63 Thus, the individual complaints procedure retains major importance despite its shortcomings. Yet, this does not mean that no further action is needed to remedy the shortcomings.

Since there have not been many cases on child labour to date, 64 the individual complaints procedure has not contributed significantly to solving the problem of child labour. 65 Therefore, additional remedies have to be investigated.

58 Ibid., 152–153.
59 As of March 2008, 111 states were parties to the Protocol, www2.ohchr.org/english/bodies/ratification/5.htm.
62 Ibid., p. 146.
63 Ibid., p. 142.
64 Such a complaint could be brought under Art. 8 (2) and (3) or Art. 24 of the ICCPR, cf. Chapter 2.
65 See jurisprudence of the HRC at www.unhchr.ch/tbs/doc.nsf.
3. Implementation of the ICESCR

a) Overview of the implementation provisions of the ICESCR

Art. 16 – 22 of Part IV of the ICESCR provide a reporting system according to which states parties are required to report on the measures they have adopted and the progress they have made in achieving the observance of the rights recognised in the Covenant. The reports may indicate factors and difficulties affecting the degree of compliance with the obligations under the ICESCR, Art. 17 (2) of the ICESCR. They have to be referred to the Secretary-General, who is required to transmit copies of the reports to the ECOSOC, and copies of all relevant parts to the specialised agencies, Art. 16 (2) lit. a of the ICESCR. If an agency has already been furnished with information, it suffices for the report to refer to that, Art. 17 (3) of the ICESCR. The specialised agencies report to the ECOSOC on progress achieved in observance of the Covenant, Art. 18 of the ICESCR. According to Art. 19 of the ICESCR, the Commission on Human Rights may receive from the ECOSOC copies of both the states’ and agency reports and may make general recommendations thereon. The specialised agencies and the states parties may then submit their comments on any such recommendations to the Council, Art. 20 of the ICESCR. The Council is entitled to submit reports to the General Assembly with recommendations of a general nature and a summary of the information received, Art. 21 of the ICESCR. It may also bring to the attention of the specialised agencies matters that may warrant action under Art. 22 of the ICESCR, which provides for technical assistance or the taking of other international measures.

b) Principal activities of the Committee

The provisions of Part IV of the Covenant do not reflect the actual practice that has evolved regarding the implementation of the Covenant.

Although, during the drafting process, there was strong opposition to the creation of a special committee under the ICESCR, soon after the entry into force of the Covenant the ECOSOC decided to establish a ‘Sessional Working Group’ to consider reports under the ICESCR. In 1985, the Sessional Working Group was replaced by the Committee.

---

66 The Commission on Human Rights has now been replaced by the Human Rights Council, see below p. 145.

on Economic, Social and Cultural Rights, which inherited the existing procedures with respect to implementation. In contrast to the HRC, it is responsible not to the states parties but to the ECOSOC.

It was generally expected that the Committee should employ a similar working method to that of the HRC. Thus, states parties are under an obligation to present an initial report one year after the Covenant enters into force in their country, followed by periodic reports at five-year intervals. Similar to the reporting system under the HRC, the idea was to establish a ‘constructive dialogue’ with states parties. An interesting development was the decision to request ad hoc reports in cases of serious human rights violations.

Originally not being given specific authorisation to adopt ‘General Comments’, the Committee provided an important first General Comment, where it outlined the basic function of the reporting procedure, namely to facilitate a review of a state’s legislation and administrative measures, to provide a basis for assessing progress and to enable an exchange on problems and remedies regarding the implementation of the covenant.

There is a consensus that although carrying a certain amount of authority and contributing to the shaping of state practice, these General Comments are not legally binding. Yet, the endorsement by ECOSOC and the General Assembly gives considerable weight to these General Comments.

With regard to the participation of NGOs, the Committee decided to invite them, including NGOs without consultative status, to submit written statements and to allow them to make oral presentations.

Interestingly enough, the Committee on Economic, Social and Cultural Rights took the lead among the various Committees in overcoming the

72 Craven, The International Covenant on Economic, Social and Cultural Rights, p. 62 mentions cases in this context where NGOs have brought matters to the attention of the Committee, which subsequently requested specific reports on those matters.
76 Ibid., p. 92.
77 Ibid., p. 81.
restriction as regards country-specific Committee views and adopted at its second session in 1988 the practice of making ‘Concluding Observations’. 78

In response to the poor record of reporting, the Committee has devised several remedies. It sends lists of defaulting states to the ECO-SOC and letters to the respective governments reminding them of their obligations. 79 A better means has been the announcement that it would examine the state of economic, social and cultural rights in certain defaulting states even in the absence of a report and a state delegation representing it. 80

In cases where information in submitted reports was incomplete, the Committee has introduced a follow-up procedure of sending a mission consisting of one or two members of the Committee to the country concerned to collect the necessary information. 81

As mentioned in the first General Comment, one function of the Committee is the clarification of the content of the norms recognised within the Covenant. Since states’ reports often have not been particularly enlightening in this respect, the Committee has sought additional means of improving the understanding of the norms. In addition to its General Comments, it has scheduled a ‘Day of General Discussion’ at each session on a specific right or a particular aspect of the ICESCR. 82

Despite the progress achieved in the examination of reports and various other activities, the Committee still faces a number of problems in developing the effectiveness of its supervision process.

Firstly, in September 2008, the number of overdue states’ reports was 198. 83 The number of overdue states’ reports thus exceeds the number of states parties, which was 159 in September 2008. 84 This means that on average, every state party has at least one report overdue. Secondly, to a large extent, the inadequacy of states’ reports remains. 85 In addition, although the Covenant emphasises the important role of specialised agencies in the reporting process, the record of agency participation is generally poor. 86 A further problem of an enduring nature is that the Committee only has a single annual session of three weeks’ duration,

---

78 Simma, ‘The Examination of State Reports’, p. 38.
79 Ibid., p. 33.
80 Ibid.
81 Ibid., p. 40.
82 Craven, The International Covenant on Economic, Social and Cultural Rights, p. 93.
84 See above p. 62.
86 Ibid., p. 79.
which generally leads to a poor consideration of reports and a poor constructive dialogue.\(^{87}\) Another shortcoming is the lack of a follow-up procedure that assesses states parties’ reactions to the respective Concluding Observations. However, the Committee has had some operational successes and, through its innovative functions, has overcome many of its built-in defects and developed a relatively efficient supervisory system.

c) Changes in law and practice

In relation to Brazil, in 2003 one expert from the Committee on Economic, Social and Cultural Rights expressed concern that still nearly 3 million Brazilian children were working, and only 15,000 had been helped by the International Programme on the Elimination of Child Labour (IPEC).\(^{88}\) There were still very young children working up to sixteen hours a week.\(^{89}\)

In relation to Benin, in 2002 one expert from the Committee noted the paradox between the high rates of youth unemployment on the one hand, and the use of child labour on the other.\(^{90}\) In other African countries, laws on compulsory schooling had had the effect of releasing jobs for unemployed young people.\(^{91}\)

In relation to the situation in Trinidad and Tobago, in 2002 the Committee was deeply concerned that the minimum working age, in some cases as low as twelve years, left children more vulnerable to exploitation and prejudiced their right to education.\(^{92}\)

These examples suggest that while the reporting procedure is a useful tool for providing information on the legal and factual situation in countries, it is a lengthy process with limited practical results, especially in the light of the fact that the reporting procedure under the ICESCR has now existed for almost twenty years.

d) Complaints procedures

In 2002, the Commission on Human Rights decided to establish an open-ended working group to elaborate options for an optional protocol on an

---

\(^{87}\) Ibid., p. 104.


\(^{89}\) Ibid., para. 17.


\(^{91}\) Ibid.

individual complaints procedure. On 18 June 2008, the Human Rights Council adopted Resolution 8/2 providing for an individual, interstate complaints procedure and an inquiry procedure under an Optional Protocol to the ICESCR. It is now open for adoption by the General Assembly.

As under the Optional Protocol to the ICCPR, individuals may submit communications to the Committee alleging violations of rights contained in the Covenant. Most notably, in urgent cases, the Committee may, without deciding on the merits, request the state party concerned to take necessary interim measures to prevent irreparable damage to the victims. After considering the communication in closed sessions and possibly consulting specialised agencies, the Committee transmits its views including recommendations to the state party concerned, which in turn gives a written response within six months. As a follow-up, the Committee may request the state party concerned to provide further information under the reporting procedure.

Whilst the possibility of requesting interim measures is a clear advantage over the procedure under the HRC, the procedure has the same weaknesses such as a lack of clear timeliness and the non-binding nature of the views. However, it is already a major success that, finally, the long-awaited complaints procedure for economic, social and cultural rights is about to be adopted. The exploitation of child labour as defined by Art. 10 (3) of the ICESCR can now be the subject of individual complaints.

Art. 10 of the Optional Protocol provides for an interstate complaints procedure. A state party to the Protocol may submit a communication to another state party declaring that it has violated its obligations under the Covenant. If the matter is not settled within six months after the receipt of the communication, the case may be referred to the Committee. The Committee tries to reach a friendly solution examining the communications in closed session and considering the parties’ oral and written submissions. The Committee then submits a report on the matter and any views to the parties.


It remains to be seen whether this interstate procedure will be used more frequently than the one under the HRC.

Finally, if the Committee receives information on grave and systematic violations of the rights contained in the Covenant by a party to the Protocol, it will invite the state party concerned to cooperate in the examination and to provide information. Most importantly, the members of the Committee may conduct a confidential inquiry including a visit in situ. The Committee then transmits the findings of the inquiry to the state party concerned, which shall respond within six months.

The inclusion of this inquiry procedure into the Protocol is to be welcomed in the light of the fact that, as will be seen in later sections of this chapter, special fact-finding missions or direct contacts have proven most useful under the UN and ILO system.

4. Implementation of the CRC

a) Overview of the implementation provisions of the CRC

Art. 43 of the CRC provides for the establishment of a Committee on the Rights of the Child for the purpose of examining the progress made by states parties in achieving the realisation of the Convention’s obligations. Art. 44 of the CRC provides for a reporting system according to which states parties undertake to submit to the Committee reports on the measures adopted to implement the CRC. The initial report is due within the first two years of the entry into force of the Convention and thereafter every five years. The reports must indicate factors and difficulties affecting the degree of fulfilment of the obligations under the CRC. The Committee may request further information from states parties. Art. 45 of the CRC provides for cooperation with the specialised agencies, inter alia UNICEF and other competent bodies. The Committee may recommend to the General Assembly that it requests the Secretary-General to undertake studies on specific issues relating to the rights of the child on its behalf. Finally, according to Art. 45 of the CRC, the Committee may make suggestions and recommendations based on information received.

b) Principal activities of the Committee

Since 1995, the Committee has met three times a year, each time for a three-week period and an additional week for the pre-sessional working group.95

---

The implementation mechanism is that of reporting combined with the provision of technical assistance, but not the receipt of complaints.\textsuperscript{96} Similar to the reporting system under the HRC and the Committee on Economic, Social and Cultural Rights, states parties are under an obligation to submit periodic reports according to General Guidelines devised by the Committee. These reports are then examined in the Committee’s sessions with the purpose of maintaining a constructive dialogue and the drafting of Concluding Observations. The Committee also adopts General Comments on the ambit of various articles.\textsuperscript{97} Similar to the General Comments of the other treaty bodies, they do not constitute binding interpretations either, but carry a certain amount of authority.

Based on this structure, both the CRC and the Committee have introduced many innovative working methods: the CRC has broken new ground for a universal human rights treaty as it provides a single method of monitoring for the protection of both civil and political, and economic, social and cultural rights.\textsuperscript{98} Additionally, the four underlying principles of the CRC (non-discrimination in Art. 2, the best interests of the child in Art. 3, the rights to life, survival and development in Art. 6, and the right of children to participate in decisions affecting them in Art. 12) must be considered in the scrutiny of compliance with all other rights.\textsuperscript{99}

This holistic approach is reinforced by its comprehensive review of children’s rights and an all-embracing strategy for the development and adoption of legislation, policies and action plans.\textsuperscript{100} The aim of the reporting process is to strengthen the national capacity to monitor children’s rights rather than to replace it.\textsuperscript{101} The Committee views its major function as implementing children’s rights through advocacy, education and awareness-raising dialogue with governments and other bodies.\textsuperscript{102} In this sense, Art. 42 of the CRC requires that governments publish their reports in their countries.

\textsuperscript{96} van Bueren, The International Law of the Rights of the Child, p. 389.
\textsuperscript{97} See for example CRC, General Comment No. 1, The Aims of Education, Article 29, 17 April 2001, CRC/GS/2001/1.
\textsuperscript{98} van Bueren, The International Law of the Rights of the Child, p. 392.
\textsuperscript{101} Landsdown, ‘The Reporting Process’, p. 113.
\textsuperscript{102} Karp, ‘Reporting’, p. 37.
The Committee requires information on general measures of implementation, including measures taken to harmonise national law and policies, existing and planned monitoring mechanisms at the national and local level, and the amount of statistical information needed to assess the situation of children in the country concerned.\(^{103}\)

The Committee has also introduced General Discussion Days. For example, it discussed the economic exploitation of children to raise awareness and to respond to the need for integrated and concerted action by governments, UN bodies and other competent bodies active in the field of the rights of the child.\(^{104}\)

The field visits conducted so far were another innovative example of combining the process of reporting with other activities.\(^{105}\)

In 1992, the Committee introduced an ‘urgent action procedure’ as part of the reporting procedure.\(^{106}\) According to this procedure, in serious situations where there was a risk of deterioration, the Committee should take up the case in the ‘spirit of dialogue’ and in a non-accusatory way.\(^{107}\) The Committee should assess the information before it and transmit it to the state party concerned.\(^{108}\) It may also suggest a visit to the relevant country.\(^{109}\) The Committee also emphasised that it could make the case public by including it in its reports and informing other treaty bodies where appropriate.\(^{110}\) So far, the Committee has responded several times to such serious situations in a confidential way with a view to sensitising states regarding their treaty obligations to safeguard children’s rights.\(^{111}\)

The introduction of this ‘urgent action procedure’ in the framework of the reporting system is a very innovative way to deal ad hoc with serious violations of children’s rights despite the lack of a specific provision regarding such situations.


\(^{105}\) Karp, ‘Reporting’, p. 40.


\(^{107}\) Ibid., para. 55.

\(^{108}\) Ibid.

\(^{109}\) Ibid., para. 56.

\(^{110}\) Ibid., para. 57.

The Committee is unique in its cooperation with NGOs – inviting them to attend pre-sessional working groups to comment on government reports and to identify major issues of concern with regard to children’s rights.¹¹²

Moreover, in line with Art. 45 lit. a and lit b of the CRC, according to which the Committee may invite specialised agencies to provide expert advice and may forward them states’ reports, the Committee periodically exchanges views with other UN organs and competent bodies to foster international cooperation and to make the CRC a focal point in the planning of programmes for technical assistance devised by these bodies.¹¹³ The provision on the forwarding of states’ requests for technical advice and assistance to the UN specialised agencies and other competent bodies contained in Art. 45 lit. b of the CRC is a refinement of the provision of the ICESCR. It is intended to complement other forms of implementation and is of crucial importance in assisting states parties to implement the CRC.¹¹⁴

As a preliminary conclusion, it can be stated that the Committee has been very creative in developing its working methods. As a minimum, the reporting system is capable of providing a forum for public examination of state activities and for human rights education.

Nonetheless, the Committee faces the serious problem of non-submission of reports by states parties, or the states’ failure to submit their reports on time. As of September 2008, 116 reports were overdue.¹¹⁵ As under the ICESCR, the number of overdue reports is more than half of the states parties, which was 193 as of September 2008.¹¹⁶ Ironically, the present supervisory system can only function because of the states’ large-scale delinquency as they report after the due date.¹¹⁷

It has been recommended that the CRC should be amended to empower the Committee to receive and consider individual and group complaints.¹¹⁸ This would promote rights against exploitative child work.¹¹⁹ However, the Committee also may transfer possible cases on child labour to the HRC, which may consider individual communications.

¹¹⁵ For an overview see www.unhchr.ch/tbs/doc.nsf/newhvoervativebytreaty?OpenView.
¹¹⁶ See above p. 67.
¹¹⁷ UN Commission on Human Rights, Alston, Effective Functioning of Bodies, para. 48.
¹¹⁸ Weston, Teerink, Child Labour, p. 45.
¹¹⁹ Ibid.
Nevertheless, the question arises whether complementary means should be explored to strengthen children’s rights.

c) Changes in law and practice

Still, some positive changes in law and practice are attributable to the dissemination of the CRC and the work of the Committee.

The initial report on the implementation of the CRC in India, for example, states that the preparation of the country report was an important step in the implementation and dissemination of the CRC.\textsuperscript{120} It was a ‘participatory process’ involving inputs from NGOs, academics and other experts including a National Consultation Workshop organised by the Indian Council of Child Welfare in collaboration with the Department of Women and Child Development and UNICEF in Delhi during November 1994.\textsuperscript{121} In 1995, a four-member team of the Committee on the Rights of the Child travelled to India to visit child labour projects.\textsuperscript{122} Their suggestions were incorporated into the government’s plan of action for the elimination of child labour. Many more steps were taken to implement the CRC, for example, the International Conference on Shaping the Future by Law was held in Delhi, which resulted in children’s issues gaining a higher profile in the media, an emphasis on key issues like child labour and primary education, and the sensitisation of top levels of the judiciary.\textsuperscript{123} Further examples are the RugMark Foundation that was registered to encourage carpet exporters to eliminate child labour in that industry and recycle funds received from importers for the rehabilitation of children, and the Prime Minister’s commitment to the issue in 1994, resulting in the creation of a scheme for the elimination of child labour from hazardous industries and the ear-marking of substantial funds for this purpose with a time-bound target for implementation.\textsuperscript{124}

Other positive results relate to the situation in Libyan Arab Jamahiriya: in its Concluding Observations on the initial report submitted by Libyan Arab Jamahiriya, the Committee on the Rights of the Child recommended that research on the issue of domestic violence and child abuse


\textsuperscript{121} Ibid., para. 2.2 iv.

\textsuperscript{122} Ibid., para. 1.24.

\textsuperscript{123} Ibid., para. 2.4.

\textsuperscript{124} Ibid., para. 2.8 ii. and iv.; on the RugMark initiative see below p. 362.
be undertaken.\textsuperscript{125} It further recommended that research be carried out on the situation of child labour in the state party, including the involvement of children in hazardous work, to identify its causes and the extent of the problem.\textsuperscript{126} In the thirty-third session of the Committee on the Rights of the Child in 2003, the Libyan representative stated that studies had been conducted on child abuse and family violence, and measures were taken to protect children.\textsuperscript{127} In addition, the representative asserted that the government was addressing the problem of child labour through social programmes and labour legislation prohibited the employment of children under the age of fifteen. Children were not allowed to work for more than six hours, and their guardians had to ensure that they did not engage in inappropriate forms of work.\textsuperscript{128}

This short reference to changes on the ground demonstrates that the system is functioning and may in the long run achieve sustained results.

5. Evaluation of the treaty-based implementation mechanism

Among the three Committees presented, the HRC has the strongest implementation mechanism, providing for an individual and interstate complaint procedure. However, the interstate complaint procedure has been rather unsuccessful, as it is not used by states parties. The individual complaint procedure is considered to be one of the major achievements of UN efforts aimed at the protection and promotion of human rights.\textsuperscript{129} However, since it has not been frequently used regarding child labour, it has not been of much help in solving this issue. Since the CRC and the ICESCR still lack an individual complaints procedure, although there is progress towards the adoption of one under the ICESCR, the focus of this work is on the reporting mechanism and potential complementary enforcement tools.

As regards the reporting mechanism today, all three Committees review states’ reports and give specific recommendations to states

\textsuperscript{126} Ibid., p. 275.
\textsuperscript{128} Ibid., para. 66.
parties in their Concluding Observations on how to improve the legal and actual situation of children. The Committee on Economic, Social and Cultural Rights has inter alia identified the function of the reporting system as facilitating a comprehensive review of national legislation and practices, providing a basis for measuring progress and enabling the Committee and states to appreciate remedies that might be taken better. Put differently, the reporting system provides a basis for further action at the national and international level.

Another positive outcome of the reporting system was the introduction of General Comments that provide authoritative interpretations on the ambit of the various articles contained in the ICESCR, the ICCPR and the CRC.

It is also noteworthy that the Committee on the Rights of the Child has introduced many innovative working methods that correspond to the multi-pronged strategy for action against child labour including advocacy, awareness raising, education and social protection measures presented in Chapter 1. Its main function is to act as a facilitator for children’s rights, which corresponds to the new approach taken by IPEC. Another important step was the introduction of an urgent action procedure enabling the Committee to deal with serious violations of children’s rights.

It has been concluded that, through the reporting process, the treaty bodies have developed remarkably effective practices to scrutinise how far states have met their obligations under the human rights treaties to which they are party, as well as to encourage further implementation of these treaties.

However, as the system has grown, challenges have emerged from delays in submission and/or consideration of reports, non-reporting and duplication of reporting requirements among treaty bodies. Some authors have therefore concluded that the system is in crisis because of the huge backlog in states’ reports under the various treaties and the delays in processing the reports because of the enormous workload of the various treaty bodies. Improving the effectiveness of the supervisory system has been an ongoing concern of the treaty bodies.

---

130 See below p. 180 et seq.
131 OHCHR, Fact Sheet No. 30, p. 17.
132 Ibid., p. 33.
134 OHCHR, Fact Sheet No. 30, p. 33.
Proposals for reform are *inter alia* to take steps to ensure greater cooperation and coordination among treaty bodies or to develop close collaboration with the relevant country-specific or thematic rapporteurs.\(^\text{135}\)

Overall, however, despite these shortcomings, the reporting system is functioning and may have a significant impact within a state by helping to ensure more effective implementation of the treaties. There seems to be a broad consensus\(^\text{136}\) that ‘the basic assumptions of the treaty supervisory system are sound and remain entirely valid’.\(^\text{137}\) As analysed above, there have indeed been some positive changes due to the reporting system of the Committees, such as legislative reforms, action plans or studies and programmes.

Nevertheless, despite these achievements it should be pointed out that the reporting system of the treaty bodies has now been in place for over fifteen years but child labour still exists on a large scale. As stated in Chapter 1, though less than in 2000, there are still 218 million child labourers aged five to seventeen worldwide.\(^\text{138}\)

At this point, it should be recalled that the main characteristics of the reporting system are its dependence on the goodwill of the states parties concerned\(^\text{139}\) and the absence of decision-making powers of a judicial or quasi-judicial nature vested in the treaty bodies.\(^\text{140}\) Thus, it is a rather weak implementation system. Even a restructuring of the human rights implementation system will not change the attitude of delinquent states.\(^\text{141}\) Improved technical and advisory services to help states to produce their reports will only bear fruit when states are willing to report and to take action.

In addition, it is important to bear in mind that the treaty bodies can only be expected to have a limited impact upon the actual enjoyment of human rights in countries over which they have occasional supervisory jurisdiction.\(^\text{142}\) No matter how far Committees may improve their

---


\(^{137}\) UN Commission on Human Rights, Alston, *Effective Functioning of Bodies*, para. 9.

\(^{138}\) See above p. 23.


working methods or how intensively they try to deal with serious human rights violations, there are inherent limitations to the supervisory system.

It has even been stated that the reporting system should be abolished because ‘tying economic interests to improving human rights protection is the only message rejectionists are likely to understand’.\textsuperscript{143}

While such a statement might go too far, the question nevertheless arises whether stronger enforcement measures, such as trade measures, may accelerate the process. Such measures could complement the reporting process in addressing governments’ lack of political will by putting pressure on them through trade measures. Before addressing this question though, the extra-conventional procedures developed by the Commission on Human Rights and the ILO supervisory system will be examined.

III. Extra-conventional UN procedures

1. Introduction

The regular treaty-based supervisory system has to be distinguished from the extra-conventional procedures under the newly created Human Rights Council. The following sections will examine these procedures in order to assess whether the system is still valid or further reforms are needed.

2. The Human Rights Council

In 2006, the Human Rights Council replaced the Commission on Human Rights established by the ECOSOC according to Art. 62 and 68 of the UN Charter.\textsuperscript{144} The main task of the Commission was the promotion and protection of human rights, after having set aside the initial ‘no power doctrine’ established in ECOSOC resolution 728 F (XXVIII).\textsuperscript{145} It was assisted by the Sub-Commission on the Promotion and Protection of Human Rights, which was made up of independent experts.\textsuperscript{146}

Like the Commission, the Human Rights Council also consists of member states delegates.\textsuperscript{147} The forty-seven member states are elected


\textsuperscript{144} UN General Assembly, Human Rights Council Resolution 60/251, 3 April 2006, para. 1.


\textsuperscript{147} UN General Assembly, Resolution 60/251, para. 7.
for three years. The Council is assisted by the Human Rights Advisory Committee, consisting of eighteen experts serving in their personal capacity, which functions as the think-tank for the Council. The Office of the High Commissioner for Human Rights (OHCHR) serves as the secretariat of the Council.

Since June 2006, the Council has been reviewing all mechanisms established under the Commission in order to improve and maintain the system of special procedures, expert advice and complaint procedures.

3. The universal periodic review

Before examining the newly created universal periodic review mechanism, it should be pointed out that the first instrument authorising the Commission to deal publicly with situations of human rights violations was ECOSOC Resolution 1235 adopted in 1967. The Resolution mandated the Commission to examine information relevant to gross violations of human rights and to study situations that revealed a consistent pattern of violations. In practice, Resolution 1235 has served as the basis for an annual debate on human rights violations in specific countries during the sessions of the Commission and Sub-Commission on the Promotion and Protection of Human Rights. Although these debates began as rather reserved discussions, NGOs later started to use them as an occasion to confront governments with human rights violations committed by them.

These rather modest initial efforts stand in stark contrast to the universal periodic review mechanism introduced in 2006. This periodic review is an objective assessment of the human rights situation in individual countries and is based on cooperation with the country concerned and relevant stakeholders. A working group consisting of representatives of the forty-seven member states of the Council reviews the human rights situation of every UN member in a four-year cycle. It drafts a report based on information provided by the state concerned, relevant stakeholders and the OHCHR. The final report includes inter alia

---

148 Ibid.
150 Ibid., Rule 14 (47) of the Rules of Procedure.
151 UN Doc. A/RES/60/251, para. 6.
152 Cf. UN Doc. ECOSOC Resolution 1235 (XLII) (1967).
154 Ibid.
155 For the review mechanism see UN Doc. A/HRC/RES/5/1, Annex, paras. 1–38.
an assessment of the situation, best practice, provision of technical assistance and the voluntary commitment of the country. The outcome is discussed and adopted by a plenary session of the Council.

The first cycle started in 2008 and will end in 2011. At its eighth session, the Council discussed the report on India and recommended it continue its work on the ratification and implementation of ILO Conventions No. 138 and 182. The National Human Rights Commission of India agreed, stating that the Government had committed to their gradual implementation.

It is to be welcomed that the public analysis and discussion of the human rights situation of UN members has now become a more formalised and sophisticated process. As demonstrated by the example of India, it has the potential to bring about positive results for the implementation of international instruments on child labour.

4. Special procedures

Besides public debates, Resolution 1235 served as a basis for the Commission to appoint special rapporteurs, special representatives, experts, working groups and other envoys to monitor human rights violations in specific countries. Special rapporteurs usually made direct urgent appeals or letters of allegations to governments, visited countries, made detailed recommendations to governments and ultimately sought to stop human rights violations. Special thematic rapporteurs and working groups made annual public reports to the Commission, which included a summary of their activities, summaries of correspondence, analyses of situations and recommendations.

These special procedures proved quite successful and have been taken up by the Council.

---

157 Ibid., para. 117.
161 UN Human Rights Council, Resolution 5/1 Annex, paras. 39–64.
In response to specific allegations of human rights violations, the Council appoints country rapporteurs, who research and study issues of concern, carry out country visits and intervene with governments on behalf of victims.162

In his 2002 report on Cambodia, the Special Representative for Human Rights in the country addressed the situation of children who must stop schooling in order to help their families survive. He urged international donors to continue their support of the Royal Government of Cambodia’s efforts to respond to the needs of the population, in particular its effort to achieve compulsory, free primary education for all.163

The first Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography was appointed in 1990.164 The most recent report was presented by the predecessor of the current rapporteur.165 It included a country review of programmes and activities of governments and private parties concerning children and minors who are victims of commercial sexual exploitation. Most importantly, it set guidelines for assistance and rehabilitation activities referring *inter alia* to psychological counselling, medical assistance and legal aid.166

The Special Representative of the Secretary-General for Children and Armed Conflict reports on the situation of children in armed conflicts in different countries, evaluates the application of child protection norms and monitors national measures and programmes directed at helping children.167 In her latest report, she highlighted issues of concern such as the use of rape of children as a method of warfare by certain armed groups in Darfur, pointed to significant developments such as the signature of an agreement between the Government of Chad and the United Nations Children’s Fund (UNICEF) to demobilise child soldiers from its armed forces and made recommendations such as encouraging states

162 OHCHR, *Fact Sheet No. 27* (under revision), p. 8.
166 Ibid., paras. 75–8.
to enact extraterritorial legislation to strengthen the international protection of children against recruitment into the armed forces.\textsuperscript{168}

5. The complaint procedure

The new complaint procedure is based on the ECOSOC Resolution 1503 (XLVIII), which allowed the Commission on Human Rights to deal specifically with the communications on human rights violations received in closed sessions.\textsuperscript{169} The aim was to address ‘consistent patterns of gross and reliably attested violations of all human rights violations in any part of the world under any circumstances’.\textsuperscript{170}

The Working Group on Communications consisting of five members of the Council’s advisory committee examines a communication received by the Council and considers whether it alone or in combination with other communications is admissible and displays a consistent pattern of gross and reliably attested violations of human rights.\textsuperscript{171} The Working Group on Communications decides whether it keeps a communication to obtain replies or further information from the governments concerned, or refers the communication to the Working Group on Situations.\textsuperscript{172}

The Working Group on Situations consists of five members of the Council and decides whether the situation referred to it appears to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.\textsuperscript{173} The Working Group on situations may forward a situation to the Council, in which case it usually makes specific recommendations for action.\textsuperscript{174} Alternatively, it may decide to keep a situation pending before it or to close the file.\textsuperscript{175}

The Council considers the situations referred to it by the Working Group on Situations.\textsuperscript{176} The state concerned should provide substantive replies to any requests made by the Council.\textsuperscript{177}


\textsuperscript{169} Resolution 1503 (XLVIII) of the Economic and Social Council, 1693rd plenary meeting, 27 May 1970.

\textsuperscript{170} UN Human Rights Council, Resolution 5/1, Annex, para. 85.

\textsuperscript{171} Ibid., para. 95; see also Baum and Volger, ‘Commission on Human Rights’, p. 204.

\textsuperscript{172} UN Human Rights Council, Resolution 5/1, Annex, paras. 95 and 98.

\textsuperscript{173} Ibid., para. 98.

\textsuperscript{174} Ibid.

\textsuperscript{175} Ibid.

\textsuperscript{176} Ibid., para. 103.

\textsuperscript{177} Ibid., para. 101.
The Council has a variety of options for dealing with situations referred to it: it may dismiss the case altogether; it may elect to keep a situation under review and request the state concerned to provide further information; it may keep it under review and appoint an independent expert or group for further inquiry; it may discontinue the matter under the confidential procedure and may take it up instead in a public procedure, or it may make recommendations to the OHCHR to provide technical assistance.\textsuperscript{178}

The question arises whether the occurrence of child labour can be dealt with under the complaint procedure. While economic, social and cultural rights have never been examined explicitly under the 1503 procedure,\textsuperscript{179} this situation could change. For example in 1993, forced child labour was dealt with when the situation in Myanmar was being considered under the former 1503 procedure.\textsuperscript{180} In addition, the legal argument could be made that child labour is a contemporary form of slavery and requires immediate action in contrast to some other economic rights that have to be implemented progressively.\textsuperscript{181}

As regards the requirement of a ‘consistent pattern’, three further criteria have to be met. Firstly, although there is no minimum requirement as to the concrete number of human rights violations, it is agreed that violations have to be widespread.\textsuperscript{182} Secondly, these violations have to occur over a certain period of time. Thirdly, it can be assumed that the Council will only consider violations of human rights perpetrated on the orders of a government or with its sanction.\textsuperscript{183} This would be the case if national law or administrative practices reflected human rights violations.\textsuperscript{184} Moreover, if a state fails to prevent human rights violations through legislative acts or administrative measures and creates conditions conducive to their perpetration by private individuals, human

\textsuperscript{178} Ibid., para. 109.
\textsuperscript{181} See above, p. 39 et seq. and p. 65.
\textsuperscript{183} Ibid., pp. 422–3.
\textsuperscript{184} Ibid., p. 423.
rights violations can be considered to be committed on behalf of the government concerned.\textsuperscript{185}

Thus, situations where states do not hinder employers from using exploitative forms of child labour on a large scale could be examined under the complaint procedure.

As of 2002, eighty-three states had been examined under the 1503 procedure.\textsuperscript{186} There are positive and negative examples of its effectiveness. In the case of Argentina, Iain Guest concluded that the procedure had, if anything, been harmful to the cause of those wishing to put an end to the continuing violations under the military government.\textsuperscript{187} In contrast, the former Government of the German Democratic Republic often responded to complaints on behalf of its citizens trying to emigrate by releasing these individuals.\textsuperscript{188} In the case of Myanmar, in 1990 and 1992, a special rapporteur was appointed to examine the situation of human rights in Myanmar.\textsuperscript{189} While the situation remains grave, international monitoring \textit{inter alia} led to the opening of the country in 1996.\textsuperscript{190} Although the 1503 procedure has sometimes been described as painfully slow, it has rightly been recommended that it is applied in the case of child labour.\textsuperscript{191}

6. Promotional activities

Although the Technical Cooperation Programme in the Field of Human Rights of the OHCHR encompasses projects directed at children, for example the ‘Protecting the Rights of Children in Conflict with Law’ project in the Philippines established in May 2000,\textsuperscript{192} the main programme for the protection of children’s rights is UNICEF.

UNICEF is mandated by the UN General Assembly to advocate and promote the protection of children’s rights.\textsuperscript{193} It acts through country programmes and other promotional activities such as the ‘Say Yes for Children Campaign’ launched in 2001,\textsuperscript{194} the ‘Global Movement for

\begin{itemize}
\item \textsuperscript{185} Ibid, p. 423.
\item \textsuperscript{187} I. Guest quoted in Alston, ‘The Commission on Human Rights’, p. 150.
\item \textsuperscript{189} UN Commission on Human Rights, \textit{Report on the Situation of Human Rights in Myanmar}, para. 2.
\item \textsuperscript{190} Newman, Weissbrodt, \textit{International Human Rights}, p. 181.
\item \textsuperscript{191} Weston, Teerink, \textit{Child Labour}, p. 48.
\item \textsuperscript{194} Ibid., p. 25.
\end{itemize}
Children’ conducted in 2001 and the organisation of the Special Session on Children of the General Assembly in 2002. It currently works in 162 countries in the areas of health, food, nurturing, education and child labour.

The approach by UNICEF focuses on advocacy, challenging societal attitudes and traditions, law-based approaches, working with communities, ensuring access to services for recovery and reintegration, and promoting child participation. In line with the approach of technical cooperation programmes of the UN in general, UNICEF aims at national capacity building through partnerships with national institutions such as schools. It also develops corporate alliances in the private sector and global partnerships with the UNDP, ILO, UNAIDS etc.

In Cambodia, UNICEF contributed to the formation of community-based child protection groups. In Brazil, UNICEF has supported the Government’s Child Labour Eradication Programme, cooperating with the ILO, the country’s NGOs, the private sector, the media and all levels of government. As a result, the number of child labourers declined by 1.5 million children between 1995 and 2001. In Sierra Leone and Sudan in 2001, more than 8,000 child soldiers were freed.

7. Assessment

Whereas in the 1960s the view prevailed that the Commission on Human Rights had become ‘the world’s most elaborate waste-paper basket’, it is now agreed that the activities of the Commission were effective by creating awareness and publicity for human rights. This might be all the more the case with the newly established Human Rights Council.

The most important work of the Commission on Human Rights was its annual stocktake of the human rights situation worldwide. Public debates, based on Resolution 1235 and reports of the special rapporteurs, fulfilled a sort of ‘glasshouse’ function: they made the international community aware of occurring human rights violations and

199 Ibid.
200 Ibid.
often functioned as an early-warning system for emerging human rights disasters.\textsuperscript{204} This will be continued at the Council sessions, in particular under the universal periodic review.

By contrast, the confidential complaint procedure seeks a constructive dialogue and cooperation with the state concerned. While achieving some results, its predecessor, the 1503 procedure, has proved extraordinarily slow, complex, secret and vulnerable to political influence at many junctures.\textsuperscript{205} This may also be due to the fact that the Commission and now the Council are both political bodies.

A consensus exists among scholars that the most effective procedures are country and thematic procedures.\textsuperscript{206} They can act more swiftly than the rest of the special procedures by responding promptly to human rights violations. While sometimes achieving concrete results, their reports also provide an invaluable analysis of the human rights situation in a specific country or a specific theme.\textsuperscript{207} As such, they function as an early-warning system, as was the case in Rwanda. As mentioned above, exploitation of child labour has been dealt with and concrete results have been achieved.

The Working Group of Contemporary Forms of Slavery has served the cause of children considerably through its various Programmes of Action.

As regards promotional activities, the previously described projects and many others are proof of the effectiveness of the work of UNICEF. However, in view of the vast amount of children still trapped in child labour,\textsuperscript{208} UNICEF cannot do the work alone. In addition to UNICEF’s work, national and global partnerships have to be built and new strategies developed.

IV. Conclusion

Both the regular treaty-based procedures and the extra-conventional procedures derive their effectiveness only from the various committees and the Human Rights Council’s ability to shame individual governments and are of a rather weak character. Neither system provides for economic sanctions.

\textsuperscript{204} Ibid., pp. 202 and 205.
\textsuperscript{207} OHCHR, \textit{Fact Sheet No. 27}, p. 12.
\textsuperscript{208} See above p. 23.
By making public debate about human rights possible, the UN human rights implementation system is an important international mechanism for the promotion and protection of human rights. The Concluding Observations and General Comments of the treaty bodies are an indispensable source for the interpretation of international human rights law. While not legally binding, they carry a certain amount of authority. Moreover, the UN human rights implementation system has brought about some considerable achievements, including legislative reforms under the treaty-based reporting system and the establishment of a Special Representative on Children and Armed Conflict and a Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, as well as such concrete results as children withdrawn from child labour in Brazil and Sierra Leone.

Yet, given the prevailing existence of large-scale child labour, the progress made has been slow. In 2001, the Preparatory Committee for the Special Session of the General Assembly on Children confirmed that, given the persistent economic exploitation of children, much remains to be done.209

Overall, international human rights protection has been considered to be weak.210 There are major shortcomings such as the limited impact of the reporting system, the complexity and length of the complaint procedure, the lack of political will of states to cooperate and often their indifference to UN condemnation. Another drawback is the scarce resources of the UN.211

Thus, regarding the UN human rights implementation system, the question remains whether it could be complemented by an enforcement mechanism providing for trade measures in order to better address the lack of political will of governments to enforce human rights law.

C. THE ILO IMPLEMENTATION SYSTEM

I. Introduction

The International Labour Organization (ILO) was founded in 1919 and became the first specialised agency of the United Nations


in 1946.\textsuperscript{212} In contrast to some of the UN enforcement mechanisms, the ILO system does not provide for individual complaints procedures.

\section*{II. The supervisory bodies}

The tripartite structure of the ILO is its most significant organisational feature, referring to the participation of representatives of employers’ and workers’ organisations as full members of the ILO.\textsuperscript{213}

The main supervisory bodies executing the regular reporting system are the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts), consisting of about twenty independent experts acting in their personal capacity,\textsuperscript{214} and the tripartite Committee on the Application of Conventions and Recommendations (Conference Committee), being a standing committee of the annual International Labour Conference.\textsuperscript{215} Other institutional bodies involved in the monitoring system are the Governing Body, the International Labour Office and the International Labour Conference. The Governing Body has a tripartite structure, and is responsible for and controls the International Labour Office, the Organization’s secretariat and its Director-General, the adoption of the International Labour Conference’s agenda, the Organization’s supreme body, and the discussion of representations and complaints submitted under the special procedures.\textsuperscript{216}

\section*{III. The regular supervisory system}

The ILO regular supervisory system obliges states parties to report on ratified and non-ratified ILO conventions.

\subsection*{1. Reports on ratified conventions}

Art. 22 of the ILO Constitution provides:

Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions

\begin{itemize}
  \item\textsuperscript{216} Jetzlsperger, ‘ILO-International Labour Organization’, p. 299.
\end{itemize}
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.

The principal ILO system of the application of international labour standards is based on reports received from governments and examined by the Committee of Experts. The original reporting system whereby governments had to submit reports every year was revised by the Governing Body in 1996 and replaced by the system described below.

Detailed reports are requested the year following that in which a convention comes into force, and two years after the first report. Periodic detailed reports are requested every two years on the priority conventions, inter alia on:

- Convention Concerning Forced and Compulsory Labour, No. 29;
- Convention Concerning the Abolition of Forced Labour, No. 105;
- Minimum Age Convention, No. 138;
- Worst Forms of Child Labour Convention, No. 182.

This new emphasis of ILO bodies on ILO human rights provisions especially as regards the promotion and supervision of provisions concerning child labour came about with the discussion of the introduction of a social clause into the ILO Constitution, which was rejected by the ILO.

Simplified reports are requested every five years on other conventions. Detailed reports may nevertheless be requested when the Committee of Experts or the Conference Committee considers them necessary on their own initiative; in follow-up proceedings to the special procedures; when comments have been received from employers’ or workers’ organisations due to which the Committee of Experts considers a detailed report necessary; or when no report has been supplied.

Detailed reports generally contain information on all relevant national legislation and administrative and judicial decisions applying the relevant convention, the effect of ratification and permitted exclusions, comments by the supervisory bodies, comments received from employers’ and workers’ organisations, as well as a general appreciation, consisting of a general assessment of the government of its application of the

---

219 ILO, Possible Improvements, GB.280/LILS/3, p. 15.
220 Bartolomei de la Cruz, von Potobosky, Sweptson, The International Labour Organization, p. 123.
221 ILO, Possible Improvements, GB.280/LILS/3, p. 15.
convention including extracts from official reports, statistics of workers covered by the legislation, details of contraventions, prosecutions etc. 222

Simplified reports include information on whether changes have occurred in legislation and practice that affect the application of the convention, statistical information and comments received from employers’ and workers’ organisations. 223

2. Reports on non-ratified conventions

According to Art. 19 (5) lit. e of the ILO Constitution, the Governing Body may request information from member states on the extent to which they have implemented the convention in question as well as on the reasons for delays in the ratification process. Pursuant to Art. 19 (6) lit. d, the same holds true for the implementation of recommendations. Member states thus also have reporting obligations in the case of non-ratified conventions.

The Governing Body decided at its 264th session in November 1995 that governments of all states that had not ratified the conventions concerning forced labour, freedom of association, discrimination and child labour should be asked to submit reports under Art. 19 of the ILO Constitution. 224 From 1997 onwards, reports on the corresponding conventions have been requested from governments in a four-year cycle, starting with the Conventions concerning forced labour. The cycle recommenced in 2001. The Governing Body has adopted a standard questionnaire form for these reports. 225 The reports have to be sent to workers’ and employers’ organisations to enable them to make observations on the subject in question. However, this procedure has been superseded by the Follow-up procedures introduced by the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which are explained below. 226

3. Examination of reports

a) Reports of the Committee of Experts

The staff of the International Labour Office carefully examine the reports on conventions and prepare draft comments for the Committee of Experts. 227 The Committee of Experts in turn submits its report to the

---

222 Ibid., pp. 16–17.
223 Ibid., p. 17.
225 Ibid.
226 See below p. 167.
Governing Body, consisting of: in part one a general report of the Committee’s work drawing the attention to matters of general interest and special concern; in part two individual observations as to the application of conventions, including in more serious cases a series of direct requests addressed to governments for further information, or if a government has given an adequate response, a series of acknowledgements; and in part three a general survey of national law and practice with regard to the instruments on which reports have been supplied on non-ratified conventions under Art. 19 (5) lit. e of the ILO Constitution.228 General Surveys – although not being jurisprudence in its proper sense – are a vital source on how ILO supervisory bodies have interpreted ILO conventions and how governments should apply them.229 The direct requests are not published in full, but mention is made of them in the report.230 The Committee of Experts has developed a highly stylised, understated language to express its views, which has been criticised as excessively diplomatic by a worker representative from Uruguay.231 The aim of these observations is not to condemn, but to attempt to convince governments to ensure fuller compliance.232 Although reports submitted by governments are the main source for these observations, the Committee of Experts also looks at other available official or reliable data, such as information gathered in the course of ILO direct contact missions, reports of UN bodies, and submissions from employers’ and workers’ organisations.233 This is important for an objective evaluation of whether the conventions are implemented in practice.234

Any employers’ or workers’ organisation – whether or not it has received copies of government reports – may at any time submit its observations on any matters arising in connection with governments’ compliance under the conventions and the ILO Constitution.235 Usually, these observations

229 Bartolomei de la Cruz, von Potobosky, Swepston, *The International Labour Organization*, p. 70.
231 Ibid.
234 Ibid.
are sent to the government concerned so it may make comments.\textsuperscript{236} The Committee of Experts will examine the observations submitted in the light of the relevant government’s comments. The Committee of Experts may also examine the observations if the government concerned has not made any comments. These observations may be regarded as a kind of ‘soft’ complaint and are used often.\textsuperscript{237} This may be the reason why formal complaints are only beginning to increase in number.

If a country fails to report, reminders are sent to governments and the matter may be brought up with government delegates at the International Labour Conference.\textsuperscript{238}

\textbf{b) Discussion of reports by the Conference Committee}

The next stage of the reporting system is public. The Conference Committee meets annually at the International Labour Conference to discuss the most serious cases referred to by the Committee of Experts’ report.\textsuperscript{239} It may also discuss matters covered by the general part of the Committee of Experts’ report as well as by the general survey.\textsuperscript{240} Government representatives appear before the Conference Committee to respond to questions. The questions asked by the Conference Committee are based on the report of the Committee of Experts and are therefore well prepared.\textsuperscript{241} Afterwards, the Conference Committee issues a report that is adopted in the plenary session of the Conference, which contains governments’ statements and information on its discussions as to various states’ compliance with specific obligations, including: submission to the competent authorities; failure to comply with reporting obligations; mentions of cases of progress, in which the Committee notes changes in law and practice that overcome difficulties previously discussed by it; paragraphs drawing the Conference’s attention to discussions of certain special cases; other paragraphs drawing attention to cases discussed previously by the Committee where there has been continued failure over several years to eliminate serious deficiencies in the application of ratified conventions; communications of copies of

\begin{itemize}
\item B. Bartolomei de la Cruz, von Potobosky, Swepston, \textit{The International Labour Organization}, p. 69.
\item \textsuperscript{237} Ibid.
\item \textsuperscript{238} ILO, \textit{Handbook of Procedures}, p. 17.
\item \textsuperscript{239} ILO, \textit{Handbook of Procedures}, p. 24.
\item \textsuperscript{240} Leary, ‘Lessons from the Experience of the International Labour Organization’, p. 599.
\end{itemize}
reports to employers’ and workers’ organisations; and participation of governments concerned in the work of the Conference Committee.242

If a state party fails to report or does not reply to the comments of the Committee of Experts, it has to submit a detailed report.243 In 2006, the Committee of Experts sent specific follow-up letters to governments, drawing their attention to specific failures and requesting them to identify the difficulties.244

The active and crucial participation of employers’ and workers’ organisations plays a major role in the success of the Conference Committee’s discussions.245 They may raise any matter concerning the discharge of standards-related obligations.246 For example, due to the two-thirds non-governmental participation, it has been possible for the Conference Committee to cite governments in its reports – including even major countries – for failure to implement conventions.247

The Conference Committee’s work complements the work of the Committee of Experts. While the role of the Committee of Experts is of a strictly technical and legal nature, the function of the Conference Committee is one of political oversight and direct dialogue with members.248 This complementarity is said to be one of the keys to the success of the supervisory system of the ILO.249

4. Cases of progress and concern

a) Cases of progress

Thus far, the ILO reporting system has been regarded as one of the most effective systems to protect human rights.250 A considerable number of

246 ILO, Handbook of Procedures, p. 25.
248 Bartolomei de la Cruz, von Potobosky, Sweptson, The International Labour Organization, p. 120.
countries have adopted improved labour laws following ratifications of ILO conventions. Countries that have been criticised have consequently asked for assistance or entered into closer contact with the supervisory bodies. A study carried out in the 1960s, comparing comments of the supervisory bodies and the following changes in national legislation, concluded that, in 61 per cent of the cases in which discrepancies between conventions and the legislation had been noted, they were fully or partly eliminated. Every year, the Committee of Experts lists cases in which countries have taken measures requested by the Committee to bring their law and practice into conformity with conventions.

In 1994, there were forty-two cases of progress in thirty countries, in 1995, thirty-six cases in twenty-two countries and in 2002, also thirty-six cases in twenty-two countries. In its 2007 annual report, the Committee of Experts cited eight cases of progress regarding child labour. By 2003, the Committee of Experts had expressed its satisfaction with progress achieved in 2,342 cases since it began listing them in 1964.

Cases of progress include the following: in 1993, Pakistan abolished its law allowing for bonded labour after years of pressure from the ILO, and Israel authorised light work as an exceptional measure for children between fourteen and fifteen years of age, i.e. in accordance with ILO Convention No. 138. Regarding Slovenia, the Committee of Experts expressed its satisfaction that the provisions of the Employment Act set the minimum age for employment on board ship at sixteen years of age.


Bartolomei de la Cruz, von Potobosky, Sweepston, The International Labour Organization, p. 31.

252 Bartolomei de la Cruz, von Potobosky, Sweepston, The International Labour Organization, p. 31.

253 Ibid., p. 31.

254 ILO, Provisional Record 28, para. 166.


257 Ibid., p. 32.


In the case of the US, in 2003 the Committee of Experts noted with interest the detailed supplementary report in response to the Committee’s allegations contained in its report of 2002 and the intention of the US Government to introduce measures to improve the situation of child labourers.\textsuperscript{260} Based on a report of the International Confederation of Free Trade Unions (ICFTU), the Committee of Experts had requested comments from the US Government on the following allegations: that, for example, 290,000 children were working illegally, mostly in agriculture; 14,000 children under the age of fourteen were working in garment ‘sweatshops’; and that US child labour laws did not apply to agriculture.\textsuperscript{261} In its supplementary report, the US Government referred to two studies undertaken by the National Institute for Occupational Safety and Health and the General Accounting Office alleging that indeed the Fair Labor Standards Act of 1938 (FLSA) provides for many exemptions for hazardous child work in agriculture: for instance, in contrast to industrial employment, children at the age of sixteen may work in hazardous occupations on family farms, and there are no restrictions on working hours.\textsuperscript{262} The US Government then pointed to legislative amendments to the FLSA introduced in Congress, one of which included raising the minimum age of employment from sixteen to eighteen years in agriculture.\textsuperscript{263} The Committee of Experts also noted with interest that the Department of Labor had already announced the start of the implementation of these measures.\textsuperscript{264}

Regarding Kenya, in 2006 the Conference Committee acknowledged that a national committee had been set up to review the Education Act with a view to modifying, \textit{inter alia}, the age of compulsory schooling.\textsuperscript{265} However, the Committee, noting that ILO Convention No. 138 had already been ratified twenty-five years ago, expressed concern that the review of the draft laws in question was completed in 2004, but had not yet been adopted by Parliament.\textsuperscript{266}

\begin{footnotes}
\item 260 Ibid., p. 683 et seq.
\item 263 Ibid., p. 688.
\item 264 Ibid.
\item 265 ILO, \textit{Individual Observation concerning Kenya}.
\item 266 Ibid.
\end{footnotes}
Regarding Cameroon, the Committee of Experts noted in 2007 that, in accordance with its previous recommendations, the Government had started working on a national action programme on the worst forms of child labour, but at the same time noted that the programme was still not fully formulated.\textsuperscript{267} Moreover, the Committee noted that within the framework of the ILO/IPEC regional programme to combat exploitation of child labour in cocoa plantations/commercial agriculture, 150 children had been removed from such working conditions.\textsuperscript{268} Further on this subject, the Committee requested the government to provide information on measures for children that have been removed from the worst forms of child labour to ensure they have access to free basic education.\textsuperscript{269}

b) Cases of concern

On the other hand, there are also cases of concern: in the past, the Conference Committee report included a ‘special list’ of states that had not adequately implemented ratified conventions, often referred to as a ‘blacklist’.\textsuperscript{270} Since a lot of states parties objected to this list, arguing that such type of moral sanction had no basis in the ILO Constitution, this list was abandoned.\textsuperscript{271} However, ‘special paragraphs’ and ‘special cases’ replaced special lists.\textsuperscript{272} These paragraphs or cases state a continued failure to implement conventions fully, the Conference Committee’s grave concern for this matter and that such cases will be discussed in subsequent paragraphs of the report. Hence, the change was more of form than of substance.\textsuperscript{273}

For example, in 1999, in the special paragraph regarding Myanmar’s failure to implement the Forced Labour Convention No. 29, the Conference Committee deplored the fact that the government concerned had not implemented the previous recommendations made by the Commission of Inquiry and the Committee of Experts as well as the country’s

\begin{footnotesize}
\begin{itemize}
\item[268] Ibid.
\item[269] Ibid.
\item[271] Ibid., p. 600.
\item[272] Ibid.
\item[273] Ibid.
\end{itemize}
\end{footnotesize}
non-cooperation with the ILO supervisory bodies. In 2002, the Conference Committee expressed concern that there had been a continued failure over several years to eliminate serious discrepancies in the Government of Sudan’s application of the Forced Labour Convention No. 29 and the Government of Venezuela’s application of the Freedom of Association and Protection of the Right to Organize Convention.

In 2003, Belarus and Myanmar were cited in a special paragraph for their failure to adequately implement Convention No. 87 on Freedom of Association.

The objection of governments to being mentioned in a special paragraph proves that such moral sanctions are a sensitive and important matter for governments. Governments’ objections to this are partly due to the fact that the discussion preceding their inclusion in a special paragraph occurs at the annual ILO Conference. The Conference Committee invites governments to discuss the most serious cases, on average twenty-seven during each session between 1994 and 2003. Cases of continued failure are then included in a special paragraph of the report. The Conference is a major annual international event attracting 2,000–3,000 government, worker and employer representatives.

c) Assessment

These results offer proof that the supervisory system is working. However, many cases of progress are overshadowed by the length of time that elapses until measures are taken and sustained results achieved, such as the rehabilitation of children. Yet, there are also cases of serious concern. Given the ongoing prevalence of child labour in many countries, the question remains whether the process should be complemented by additional means to accelerate and strengthen the process. As under the UN supervisory system, there is also the question whether a

275 ILO, Provisional Record 28, para. 178.
278 Ibid., p. 601.
280 Ibid., p. 49.
supervisory method aiming at dialogue is adequate when states are unwilling to cooperate.

5. The interpretative authority of ILO bodies

When commenting on states’ compliance, the Committee of Experts necessarily has to interpret the scope of provisions and obligations contained in the ILO conventions. This raises an important question concerning the interpretative authority of the Committee of Experts and other ILO bodies. According to Art. 37 of the ILO Constitution, any dispute concerning the interpretation of conventions shall be referred to the ICJ, which shall provide authoritative binding judgments or advisory opinions. In practice, however, the Court has only once been asked to interpret an ILO convention.\(^{282}\)

Explanations as to the scope and meaning of articles of ILO conventions are contained in the reports of the Committee of Experts and the Conference Committee and the Commissions of Inquiry appointed under Art. 26 of the ILO Constitution.\(^{283}\) Members in most cases address the International Labour Office when they are in doubt as to the meaning of a provision of a convention.\(^{284}\) The International Labour Office in turn delivers its view, pointing out that it has no special authority to interpret conventions.\(^{285}\) After having been referred to the Governing Body though, most of these opinions are published as a Memorandum by the International Labour Office in the Official Bulletin. Due to this they enjoy such authority as follows from their having been formulated by the International Labour Office in its official capacity at the request of members of the ILO.\(^{286}\) In the view of the International Labour Office, if it supplies an interpretation of a provision that is published in the Official Bulletin and no member objects to it, this interpretation will be authoritative and can always be invoked.\(^{287}\)

This view corresponds with the view of the Committee of Experts, which considers its interpretations valid as long as the ICJ does not contradict them.\(^{288}\) However, serious divergences exist between workers’
and employers’ groups regarding the legal force of the observations, recommendations and conclusions of various supervisory bodies.\textsuperscript{289} While they are not case law in the strict sense, these observations have an undeniable political weight and force.\textsuperscript{290} This view is based on the founding documents, which confirm that the Committee of Experts’ task is of a technical legal nature and in no way has a quasi-judicial role.\textsuperscript{291} Employers’ groups especially point out that only the ICJ has the authority to make binding interpretations and that the competence of the Committee of Experts may not exceed that of the body which created it, i.e. the Governing Body.\textsuperscript{292} That would violate the \textit{ultra vires} doctrine. The debate has now turned into a discussion about the relationship between the Committee of Experts and the Conference Committee.\textsuperscript{293} Although there is no final position, there is a consensus that the Committee of Experts’ role is a technical and preparatory one, on the basis of which the Conference Committee carries out its supervisory functions.\textsuperscript{294}

In conclusion, while not being legally binding in its proper sense, interpretations delivered by the Committee of Experts or the International Labour Office have a certain authority and cannot be ignored when applying its conventions and recommendations.\textsuperscript{295} The legal nature of recommendations by the Commission of Inquiry will be examined below.

6. Members’ compliance with reporting obligations

As in the UN system, both the ILO supervisory bodies and the reporting governments have a considerable workload. In order to reduce this workload, the reporting system has been adjusted periodically.\textsuperscript{296} As a result, compliance of states parties with reporting obligations is much better in the ILO than in the rest of the UN system. In 2002–2003, 2,368 reports were required and 1,529 (64.57 per cent) received.\textsuperscript{297} In contrast, as of September 2007, on average, the number of overdue state reports

\begin{itemize}
\item \textsuperscript{289} ILO, \textit{Provisional Record} 28, para. 40.
\item \textsuperscript{290} Ibid.
\item \textsuperscript{291} Ibid., para. 42.
\item \textsuperscript{292} Ibid., para. 45.
\item \textsuperscript{293} Bartolomei de la Cruz, von Potobosky, Sweepston, \textit{The International Labour Organization}, p. 120.
\item \textsuperscript{294} Ibid.
\item \textsuperscript{295} Similarly Hepple, \textit{Labour Laws and Global Trade}, p. 56.
\item \textsuperscript{296} ILO, \textit{Examination of Standard-related Reporting Arrangements}, GB.282/IILS/5, para. 2.
\item \textsuperscript{297} Hepple, \textit{Labour Laws and Global Trade}, p. 48.
\end{itemize}
under the ICESCR was greater than the number of states party to it. In addition, reports on the ILO conventions concerning child labour are due every two years whereas states’ reports under the relevant UN conventions are due at five-year intervals.

However, there is ongoing concern about governments’ failure to report and both the Committee of Experts and the Conference Committee have repeatedly stressed that failure to report undermines the supervisory system. In cases where governments simply refuse to report, the ILO supervisory bodies can only act by mobilising shame through mentioning the recalcitrant states in a special paragraph or citing them as a special case. The Committee of Experts lists cases of serious failure to report in its report submitted to the International Labour Conference. In 2003, the list contained eighteen countries, some of which had not reported for seven years. Countries included in the list were Haiti, Cambodia and the Syrian Arab Republic.

As to the quality and substance of reports, every year a considerable number of states’ reports answer none of the questions asked by the Committee of Experts or otherwise fail to supply the necessary information. In most cases, this is due to serious structural problems or a state’s lack of public service infrastructure.

In order to improve the quality of the supervisory system, several reforms were proposed in 2001. These proposals are based on the assumption that the non-punitive techniques of the reporting system should be maintained. However, the fact that the ILO advisory system depends on the goodwill of states and often is of limited impact lets the question arise whether some punitive action is in fact necessary.

IV. The Follow-up under the ILO Declaration on Fundamental Principles and Rights at Work

1. Introduction

The Follow-up under the ILO Declaration on Fundamental Principles and Rights at Work consists of an annual review of reports and a Global Report based on these reviews. The information gained should help to

300 ILO, Examination of Standard-related Reporting Arrangements, GB.282/LILS/5, para. 31.
301 Ibid., para. 32.
302 Ibid., para. 16 et seq.
identify priorities and plans of action for technical cooperation. Additionally, the InFocus Programme on Promoting the Declaration has been established to serve as a tool to achieve the goals of the Declaration.

2. Annual reports

a) In general

The annual Follow-up concerns non-ratified ILO conventions referred to in the ILO Declaration. Paragraph II B (1) of the Follow-up requests reports from members under Art. 19 (5) lit. e of the Constitution on any changes in law and practice regarding the fundamental conventions. According to Art. 19 (5) lit. e, members who have not ratified the relevant ILO convention shall report to the Director-General about changes in law and practice in regard to matters dealt with in the convention. These reports are compiled by the International Labour Office and reviewed by the Governing Body, paragraph II B (2). Paragraph II B (3) of the Follow-up recommends calling upon a group of experts to present an introduction to these reports. The reporting for the annual reports is not to be confused with the supervisory mechanisms of the various ILO conventions.

b) Reporting details

The review of annual reports generally consists of eight parts: an introduction, i.e. the mandate of the Expert-Advisers; general observations by the Expert-Advisers; their recommendations; the efforts made by governments to achieve the goals of the Declaration; comments on the role of workers’ and employers’ organisations, and governments’ relations with regional and international organisations; observations on technical cooperation projects; and comments on the effect given to past recommendations. In the introduction, the Expert-Advisers first generally reiterate that the emphasis of their work is not the analysis of the legal situation in countries that have not ratified the core ILO conventions, but of the factual situation and steps that have been taken to ratify and implement these conventions.

In 2003, the Advisers were content that 56 per cent of countries falling under the Follow-up had submitted reports on the effective abolition of child labour. However, they expressed their discontent with ten

304 Ibid., pp. iii and iv.
305 Ibid., para. 12.
countries that had never replied or repeatedly failed to submit a report.\textsuperscript{306} They also stated that Conventions No. 138 and 182 on child labour had been ratified by four and ten more states respectively.\textsuperscript{307} Especially in the Arab states and China, they appreciated legislative and other steps taken to promote the Declaration.\textsuperscript{308} Governments reported above all about minimum age legislation, instances of hazardous work, compulsory schooling, worst forms of child labour, and national policy plans to combat child labour.\textsuperscript{309} However, few countries actually submitted data and reported instead on national laws.\textsuperscript{310}

As to promotional and technical activities, the Advisers pointed out that the Declaration has been a decisive factor in the acquisition of international assistance from donor countries.\textsuperscript{311} For example, US $10 million were provided to extend or launch projects in relation to the core conventions.\textsuperscript{312} Also, governments more often request technical cooperation, such as capacity building, i.e. labour inspection and administration, establishing or strengthening specialised institutional machinery etc.\textsuperscript{313}

3. The InFocus Programme

As regards the InFocus Programme, results have been mixed.\textsuperscript{314} On the one hand, the InFocus Programme calls for research and reports, but on the other hand, its activities also include promotion and technical cooperation. Studies that have been suggested include one on obstacles to the full respect of fundamental principles and rights to be conducted in individual countries. Several countries declined the suggestion of this study.\textsuperscript{315} More positive results were achieved in Mongolia, Vietnam, China and Peru, which has actually ratified two of the core conventions.\textsuperscript{316} Equally, Fiji and Swaziland are no longer subject to the reporting procedure due to their ratification of core conventions.\textsuperscript{317}

\begin{footnotesize}
\begin{align*}
306 & \text{Ibid., para. 9.} \\
307 & \text{Ibid., para. 16.} \\
308 & \text{Ibid., para. 24 et seq.} \\
309 & \text{Ibid., para. 96 et seq.} \\
310 & \text{Ibid., para. 115.} \\
311 & \text{Ibid., para. 171.} \\
312 & \text{Ibid.} \\
313 & \text{Ibid., para. 177.} \\
314 & \text{Ibid., para. 182.} \\
315 & \text{Ibid., para. 182.} \\
316 & \text{Ibid., para. 182.} \\
317 & \text{Ibid., para. 179.}
\end{align*}
\end{footnotesize}
Other important activities have been the adoption of a Memorandum of Understanding between the ILO and the Asian Development Bank.  

4. Global Reports

The Global Report constitutes the second part of the Follow-up. It aims to provide a dynamic global picture referring to each category of fundamental rights and principles contained in the Declaration, paragraph III A (1). It covers all member states regardless of whether they have ratified the convention. The Global Report should serve as a basis for assessing the effectiveness of the assistance by the ILO and for determining priorities for the following period in the form of action plans and technical cooperation.

The Global Report ‘A Future without Child Labour’ was submitted to the ninetieth session of the International Labour Conference in 2002. It consists of three parts. The first part outlines child labour facts; the second part relates to the international response to child labour through action taken at local, national and international levels, focusing on the work of ILO constituents with support from IPEC and other ILO programmes; and the third part devises a possible ILO action plan to combat child labour. The ILO action plan has three general aims: to reinforce IPEC’s work in advocacy, research, policy and technical cooperation; to mainstream the effective abolition of child labour across the ILO; and to forge closer partnerships between the ILO and other bodies. The action plan relates to the three main instruments of the ILO – normative and promotional work, advocacy backed by research, and operational, technical and cooperation programmes.

The most recent Global Report from 2006 is titled ‘The End of Child Labour: Within Reach’. It provides an update of the incidence of child labour worldwide, assesses national action, evaluates current ILO work to eradicate child labour and proposes a global action plan drawing on existing approaches and strategies.

5. The promotional approach of the ILO Declaration

As mentioned above, the debate as to whether the new approach taken by the Declaration threatens the traditional international labour law regime also extends to its Follow-up system.

318 Ibid., para. 183.
319 ILO, A Future without Child Labour.
320 Ibid. p. xiii.
321 Ibid., p. 120.
322 ILO, The End of Child Labour: Within Reach.
Alston strongly criticises the weak Follow-up system of the Declaration, stating that the annual reports are limited to the description of the law but not the application and related problems. He also says the Global Reports do not review progress made by the ILO members and criticises the increasing use of the Declaration in trade agreements and by private parties, which has led to an alternative monitoring system. In his view, the US–Australia Free Trade Agreement is an excellent example of how repeated affirmations of the importance of the ILO Declaration can coexist with a failure to comply with ILO conventions, given the fact that at the time his work was published Australia had ratified neither ILO Convention No. 138 nor No. 182.

Maupain opposes these arguments stating that the Declaration has helped to develop a more action-oriented and problem-solving approach by focusing on technical cooperation and advisory services. Acknowledging that the reports fall a bit short from assessing progress made by ILO members, he assumes that they are written from a more donor-oriented perspective, which he thinks vital for the success of the Declaration and its technical cooperation programme. For example, they have been quite abundant in case of child labour.

Although Alston rightly points to the risks of using promotional techniques in addition to the traditional supervisory system, in the case of child labour, these risks have not come true. As stated above, ratification rates of ILO Conventions No. 138 and 182 have tripled since the adoption of the Declaration. Thus, the danger that promotional techniques will replace the existing reporting and complaints system is small. The same holds true for the increasing use of the Declaration in trade agreements. As long as states have ratified the relevant conventions, they are subject to the supervisory system. With respect to the US–Australia Free Trade Agreement, it should be noted that Australia has meanwhile ratified ILO Convention No. 182. Thus, the use of the Declaration in trade agreements could indeed support the ratification

324 Ibid., 513.
325 Ibid., 510.
326 Ibid., 505.
328 Ibid., 457.
329 See for example below p. 227 and p. 237.
process of ILO conventions. As regards practice in non-ratifying countries, the Follow-up system of the Declaration provides a model for how to use the potential inherent in Art. 19 (5) lit. e more effectively.

Thus, in the case of child labour, the Declaration is likely to and in fact has acted more in a complementary way than threatened the old structures: although the Expert-Advisers are not yet fully satisfied with member states’ compliance with their reporting obligations under the ILO Declaration on Fundamental Principles and Rights at Work, substantial progress has been achieved. Providing reliable data on child labour and existing efforts to combat child labour at all levels, the first Global Report on child labour under the Follow-up of the Declaration constitutes an excellent basis for action aimed at eliminating child labour. The second Global Report is much shorter and neither provides as much data on the occurrence of child labour, nor such a detailed analysis of the existing programmes such as IPEC as the first Global Report. However, it provides new estimates on the distribution of child labour and highlights the main challenges, such as the mainstreaming of child labour in Africa.331

It is also worth stressing that in the case of child labour the Declaration has indeed acted as a focal point for donors interested in providing assistance to countries asking for such assistance.

6. Conclusion

The Follow-up system of the ILO Declaration on Fundamental Principles and Rights at Work pursues a promotional approach rather than the traditional reporting and complaints-based approach. Although a legal scholar rightly points to the risk of undermining the traditional approach, such risk is not great in the case of child labour. Rather, the additional reports and technical assistance complement the supervisory system.

In sum, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up constitute an important instrument in the fight against child labour.

V. The special procedures

Art. 24–26 of the ILO Constitution provide for procedures to file complaints against states parties for failing to implement ratified ILO

331 ILO, The End of Child Labour: Within Reach.
conventions. Though not explicitly providing for economic sanctions, the procedures nevertheless create pressure to force the reluctant states to abide by their obligations under ILO law.\(^\text{332}\)

1. Representations

Art. 24 of the ILO Constitution reads:

In the event of any representation being made to the International Labour Office by an industrial association of employers 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.

Representations of workers’ or employers’ organisations may thus allege that a member has failed to implement provisions of ILO conventions. Under the special Standing Orders adopted by the Governing Body, the International Labour Office in such a case informs the government concerned and brings the matter before the Governing Body.\(^\text{333}\) If the representation is receivable, the Governing Body sets up a tripartite committee to examine the matter. According to Art. 3 (3) and 7 (3) of the Standing Orders concerning the procedure for the examination of representation under Art. 24 and 25 of the ILO Constitution, the meetings of the appointed committee and of the Governing Body shall be held in private. In accordance with Art. 5 of the Standing Orders, the tripartite Committee may ask a representative of the Director-General to visit the country concerned to obtain information on the subject of the representation through direct contacts with the relevant authorities and the organisations.\(^\text{334}\) In contrast to the Commissions of Inquiry set up under Art. 26 of the ILO Constitution, this Committee lacks the investigatory power to gather evidence through individual testimonies. The tripartite Committee reports back to the Governing Body, both describing the steps it took to examine the representation and passing on its conclusions and recommendations for decisions to be made by the Governing Body.\(^\text{335}\) The government concerned is then invited to represent itself during the Governing Body’s consideration of the matter.\(^\text{336}\)


\(^{334}\) Bartolomei de la Cruz, von Potobosky, Sweeptons, *The International Labour Organization*, p. 90.

\(^{335}\) ILO, *Possible Improvements*, GB.280/LILS/3, para. 31.

According to Art. 25 of the ILO Constitution, the Governing Body decides whether to publish the representation and any government statement it has received in reply, and notifies the association and government concerned. The Governing Body is expected to publish the representation by way of sanction when the government’s reply has been unacceptable.\(^{337}\)

This happened in the case of former Czechoslovakia while almost all other cases have been referred back to the Committee of Experts under the regular supervisory system.\(^{338}\) Although the tripartite Committee acknowledged the willingness of the Czechoslovakian government, it found its response too vague and therefore not satisfactory.\(^{339}\)

While only eight representations were made until 1970, the number has increased significantly in the past two decades: 80 per cent of the total number of eighty-nine representations in 1999 were submitted since 1970.\(^{340}\) The increasing number of representations is partly due to the democratisation of a growing number of countries and also proof of the overall success of this procedure.\(^{341}\)

2. The complaints procedure

Art. 26–31 of the ILO Constitution provide for a procedure to investigate complaints that a member is not ‘securing the effective observance’ of any ILO convention it has ratified. The main provision – Art. 26 of the Constitution – reads:

1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.
2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24.
3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such


\(^{338}\) Ibid., para. 69; ILO, GB.276/LILS/2, para. 33.


\(^{341}\) Ibid., para. 7.
communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon.

4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint of a delegate to the Conference.

5. When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question.

Art. 33 of the ILO Constitution reads:

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 with it.

Accordingly, any member that has ratified the ILO convention concerned may file complaints. In addition, the Governing Body may institute the procedure. Before establishing a Commission of Inquiry, the Governing Body may communicate the complaint to the government concerned and receive a statement from the government or invite its representative. However, like the Art. 24 procedure, this procedure may go on even when the government against which the allegations are made decides not to participate in it. The Governing Body may then appoint a Commission of Inquiry composed of three independent persons. The Commission of Inquiry usually starts to examine the case by receiving communications from the parties and other interested persons or organisations. The Commission generally considers its role not to be confined to an examination of the information furnished by the parties themselves. As provided for by Art. 27 of the ILO Constitution, the Commission invites other countries to submit any information in their possession. It also hears its own witnesses in private and conducts

---

342 Bartolomei de la Cruz, von Potobosky, Swepton, The International Labour Organization, p. 94.
343 ILO, Possible Improvements, GB.280/IILS/3, para. 32.
344 Ibid.
345 ILO, ‘Forced Labour in Myanmar’, 139.
346 Bartolomei de la Cruz, von Potobosky, Swepton, The International Labour Organization, p. 96.
on-the-spot investigations. The witnesses are normally protected against any discrimination they might experience due to the statements they submit. During a visit to the country concerned, the Commission carries out interviews with public authorities, trade unionists, representatives of employers’ organisations, academics, journalists, representatives of religious institutions and any other person whose information may be useful. These interviews are private and take place without witnesses, apart from those with public authorities. The last step consists of submitting a report that contains the findings and recommendations on the steps that should be adopted to meet the complaint and indicates the time limits within which the recommended measures should be taken, Art. 28 of the Constitution. However, the pre-eminent function of the Commission is to ascertain the facts. The Commission of Inquiry is composed of independent persons and thus the best guarantee of impartiality and objectivity among the various bodies of the ILO implementation systems.

The report of the Commission is referred to the Governing Body and the governments concerned, and is published, Art. 29 (1) of the Constitution. The Governing Body takes note of the report but does not have the power of approval. The government concerned must indicate within a three-month period whether it accepts the Commission’s recommendations and, if not, whether it intends to refer the matter to the ICJ, Art. 29 (2) of the Constitution. The ICJ may confirm, modify or annul the recommendations of the Commission; its decision is not subject to appeal, Art. 31 of the Constitution. This last possibility has not been used to date since in most cases the Commission of Inquiry’s recommendations were accepted.

If the recommendations of the Commission of Inquiry are not referred to the ICJ, they become legally binding for the defaulting member.

---

348 Bartolomei de la Cruz, von Potobosky, Sweepston, The International Labour Organization, p. 96.
349 Ibid., p. 97.
350 Ibid.
353 Bartolomei de la Cruz, von Potobosky, Sweepston, The International Labour Organization, p. 97.
In case a country does not comply with the recommendations set forth in the report, the Governing Body may, under Art. 33 of the Constitution, recommend to the International Labour Conference the adoption of ‘such action as it may deem wise and expedient to secure compliance therewith’. This follow-up action demonstrates that the member is not free to not follow the recommendations. By the same token, a former chief of the International Labour Standards Department of the ILO held that recommendations of the Commission of Inquiry were binding upon the defaulting state unless referred to the ICJ.\(^{356}\)

The first case in which the Governing Body recommended adopting measures was the complaint against the Government of Myanmar, which will be examined below.\(^{357}\)

The parties have generally accepted the recommendations made by the Commission and cases have been followed up through the regular supervisory procedures for the application of ratified conventions.\(^{358}\) The complaint procedure is thus linked to the regular supervisory procedures.

The special complaints procedure under Art. 26 of the ILO Constitution has rarely been used. Apart from the Myanmar case, so far, no complaint concerning child labour has been made under ILO conventions.\(^{359}\) So far, eleven Commissions of Inquiry have been established.\(^{360}\) The reason why this special procedure is rarely used is that in most cases the regular reporting system is considered to be the adequate forum to examine countries’ compliance with labour standards. Governments might be careful about filing complaints against other states because of the risk that this might lead to reprisals in the form of counter-complaints. However, the Art. 26 procedure is necessary in cases where the reporting system has been considered inadequate and a more


\(^{358}\) Bartolomei de la Cruz, von Potobosky, Swepston, *The International Labour Organization*, p. 95.

\(^{359}\) See overview of complaints www.ilo.org/ilolex/cgi-lex/pqconv.pl?host=status01&textbase=iloeng&hitdirection=1&hitsstart=0&hitsrange=1500&highlight=&context=0&query=%23YEAR%3E1900&chspec=15&sortmacro=sortyear&submit=Submit+query.

thorough examination has seemed necessary. Countries have confidence in the Commission of Inquiry procedure because of its impartial and meticulous examination.

VI. Promotional activities

Besides its supervisory and complaint procedures, the ILO provides for technical assistance and direct contact procedures. 361

1. Technical assistance
   a) Overview

The ILO provides technical assistance to developing countries in the areas of its competence, especially assistance in vocational training, labour legislation and employment promotion. 362 Technical cooperation missions are sent to the country concerned to assist it in drafting legislation ensuring compliance with labour standards. 363 Multidisciplinary teams usually carry out these missions, which organise seminars, workshops, symposia and meetings, or provide very specialised advisory services or consultations on the meaning and application of international labour standards. 364

Technical assistance is also provided under the Follow-up of the Declaration on Fundamental Principles and Rights at Work. 365 These activities are based on plans of action like the suggested action plan for the effective abolition of child labour. 366 This plan concentrates to a large extent on IPEC. The work of IPEC will be described in the next section.

Technical cooperation assistance has been described as an essential means of realising the strategic vision of the ILO. 367 Except for the Art. 26 complaint against Myanmar, the withdrawal of technical assistance has never been used as a means of punishing states for violating their obligations under ILO conventions. 368

---

361 ILO, Handbook of Procedures, p. 33.
364 Ibid.
365 See above p. 169.
b) IPEC – The international programme on the elimination of child labour

(1) Overview

IPEC was established in 1992 as the first major technical cooperation programme on child labour.\(^{369}\) According to the second Global Report from 2006, it is operational in eighty-six countries and has thirty donors.\(^{370}\) IPEC’s partners include government agencies, employers’ and workers’ organisations, private business, community-based organisations, NGOs, the media, parliamentarians, the judiciary, religious groups and children.\(^{371}\)

Having learned from past experience, IPEC uses a comprehensive approach to tackle child labour, ranging from research to advocacy.\(^{372}\) A typology of interventions against child labour has been developed, including education and training, rescue and rehabilitation, working conditions, monitoring and enforcement, advocacy and social mobilisation.\(^{373}\)

(2) Country programmes

Originally, IPEC consisted of country programmes.

In Bangladesh, such a country programme was installed after the US implemented the Harkin Bill calling for an immediate ban on the import to the US of goods manufactured wholly or in part by child labour. Consequently, factory owners dismissed child labourers, many of whom faced destitution. In an effort to improve the situation, the Bangladeshi Garment Manufacturers and Exporters Association signed a Memorandum of Understanding with the ILO and UNICEF in 1995. The Memorandum provided for a special education programme for former working children, monitoring and verification in the garment factories, income compensation, skills training, as well as micro-credit and entrepreneurship training for the children’s families. By the end of 2000, 27,000 children were withdrawn from garment factories and many of them had received rehabilitation. The proportion of factories using child labour was reduced from 43 per cent to less than 4 per cent.\(^{374}\)


\(^{370}\) ILO, *The End of Child Labour: Within Reach*, para. 118.


\(^{372}\) Ibid., para. 228.

\(^{373}\) Ibid.

Another positive example is the soccer ball stitching industry in Pakistan. When the International Federation of Football Associations introduced a Code of Labour Practice banning the use of child labour, the Sialkot Chamber of Commerce and Industry signed a Partner’s Agreement in Atlanta with the ILO and UNICEF in 1997 for a joint project to stop children younger than fourteen working in the industry.\(^{375}\) By 2000, around 6,000 children were withdrawn from labour and IPEC was monitoring stitching centres.\(^{376}\) However, some work remains to be done as children continue to stitch soccer balls in Pakistan.\(^{377}\)

While in general the country programme approach has proven to be successful, its effectiveness has often been hampered by the small size and scope of the individual action programmes.\(^{378}\)

(3) **Time-bound programmes**

The latest step was the introduction of time-bound programmes (TBPs) in response to the widespread ratification of Convention No. 182.\(^{379}\) Art. 1 and 7 of the Worst Forms of Child Labour Convention call for time-bound measures to eliminate child labour, directed at the prevention of child labour and providing assistance for the removal of children from work and their rehabilitation. IPEC sees the TBPs as a key strategic approach to the eradication of child labour.\(^{380}\) These programmes operate for a defined period of time.\(^{381}\) The average period is five to ten years. A TBP is initiated and led by the country in terms of planning, implementation and resource mobilisation.\(^{382}\) This is why the aim of IPEC TBP projects is to support and not to supplant the national programme.\(^{383}\)

TBPs include a monitoring and evaluation system for assessing the impact, cost effectiveness and sustainability of the programme.\(^{384}\)

---

\(^{376}\) Ibid.  
\(^{377}\) EarthLink, ‘Wo Kinder weltweit arbeiten’, 1.  
\(^{379}\) Ibid., para. 236, Box 2.1.  
\(^{381}\) ILO, *A Future without Child Labour*, para. 236, Box 2.1.  
\(^{382}\) ILO/IPEC, *Time-Bound Programmes for the Eradication of the Worst Forms of Child Labour*, p. 2.  
\(^{383}\) ILO, *The End of Child Labour: Within Reach*, para. 150.  
\(^{384}\) ILO, *A Future without Child Labour*, para. 236, Box 2.1.
Strategies can be divided into long-term measures addressing the roots of child labour and those involving direct action. TBPs are supposed to be comprehensive and fully integrated into national development plans. About twenty countries have started to implement TBPs so far. Some lessons regarding the implementation of TBPs have been learned so far.

National commitment is of crucial importance also in terms of funding TBPs. TBPs must move from a project approach to a programme approach. The current reliance on project implementation contradicts the declared goal of IPEC to become more of a facilitator and provider of policy/technical support.

In its TBPs, IPEC seeks to address the root causes of child labour and therefore to place the concern for child labour in the broader framework of a country’s development. Again, this is only possible if national commitment and ownership exist.

A key strategic goal of IPEC-supported TBPs is the creation of an enabling international environment that leads to supportive national environments. IPEC stresses the importance of further inter-agency cooperation with such institutions as the World Bank, the major regional development banks, UNICEF, UNESCO, WHO and UNAIDS in order to become integrated in their poverty alleviation, education, environmental, and health promotion programmes.

In this regard, one could also think of international cooperation with the WTO. On the one hand, cooperation could provide a framework for the permission of trade measures in certain cases, which would give countries the incentive to pursue and implement national child labour policies. On the other hand, with an international framework for trade measures on child labour, countries would be protected from

385 Ibid.
386 ILO/IPEC, Time-Bound Programmes for the Eradication of the Worst Forms of Child Labour, p. 2.
388 Ibid., para. 157.
389 Ibid., para. 158.
390 Ibid.
392 ILO, The End of Child Labour: Within Reach, para. 162.
protectionist and politically biased unilateral trade measures intervening in their child labour policies.

(4) Assessment
The vast amount of projects and its comprehensive approach make IPEC an irreplaceable tool for the effective abolition of child labour.

Regarding the success of IPEC so far, the examples mentioned indicate that there has been a considerable reduction in the number of child labourers. Yet, IPEC’s success cannot be judged only in terms of the numbers of children and families directly benefiting from programme interventions.\(^{394}\) To achieve a large-scale impact, sustained action is needed. The large number of new programmes and projects recently launched in developing countries indicates the increasing willingness of governments to acknowledge that child labour exists and to undertake positive action to combat it.\(^{395}\)

With the introduction of TBPs, IPEC follows a more comprehensive and sustained approach focusing on creating national ownership, mainstreaming child labour activities into broader national frameworks and creating an enabling international environment.

When assessing the overall work of IPEC, it has to be taken into account that IPEC has already existed since 1992, i.e. for sixteen years. Although considerable progress has been made, consensus exists that much remains to be done.\(^{396}\) Both the sheer magnitude of the problem of child labour and the need to further mobilise domestic resources call for additional efforts to be made. Moreover, as demonstrated by the initiative of employers and IPEC in Bangladesh, Pakistan and the Philippines, the fear of trade measures and consumer boycotts have often contributed to an increasing willingness on the part of governments and employers to tackle the problem of child labour.

Thus, the question arises whether additional measures like trade measures could complement IPEC. Since national commitment to combat child labour and social awareness of the problem are regarded as keys to the solution of the problem of child labour, trade measures might be an efficacious means of combating child labour. To this end, trade measures recommended by WTO bodies could be linked to IPEC as measures of last resort. Such a framework might help to create an enabling international environment.


\(^{395}\) Ibid., para. 223.

\(^{396}\) Ibid., p. xiv.
2. Direct contacts

The direct contacts procedure allows a representative of the Director-General of the ILO, together with representatives of the country concerned, to examine problems affecting the ratification or implementation of conventions, the discharge of obligations relating to conventions and recommendations, or a case before the Governing Body.\(^{397}\) They complement the regular supervision procedure as they are discreet and allow for more time to confer than the discussions with government representatives in the Conference Committee on the Application of Conventions and Recommendations.\(^{398}\)

Direct contacts have been successful in most cases.\(^{399}\) They can reach solutions and establish the existence of previously contested facts.

VII. Case study – Myanmar

The application of the Forced Labour Convention, 1930 (No. 29) in Myanmar illustrates how the different implementation mechanisms of the ILO function and complement each other.

1. Reporting obligations

Since its first report under Art. 22 of the ILO Constitution, the Government of Myanmar maintained that forced labour was non-existent in its country.\(^{400}\) However, two statutes, the Village Act and the Towns Act, contain provisions whereby local residents can be called upon for service on the requisition of police or government officials.\(^{401}\) In 1991, the International Confederation of International Trade Unions (ICFTU, now ITUC – International Trade Union Confederation) submitted to the Conference Committee detailed information about the widespread practice of compulsory ‘portering’ and the exploitation of workers by the army.\(^{402}\) The Government replied that no forced labour existed because the workers were paid. In June 1999, the Conference Committee decided to mention Myanmar in a special paragraph because of its continued failure to implement Convention No. 29.\(^{403}\)

---


\(^{399}\) Ibid.


\(^{401}\) ILO, ‘Forced Labour in Myanmar’, 140.

\(^{402}\) Ibid.

\(^{403}\) ILO, *Measures*, GB.276/6, para. 3.
2. The 1993 representation

In 1993, the ICFTU made a representation concerning ‘portering’ under Art. 24 of the ILO Constitution.\(^{404}\) It accused the Government \textit{inter alia} of using the police and the military to gather women and children randomly for use as a labour force.\(^{405}\) The Governing Body subsequently established a tripartite Committee to examine the case. The Government of Myanmar explained that the contribution of labour without pay was part of tradition and in accordance with the Village Act and the Towns Act.\(^{406}\) In November 1994, the Governing Body adopted the report of the tripartite Committee and referred it back to the Committee of Experts.\(^{407}\) The Committee of Experts and the Conference Committee repeatedly from 1993 to 1996 requested that the statutes providing for forced labour be repealed.\(^{408}\)

3. The 1996 complaint under Art. 26 of the ILO Constitution

\textit{a) The Commission of Inquiry}

Since the Government of Myanmar systematically used forced labour on an ever-larger scale, in 1996 a complaint was presented under Art. 26 of the ILO Constitution for non-observance of the Forced Labour Convention No. 29.\(^{409}\) This complaint stated that Myanmar’s gross violations of the Convention had been criticised by the ILO supervisory bodies for thirty years. It alleged that large numbers of forced labourers were working on railway, road construction and other infrastructure projects, many of which were related to the government’s efforts to promote tourism in Myanmar.\(^{410}\)

The Governing Body appointed a Commission of Inquiry.\(^{411}\) Although the Government of Myanmar refused to let the Commission enter its country, the Commission undertook a mission to the region and visited

\(^{404}\) Bolle, ‘Perspectives’, 397.
\(^{405}\) Ibid.
\(^{406}\) Ibid.
\(^{408}\) Bolle, ‘Perspectives’, 398.
\(^{409}\) ILO, \textit{Provisional Record 4}, p. 2.
\(^{410}\) Bolle, ‘Perspectives’, 399.
\(^{411}\) ILO, \textit{Provisional Record 4}, p. 2.
areas bordering on Myanmar. There it gathered information from personal testimonies of 250 people.\footnote{Bolle, ‘Perspectives’, 400.}

Like the tripartite Committee, the Commission had abundant evidence before it on the use of forced labour, widely performed by women, children and elderly persons.\footnote{ILO, ‘Forced Labour in Myanmar’, 140 et seq.} In the light of the continued existence of the provisions of the Village Act and the Town Act allowing for forced labour, the Commission concluded that Art. 1 of Convention No. 29 was violated in law and practice.

The Commission then formulated its recommendations regarding measures to be taken with a view to eliminating these violations.\footnote{Ibid., 143 et seq.} It recommended, \textit{inter alia}, that the national law should be brought into conformity with the Forced Labour Convention; that in practice, no more forced labour should be imposed and that sanctions should be enforced in the case of forced or compulsory labour. It also recommended that in its reports under the regular reporting procedure, the Government of Myanmar should indicate the action taken during the period under review to give effect to the recommendations.

\textit{b) Reactions by Myanmar and measures adopted by the ILO bodies}\n
Under Art. 29 of the ILO Constitution, the Director-General communicated the report to the Government of Myanmar.\footnote{ILO, \textit{Provisional Record 4}, p. 2.} Since the Government did not act following the Commission’s recommendations, the International Labour Conference adopted a resolution on the widespread use of forced labour in Myanmar.\footnote{ILO, \textit{Resolution on the Widespread Use of Forced Labour in Myanmar}, International Labour Conference, eighty-seventh session, (Geneva: International Labour Office, June 1999), www.ilo.org/public/english/standards/relm/ilc/ilc87/com-myan.htm.} In this resolution, the Conference resolved, \textit{inter alia}, that the Government of Myanmar should cease to benefit from any assistance of the ILO, except for the purpose of direct assistance to implement the recommendations of the Commission immediately.

Noting the failure by the Government of Myanmar to act in accordance with the recommendations of the Commission of Inquiry, in March 2000, the Governing Body for the first time invoked Art. 33 of the ILO Constitution and recommended to the International Labour Conference that it adopt, \textit{inter alia}, the following measures: to discuss the case of...
Myanmar at future sessions; to recommend to the ILO’s constituents to review the relations that they may have with the Government of Myanmar and to make sure that the Government did not take advantage of such relations to perpetuate or extend the system of forced or compulsory labour; and to call on relevant international organisations to cease any cooperation and activity that could have the effect of directly or indirectly abetting the practice of forced or compulsory labour.\textsuperscript{417} Thus, while using extremely vague language, the Governing Body indirectly recommended to ILO constituents to cut any relations with Myanmar, including those of an economic nature.

As soon as the Government of Myanmar heard about the Governing Body’s decision to implement the recommendations of the Commission of Inquiry, it accepted a technical cooperation mission to Myanmar.\textsuperscript{418} However, in June 2000, the International Labour Conference, deeming the steps taken by the Government as insufficient, adopted a resolution approving the measures recommended by the Governing Body.\textsuperscript{419} It decided that these measures would take effect on 30 November 2000 unless the Governing Body expressed its satisfaction with action taken by the Government of Myanmar to implement the recommendations of the Commission of Inquiry before that date. This was the first time that the International Labour Conference adopted a resolution encompassing measures of an economic character.

c) The scope and content of Art. 33 of the ILO Constitution

During the course of the Myanmar case, the Governing Body discussed the scope of Art. 33 of the ILO Constitution. Referring to the Conference Delegation on Constitutional Questions, it noted that the actual text had replaced the original text that referred to ‘measures of an economic character’ in order to broaden the range of measures ranging from measures involving the concerned member itself to penalties.\textsuperscript{420} The

\textsuperscript{417} ILO, Provisional Record 4, p. 3.


\textsuperscript{420} Ibid., p. 8; see also ILO Record of Proceedings, International Labour Conference, twenty-ninth session, Montreal 1946, Appendix VI, p. 376.
travaux préparatoires to the ILO Constitution indeed reveal that the drafters clearly envisaged the adoption of trade measures as a measure of last resort if a party failed to implement the recommendations of the Commission of Inquiry or the Permanent Court.421

At the same time, the Governing Body found that it could neither expel the member concerned nor suspend its voting rights. According to the Governing Body, the measures adopted should meet three criteria: they should come within the terms of reference of the International Labour Conference; they must derive from the recommendations of the Commission of Inquiry; and they must be conducive to securing the implementation of the Commission of Inquiry’s recommendations.422 In view of the seriousness of the consequences that could result from applying Art. 33 of the ILO Constitution, the Governing Body highlighted that the imposition of penalties were measures of last resort.423

Hence, in contrast to the view of some legal authors,424 the ILO is not without ‘teeth’ but can recommend to its constituents measures of an economic character.

d) The legal nature of recommendations of the International Labour Conference

The question arises whether the recommendations of the Governing Body adopted by the International Labour Conference are binding for ILO constituents.

The ordinary meaning of the word ‘recommendation’ does not refer to a binding obligation. Neither does it follow from the context that the term ‘recommendation’ should be read in this sense. In accordance with Art. 19 (6) lit. d of the ILO Constitution, ILO recommendations are non-binding instruments that provide general or technical guidelines to be applied at the national level.425 By contrast, recommendations of the Commission of Inquiry are regarded as being legally binding.426

---

422 Ibid.
423 ILO, Measures, GB.276/6, p. 4.
426 Hepple, Labour Laws and Global Trade, p. 50.
One could argue that the resolution of the International Labour Conference by which it adopted the recommendations of the Governing Body made them legally binding. In fact, the term ‘resolution’ is not necessarily limited to non-binding decisions. According to Art. 25 of the UN Charter, resolutions of the Security Council are binding and oblige UN member states to accept and carry out its decisions. However, a resolution by the International Labour Conference is regarded as a formally adopted expression of opinion on a particular subject.

As regards enforcement measures, it should be noted that the ILO Constitution does not provide for any follow-up measures to ensure that members comply with recommendations of the ILO bodies. By contrast, in the cases of non-forcible sanctions against Iraq and Yugoslavia imposed under Art. 41 of the UN Charter, expensive control systems were established in order to ensure that the embargoes imposed were not circumvented by member states.

It follows that recommendations adopted by the International Labour Conference under Art. 33 are of a non-binding nature. Thus, although the founders of the ILO envisaged the adoption of trade measures as measures of last resort, they did not vest the bodies of the ILO itself with such enforcement powers. The ILO is however able to put some pressure on the defaulting state by conditioning its technical assistance.

e) Reaction by Myanmar and measures taken by ILO constituents

Under the threat of resolution of the International Labour Conference taking effect, Myanmar accepted a second Technical Cooperation mission in October 2000. It concluded that in the area of legislation, some progress had been made, but that with regard to the required executive and administrative measures, serious deficiencies remained.

In November 2000, the Governing Body concluded that the Government of Myanmar had not implemented the recommendations of the Commission of Inquiry and that the measures contained in the

---

428 ILO, *ILO Terminology*.
429 Cf. Kulessa, ‘Sanctions’, p. 477; in case of the Kuwait invasion by Iraq in 1990, the Security Council established a Committee consisting of all members of the Council to oversee the implementation of the economic measures adopted under Art. 41 of the UN Charter, Shaw, *International Law*, p. 860.
432 Ibid., paras. 33 and 34.
resolution of the International Labour Conference should take effect.\footnote{ILO, \textit{Developments concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)}, Governing Body, 280th session, Geneva, March 2001, GB.280/6, para. 1.} The ILO’s constituents and other relevant international organisations took appropriate measures.\footnote{Ibid.}

For example, the US stated that it had already imposed a series of diplomatic and economic measures and that ILO members should be prepared to consider additional measures, such as trade measures.\footnote{US Burmese Freedom and Democracy Act of 2003, 108th Congress, first session, H.R. 2330, 4 June 2003.} In 2003, it introduced the Burmese Freedom and Democracy Act of 2003 into the US Congress.\footnote{Section 3 (a) of the Burmese Freedom and Democracy Act of 2003.} It provided for a general ban on any article from Burma until the country’s government, \textit{inter alia} had made substantial progress to end violations of workers’ rights including child labour.\footnote{ILO, \textit{Developments}, GB.280/6, para. 16. The suspension of GSPs (Generalized Systems of Trade Preferences) in response to violations of human rights and labour standards will also be examined in Chapter 4.}

A group of European countries pointed out that the European Community had suspended GSP trade privileges in 1997 and that it was ready for further action;\footnote{Ibid., para. 34.} the European Commission indicated that it had engaged in discussions with the EU member states;\footnote{Ibid., para. 17.} and the Swiss Government submitted that it had passed a law in October 2000 initiating measures against Myanmar including an arms embargo.\footnote{Ibid., para. 17.}

As to measures taken by national employers’ and workers’ organisations, for instance, the Norwegian Confederation of Trade Unions contributed to bring about a statutory Norwegian economic boycott of Myanmar;\footnote{Ibid., para. 24.} the Swedish Trade Union Confederation noted that it had requested the Swedish Government to take additional measures against Myanmar, including a ban on investments and on the import of products from Myanmar;\footnote{Ibid., para. 26.} and the International Organization of Employers asked all its members to review their relations with the Government of Myanmar.\footnote{Ibid., para. 31.}
f) The direct contacts procedure

Indicating that governments would delay the implementation of economic measures in case of further inspection, the Director-General persuaded the Government of Myanmar in September 2001 to agree to receive a High-Level Team to carry out an objective assessment with respect to legislative, executive and administrative measures that the Government had adopted. The High-Level Team noted that while some positive measures were taken, in reality, the situation had improved very moderately.

The next Technical Cooperation Mission in February 2002 had the aim of establishing an ‘ombudsman’ in Myanmar, which eventually resulted in an Understanding on the appointment of an ILO Liaison Officer. Eventually, the Liaison Officer suggested _inter alia_ a plan of action for the elimination of forced labour, which led to the agreement of a Joint Government of the Union of Myanmar–ILO Plan of Action for the Elimination of Forced Labour Practices in Myanmar in May 2003. However, as a result of the suppression of the democratic movement the Plan was interrupted.

---

444 Ibid., para. 43.
449 ILO, _Provisional Record 24, Special Sitting to Examine Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)_ (Geneva: International Labour Office, 2003) Appendix E.
450 Hepple, _Labour Laws and Global Trade_, p. 52.
In 2006, the Liaison Officer concluded that the practice of forced labour remained widespread throughout the country.\footnote{ILO, ILCCR: Individual Observations concerning Convention No. 29, Forced Labour, 1930 Myanmar (Ratification: 1955) Published: 2006, www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01 &textbase=iloeng&document=774&chapter=13&query=YEAR%3D2006&highlight=&querytype=bool&context=0.} In February 2007, the ILO reached a Supplementary Understanding with the Government of Myanmar designed to provide a mechanism to enable victims of forced labour to seek redress.\footnote{ILO, ILO Concludes Understanding with Myanmar, February 2007, www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WCMS_081868/index.htm.} This Supplementary Understanding was extended for another year in February 2008.\footnote{ILO, Conclusions concerning Myanmar, Governing Body, 301st Session, Geneva, March 2008, GB.301/6, para. 2.} As of March 2008, the Liaison Officer had received seventy-eight cases. In eight cases, a child was released from forced labour.\footnote{ILO, Developments concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Governing Body, 301st Session, Geneva, March 2008, GB.301/6/2, Appendix IV.} While the situation remains grave, the Supplementary Understanding proves that improvements are possible.

4. Conclusion

The case of Myanmar is both an example of the effectiveness and the shortcomings of the ILO implementation system. The case is noteworthy because it is the first case in which the ILO recommended measures under Art. 33 of the ILO Constitution.

The two-pronged strategy of the ILO of pursuing the direct contacts procedure and using the threat of economic measures has proven most effective. According to a knowledgeable ILO officer involved in the case, the mere threat of economic measures facilitated the inspection of the country by the High-Level Team.\footnote{Maupain, ‘Reflections on the Myanmar Experience’, p. 104.}

This ‘carrot and stick’ procedure achieved some positive results, most notably the establishment of a Liaison Officer position and recent solution of cases of child labour under the Supplementary Understanding on a complaints system for forced labour.

However, the effectiveness of the procedures also has to be assessed on the impact made on the ground. Although the High-Level Team and the Liaison Officer stated in their reports that some legislative and administrative measures had been taken to reduce forced labour, they also
reported that there was still abundant evidence of forced labour in Myanmar.

In addition, one has to bear in mind that Myanmar has been under the ILO’s supervision for over thirty years\(^{456}\) and that the complaint was made by the ICFTU about ten years ago. Thus, the progress made is not satisfactory.

In sum, the case of Myanmar illustrates at the same time the good performance of the ILO implementation bodies and their dependence on the political will of states.

It also proves that the ILO may recommend trade measures and that, under certain circumstances, they are considered as adequate enforcement measures. As stated above however, the question is whether such measures are compatible with WTO law. It would be desirable if the ILO and WTO cooperated in such a case, ensuring predictability and legal certainty as well as coherence in international law.

**VIII. Evaluation of the ILO implementation system**

There is a consensus that the ILO has the most highly developed system for the adoption and supervision of international labour standards.\(^{457}\)

As in the UN, the main method used to implement ILO labour standards is the reporting system, aimed at a constructive dialogue with member states.\(^{458}\) Since 1970, the complaint procedures have been used in a considerable number of cases and were quite successful.\(^{459}\) The system of direct contacts and the provision of technical assistance complement the various procedures.

The main characteristic of the various enforcement techniques is the mobilisation of shame and moral persuasion rather than penalties like economic sanctions.

Although discussions take place as to the renewal of supervisory procedures, the basis of the system has not been seriously questioned by anyone.\(^{460}\) The various mechanisms of listing defaulting member states in special paragraphs, and the distinction between simplified and detailed reports proves that the system is able to respond to

\(^{456}\) ILO, *Provisional Record 8*, p. 11.

\(^{457}\) Bartolomei de la Cruz, von Potobosky, Sweepston, *The International Labour Organization*, p. 124.


\(^{460}\) Bartolomei de la Cruz, von Potobosky, Sweepston, *The International Labour Organization*, p. 124.
different situations in different states. There are a considerable number of cases of progress, i.e. member states that have brought their law and practice into conformity with their obligations under ILO conventions. This also holds true for child labour legislation in a number of cases. Most importantly, while interpretations of ILO conventions by ILO supervisory bodies are not legally binding, they carry a certain amount of authority and provide for an indispensable source for the interpretation of ILO law.

However, despite the achievements of the ILO implementation mechanism, critics point to its lack of teeth because it does not provide for the imposition of trade sanctions in case of failure to comply with its obligations. Given the length of time that has elapsed since the adoption of the ILO conventions on child labour and the continuing prevalence of child labour, these critics could indeed be right and new systems should be devised within the confines of the WTO regime. In this sense, it has been stated by one author, pointing to the new global economy, that while the ILO’s founding principles remain enormously relevant, its methods have become outdated.

Still, in the field of child labour, the ILO has started to react, for example with its ILO Declaration on Fundamental Principles and Rights at Work. While subject to sometimes justified critique, the Follow-up under this Declaration has been proven to be a useful enforcement instrument. Its Global Report containing data and strategies in relation to child labour is an excellent basis for further action to combat child labour. Moreover, the Declaration has served as a tool for generating financial resources from donor countries.

IPEC has also proved to be a highly successful tool for the effective abolition of child labour. It certainly has contributed to the reduction of the number of child labourers in recent years. Its various programmes and studies are the basis for developing new strategies in the fight against child labour. They place a new emphasis on the role of governments and stress the importance of cooperation with other international organisations. In this context, one could think of a legal framework providing for cooperation with the WTO, which provides for trade measures in order to reinforce national commitment and mobilisation of domestic resources.

---

462 Hepple, Labour Laws and Global Trade, p. 66.
The case study of Myanmar illustrates the pros and cons of the enforcement mechanism of the whole system: the good performance of the ILO bodies on the one hand, and the slow progress and dependence on the goodwill of member states on the other hand. Most importantly, the case has also shown that the ILO does not exclude the use of trade measures but recommends them as a measure of last resort. Yet, there is no explicit enforcement system for trade measures. The question therefore is whether a more effective enforcement mechanism providing for trade measures should be created. This could be desirable for reasons of legal certainty and coherence in international law.

As mentioned in the introduction, the issue of the introduction of a social clause was however rejected at the Copenhagen Summit. Yet, the question is still worth examining. Firstly, the Summit was ten years ago and secondly, if Art. 33 has already brought about some concrete results in reducing child labour, a stronger trade–labour linkage should be lobbied for in the future. As one knowledgeable ILO officer put it,

. . . the ILO cannot, no matter how remarkable its potential might be, reach its social objectives alone, independently of other objectives and in particular of the objectives of ‘production’ – to use the pre-war language of the Permanent Court of International Justice.463

D. CONCLUSION OF CHAPTER 3

The UN and the ILO implementation systems consist of reporting mechanisms complemented by special procedures of a quasi-judicial character and technical assistance programmes. They derive their effectiveness from their ability to mobilise shame and lack the ability to impose trade sanctions. However, the ILO may invoke trade measures by recommending their imposition on the defaulting state to its member states. To date, this possibility was realised in the case of Myanmar. However, no explicit enforcement system regarding trade measures exists.

Although in both cases reforms are needed, there is a consensus that the systems are still valid and provide a basis for the implementation of human rights mechanisms. Since both mechanisms need to be strengthened, the question arises whether a more effective mechanism providing for trade measures should complement the current enforcement systems.

A. INTRODUCTION

History has shown that under certain conditions, trade measures can be effective means of advancing the cause of human rights. A famous example is the first successful consumer boycott when hundreds of thousands refused to buy sugar produced by slaves in the Caribbean in order to achieve the abolition of slavery 200 years ago.¹ Today, many more examples of trade measures on human rights exist.

In order to find out whether trade measures should complement the existing ILO and UN enforcement systems regarding the prohibition of child labour, this chapter will examine so-called existing ‘social clauses’ in trade agreements, trade incentive regimes, unilateral legislation providing for trade measures as well as private sector action aimed at the eradication of child labour. The term ‘multilateral social clause’ relates to a clause that applies at a global in contrast to a regional level. Since to date, no specific multilateral social clause exists,² the chapter will begin by analysing social clauses in regional and bilateral trade agreements.

B. SOCIAL CLAUSES IN REGIONAL AND BILATERAL TRADE AGREEMENTS

I. Introduction

Several regional trade agreements refer to labour standards. The North American Free Trade Agreement (NAFTA) provides for a side agreement on labour standards, the North American Agreement on Labor Cooperation

² Art. XX e of the GATT however refers to goods made by prison labour.
(NAALC).³ Brazil, Argentina, Uruguay and Paraguay also included a declaration on social standards, the ‘Declaración Sociolaboral de 1998’⁴ in their MERCOSUR.⁵

Since 2000 however, there has been a proliferation of bilateral trade agreements concluded by the US incorporating labour standards as part of their foreign trade policy. Most of these agreements draw upon the NAALC model. The following section will analyse the NAALC, the US Jordan Free Trade Agreement (US–Jordan FTA), the US Chile Free Trade Agreement (US–Chile FTA) and the US Cambodia Bilateral Textile Agreement (US–Cambodia TA) in order to assess their effectiveness in improving working conditions, especially as regards the elimination of child labour.

Likewise, the EU is planning to increase the number of its bilateral economic agreements, most of which also provide for social clauses. The Cotonou Agreement from 2000 has replaced the Lomé Convention with African, Caribbean and Pacific (ACP) states,⁶ which contained a human rights clause with non-compliance provisions.⁷ The Cotonou Agreement provides the framework for the negotiation of new reciprocal trade agreements, the Economic Partnership Agreements (EPAs), between the EU and the ACP states.⁸ It was revised in 2005.⁹ In addition to a

---

⁴ www.mercosur.int/msweb/principal/contenido.asp.
⁵ Mercado Común del Sur.
human rights and non-compliance clause, it provides for a clause on trade and labour.\textsuperscript{10} Since no EPA has been ratified yet and the Cotonou Agreement was concluded for a twenty-year period until 2020,\textsuperscript{11} the human rights and labour clause of the Cotonou Agreement will be analysed, taking into account social clauses in the CARIFORUM–EU EPA as an example for future EPAs. In addition, the social clauses of the EU–Chile Association Agreement from 2002 will be examined as an example of social clauses in trade agreements other than EPAs. As an example of EU–Mediterranean Agreements, the social clause of the EU–Jordan Association Agreement will be analysed briefly. It will be assessed whether these social clauses are effective in bringing about changes for workers, especially child labourers, and may serve as models for future multilateral social clauses. EU and US social clauses will be compared in the analysis.

The analysis will mainly be done by looking at the substance of the rules, the enforcement mechanisms and the performance of the implementing bodies rather than looking at changes in law and practice. As stated above, it is particularly complex to identify the origin of any change in law and practice. Where it is possible to attribute changes in law and practice to the introduction of the respective trade agreement, they will be taken into account.

II. US Free Trade Agreements

1. The NAALC

a) Introduction

The NAALC was signed as one of the side agreements to the NAFTA by the governments of the US, Canada and Mexico in 1993 and entered into force in 1994.\textsuperscript{12} Its seven broad objectives include enforcing workers’ basic rights in each party’s territory.\textsuperscript{13} The NAALC provides for a mechanism for states parties to cooperate on labour law matters and to ensure the enforcement of their domestic labour law. Its dispute resolution mechanism is in part accessible for private parties and provides for trade measures as measures of last resort.

\textsuperscript{10} Art. 50 of the Cotonou Agreement.

\textsuperscript{11} Art. 95 (1) of the Cotonou Agreement.


\textsuperscript{13} Ibid.
b) Enforcement obligations

As mentioned above, the objectives of the NAALC contained in Art. 1 of the Agreement include improving working conditions and living standards in each party’s territory, pursuing cooperative labour-related activities, exchanging information regarding labour law matters and promoting compliance with and effective enforcement by each party of its labour law.

The states parties have six main obligations contained in Art. 2–6 of the Agreement: as regards the level of protection, they have to affirm full respect for each party’s constitution, recognise the right of each party to establish its own domestic labour standards, ensure that its labour laws provide for high standards and strive to improve those standards in that light. Secondly, each state party must promote compliance with and effectively enforce its labour law through appropriate government actions. Thirdly, each party must ensure that persons with a legally recognised interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or labour tribunals for the enforcement of the party’s labour law. Fourthly, each party must ensure that its proceedings for the enforcement of its labour law are fair, equitable and transparent. Fifthly, each party must ensure that its law, regulations, procedures and administrative rulings of general application are made available and, sixthly, the public must be made aware of its national labour law.

Thus, in contrast to the ILO, where the focus lies on the enforcement of international standards, the focus is on enforcing each party’s labour laws.

‘Labour law’ is defined in Art. 49, part six of the Agreement. It means laws related to eleven principles, i.e. freedom of association and protection of the right to organise; the right to bargain collectively; the right to strike; the prohibition of forced labour; labour protections for children and young persons; minimum employment standards; elimination of employment discrimination; equal pay for women and men; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses and protection of migrant workers. This choice of labour standards (in contrast to the level of protection, see below) corresponds to those mentioned in the ILO Declaration on Fundamental Principles and Rights at Work. This is to be welcomed.

Annex 1 of the Agreement contains guiding principles defining the scope of the labour principles. The parties are committed to promote
these guiding principles, subject to each party’s domestic law, but they
do not establish common minimum standards for their domestic law.

Labour protections for children and young persons are defined as
restrictions on the employment of children and young persons that vary
taking into consideration relevant factors likely to jeopardise the full
physical, mental and moral development of young persons, including
schooling and safety requirements. This definition corresponds to the
definition of the prohibition of economic exploitation of children con-
tained in Art. 10 (3) of the ICESCR, Art. 32 of the CRC and the prohibition
of hazardous child work contained in Art. 3 (1) of the ILO Minimum Age
Convention and Art. 3 lit. d of the ILO Worst Forms of Child Labour
Convention. Thus, although not explicitly obliging the parties to imple-
ment international standards of the prohibition of child labour and not
mentioning a minimum age, the Agreement partly refers to inter-
national standards and both of the fundamental ILO conventions con-
cerning child labour. As with the guiding principles in the ILO
recommendations, the guiding principles of the NAALC are important
instruments to orient national policy and action.

It has however been widely criticised that the NAALC aims at domestic
law enforcement rather than at the implementation of international
standards.14 Before discussing the point in detail, it has to be kept in
mind that this was the result of hard political negotiations and another
solution was simply not possible. In addition, this compromise was
based on the assumption that Mexico had adequate labour laws and
was simply not enforcing them.15 Mexico in particular was concerned
with full preservation of its sovereignty in establishing or changing its
own labour law policy.16 Hence, one could take the view that enforcing
domestic laws was an acceptable compromise.

14 See for example M. S. Weiss, ‘Two Steps Forward, One Step Back – Or Vice Versa: Labour
Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin
America, and Beyond’, University of San Francisco Law Review, 37 (2003), 689–754, 711;
International Association of Machinist and Aerospace Workers, R. T. Buffenbarger quoted in Commission for Labour Cooperation, Review of the North American Agreement on
naalc.org/english/review_annex5_usa.shtml, p. 16; International Labour Rights Fund, P. Harvey, Executive Director, T. Collingsworth quoted in Commission for Labour
Cooperation, Review, Annex 5, Public Comments, United States, p. 17; H. L. Meils, ‘A Lesson
from NAFTA: Can the FTAA Function as a Tool for Improvement in the Lives of Working
16 Ibid., 704.
However, all of the three parties are members of the ILO. As such they have to respect the principles of the fundamental ILO conventions and report on relevant changes in law and practice, regardless of whether they have ratified them or not.\(^\text{17}\) In addition, Canada and Mexico have ratified and the US has signed the CRC.

The underlying assumption, that all of the three states parties provided for high labour standards when the NAALC was concluded, is not true. In the US, under the Fair Labor Standards Act of 1938, children were allowed to work under conditions that were illegal under the fundamental ILO Conventions No. 138 and No. 182: for example, children younger than twelve were allowed to work unlimited hours outside of school, provided the work took place on a small farm and with parental consent.\(^\text{18}\) In addition, thirteen-year-old children may work in cucumber, spinach and berry fields.\(^\text{19}\) One has to bear in mind that agriculture is the most dangerous occupation to juveniles in the US with 162 deaths on family farms in the period from 1992–1997.\(^\text{20}\) Only in 2002 did the US Department of Labor recognise the need to adapt child work regulations from the period between 1939 and 1963 to accord more protection to child labourers in hazardous employment.\(^\text{21}\)

Mexican child labour law sets the minimum age for admission to employment or work at fourteen years.\(^\text{22}\) Mexico has not ratified ILO Convention No. 138 but ratified ILO Convention No. 182 in 2000 and introduced several laws concerning the protection of children from exploitative child labour.\(^\text{23}\) The law is fairly well observed in the formal sector, in particular in large and medium-sized firms.\(^\text{24}\) However, in small firms, the enforcement is less adequate, in particular in agriculture. The International Confederation of Free Trade Unions (ICFTU, now

\(^{17}\) See above p. 103 et seq.


\(^{19}\) UNICEF, *End Child Exploitation*, p. 32.


\(^{22}\) Ibid., p. 682.


called International Trade Union Confederation, ITUC) in 2003 reported 5 million working children, 2 million of whom were under twelve years old.\textsuperscript{25} Most of them work in the informal sector. However, Mexico in cooperation with UNICEF has been addressing urban child labour since 1992.\textsuperscript{26}

In sum, although the drafters were satisfied to rely on domestic law, it would have been better to refer to the fundamental ILO conventions.

It has also been criticised that the NAALC does not explicitly prevent governments from lowering their standards.\textsuperscript{27} However, Art. 2 of the NAALC stipulates that the parties must ensure that their labour laws provide for high labour standards and that they must strive to improve those standards. If they lower their standards, they would clearly have failed to fulfil this obligation. Although not explicitly stated, if interpreted correctly, parties are prevented from lowering their standards.

c) Institutional framework and general provisions

The NAALC provides for cooperative consultations and evaluation procedures as well as resolution of disputes. Its institutions are both international and domestic in scope. According to Art. 8 of the Agreement, the parties established a Commission for Labour Cooperation that consists of a Ministerial Council, a Secretariat and is assisted by the National Administrative Office (NAO) of each party.

The Council consists of labour ministers of the parties and is the governing body of the Commission.\textsuperscript{28} Its main function is to oversee the implementation and develop recommendations on the future of the NAALC.\textsuperscript{29} It directs the work of the Secretariat.\textsuperscript{30} In particular, it promotes cooperative activities between the parties with regard to labour matters including child labour.\textsuperscript{31} These activities include \textit{inter alia} seminars, joint research projects and technical assistance.\textsuperscript{32}

\textsuperscript{25} Ibid.
\textsuperscript{26} Ibid., p. 683.
\textsuperscript{28} Art. 9 (1) and 10 (1) of the NAALC.
\textsuperscript{29} Art. 10 (1.1) of the NAALC.
\textsuperscript{30} Art. 10 (1.2) of the NAALC.
\textsuperscript{31} Art. 10 (1.3) and 11 (1.2) of the NAALC.
\textsuperscript{32} Art. 10 (1.3) and Art. 11 (2.1–2.4) of the NAALC.
The Secretariat is the executive arm of the Commission for Labour Cooperation. It consists of an Executive Director chosen by the Council who appoints the staff, i.e. nationals of each party. The staff are chosen strictly on the basis of efficiency, competence and integrity and act independently of their governments. The Secretariat has three basic functions. It undertakes research and public reports on labour law matters including enforcement, provides support to bodies carrying out consultative and dispute resolution processes, and generally serves the Council in the exercise of its functions.

The NAOs are established by the parties at the federal government level. They serve as a point of contact and provide for the submission and receipt of public communications on labour law matters arising in the territory of another party and review them according to domestic procedures. The parties have full discretion to devise the procedural rules.

National Committees comprise national advisory committees and governmental committees, which are established by parties to provide advice on implementation and further elaboration of this Agreement.

As regards the operation of the NAALC, Art. 42 sets forth that nothing in the agreement shall be construed to empower a party’s authorities to conduct labour law enforcement activities in the territory of another party. In a similar vein, no party may provide for a right of action under its domestic law against any other party on the ground that it has not fulfilled its obligations under the NAALC. As will be demonstrated below, this is in sharp contrast with the right of corporations, contained in chapter 11 of the NAFTA, to directly sue the government of another party under the law of the host country.

33 Art. 12 (1) and (2) of the NAALC.
34 Art. 12 (2.1) and (5) of the NAALC.
35 Art. 14 of the NAALC.
36 Art. 13 (4) and Art. 24 (2) of the NAALC.
37 Art. 13 (1) of the NAALC.
38 Art. 15 of the NAALC.
39 Art. 16 (3) of the NAALC.
40 Art. 17 and 18 of the NAALC.
41 Art. 43 of the NAALC.
Already by looking at the institutional structure and the main functions of the implementing bodies, it becomes clear that the NAALC is an intergovernmental institution based on the recognition of the sovereignty of the states parties rather than a supranational organisation. The main body is the Council that consists of the ministers of the three parties, i.e. an intergovernmental body. The independent body, the Secretariat, does not have any right to initiate cooperative or consultative activities besides research activities and is under the control of the Council. Thus, the parties chose the solution of non-intervention for this supragovernmental body. In the EU for example, the European Commission has the right to bring a complaint to the European Court of Justice (ECJ) alleging that a member state has violated an obligation under the Treaty of the European Community (EC-Treaty) including provisions on the movement of workers.\(^43\)

The NAOs are also national institutions. They can however receive public communications relating to labour law matters of another party. Yet, the parties have introduced a provision that explicitly states that in no case can the parties enforce workers’ rights in another party’s territory or provide for domestic judicial procedures in relation to another party’s NAALC obligations. Despite this restriction, it has to be pointed out that the NAALC is the first trade-related agreement that allows for complaints of third parties, i.e. non-governmental parties.

\(d\) Public communications

Each party set up rules for a procedure for public communications for third parties under the NAOs.\(^44\)

Every procedure requires individuals or organisations to submit allegations to the NAO concerning specific violations of labour law in another member state and stating that there has been a failure in that country to enforce its applicable labour laws.\(^45\) Thus, although the text of the Agreement in very general terms refers to the ‘submission and

---

43 Art. 226 of the EC-Treaty.


receipt of public communications on labour law matters arising in the territory of another party, the procedures only refer to the enforcement of the law. It would have been better to include other obligations under the NAALC, e.g. the obligation under Art. 2 of the NAALC to strive to improve domestic labour standards.

The petitions can only be directed against governments, not private enterprises. This again demonstrates the reluctance of the drafters of the Agreement to interfere with national labour relations. Upon the fulfilment of certain criteria of acceptance, the NAO accepts the submission for review.

In contrast to the dispute resolution process, public communications – as the name suggests – can be raised by the public and have an important accountability and transparency function. Thereby governments, although not subject to a judicial process, can be made accountable for individual labour rights violations. This may generate greater transparency among workers, trade unions and civil society organisations and help them to pursue more effectively the improvement of labour rights conditions. This effect has been called the ‘sunshine effect’, bringing workers’ rights’ into the spotlight, grounded on specific events.

The NAO may then ask for more information from the petitioners or independent experts and it may use available literature. The NAO finally issues a public report containing all the information obtained and describing the applicable labour law of the country concerned, the institutions and procedures for administration or enforcement and the findings as to the practices and problems in the enforcement of the relevant labour laws. In this public report, the NAO may recommend, if necessary, that ministerial consultations be taken up pursuant to Art. 22, which may result in an agreement relating to actions to be taken in response to the problems discussed.

It has to be pointed out that no specific remedies are mentioned such as restitution in kind or compensation for workers, but provision is made for ministerial agreements relating to the action to be taken. This corresponds to Art. 43 of the NAALC prohibiting parties from providing

---

46 Art. 16 (3) of the NAALC.
48 Ibid.
49 Ibid.
50 Ibid.
51 Ibid.
for a right of action under their domestic law against any other party on the ground that another party has acted contrary to the Agreement. Although this has been criticised, it has to be kept in mind that during the negotiations Mexico absolutely rejected the idea of creating a supranational commission or tribunal that might have the power to supersede Mexico’s domestic laws. Given the enormous constitutional, political and sovereignty implications, it might be unrealistic at this stage to call for a supranational labour court. The NAALC institutions are of the view that the purpose of the NAALC is not corrective action in specific cases but long-term improvement of the states parties’ general system of administration of national labour law. Moreover, even the ILO does not provide for an individual complaints procedure offering individual remedies for workers. Nor does the CRC or the ICESCR. Even the ECJ, which may give advice to national courts on certain legal problems, does not have the power to overturn domestic labour courts.

Having said that, it is nevertheless disturbing that under the NAFTA dispute settlement, companies enjoy far more rights than workers. For example, an investor may claim that a government of a party has violated a NAFTA obligation that resulted in loss and damages for him. The government may then have to pay those damages.

In the light of these far-reaching rights for companies, the NAO procedures could at least provide for more specific recommendations to be

---


55 See the special procedures under the ILO implementation system p. 172 et seq.

56 For the UN treaty-based human rights implementation system see above p. 124 et seq.

57 Only if domestic courts ask for legal advice in a case concerning labour rights and then decide accordingly, can the European Court of Justice be said to have overturned national courts, Art. 234 of the EC-Treaty.


59 For example, in the case *Ethyl Corporation v. Government of Canada*, Ethyl, a US-based company, failed in a claim under NAFTA alleging that, by passing a ban on the importation and transport of a gasoline additive, the Canadian government breached NAFTA obligations, see Taylor, ‘NAFTA, GATT, and The Current Free Trade System’, 413. The company announced that, if the law prevailed, it would claim monetary damages. Rather than settling the case, the Canadian government repealed its ban and paid Ethyl US$13 million.
contained in the reports, e.g. the establishment of an action plan to be devised by the government or as an outcome of ministerial consultations.

The question of public hearings has to be considered carefully since it has been argued that they would raise the expectation that the NAO procedure is a judicial procedure, providing for corrective action in judicial cases.\textsuperscript{60} As already mentioned, the NAALC, respecting the sovereignty of the parties, explicitly states in Art. 5 (8) that national administrative or judicial decisions are not subject to review under this Agreement. However, although corrective judicial action in individual cases might be considered to be too intrusive and any allusion to it should be avoided, public hearings constitute an essential forum of public expression and lead to greater transparency of the process. Therefore, they should be kept.

It is an advantage that in all NAO procedures, domestic remedies do not have to be exhausted.\textsuperscript{61}

Finally, the public communication procedures fall short of a tight timetable.\textsuperscript{62} This bears the risk of them becoming endless procedures not offering adequate solutions to the case under consideration.

However, before looking at the application of the procedures, it has to be pointed out that it is very innovative for a trade agreement to establish a quasi-judicial complaint procedure for private parties. Yet, it remains to be seen whether a system completely under the control of government bodies is objective and effective.

e) Cooperative consultations and evaluations

According to Art. 20 of the NAALC, the Agreement will mainly be implemented through cooperation and consultations between the parties.

Art. 21 of the NAALC provides for consultations between the NAOs and provision of information as regards labour law matters.

According to Art. 22 (1) of the NAALC, any party may request consultations with another party at the ministerial level. The other parties must be notified of the request.\textsuperscript{63} The consulting parties must endeavour to resolve the matter through consultations.\textsuperscript{64}


\textsuperscript{61} Andrias, ‘Gender, Work, and the NAFTA’, 547.

\textsuperscript{62} Weiss, ‘Two Steps Forward, One Step Back’, 733.

\textsuperscript{63} Art. 21 (2) of the NAALC.

\textsuperscript{64} Art. 21 (3) of the NAALC.
If a matter is not resolved by consultations, any consulting party may request the establishment of an Evaluation Committee of Experts (ECE) by the Council. The ECE examines in the light of the objectives of the NAALC and in a non-adversarial manner, patterns of practice of each party in the enforcement of its technical labour standards as defined in Art. 49 of the NAALC. According to Art. 49 of the NAALC, standards 4 to 11 of ‘labour law’ are technical standards. Labour protections for children and young persons are contained in standard 5 and thus belong to technical standards. With respect to these protections, each party’s obligations pertain to enforcing the level of the general minimum wage and child labour age limits established by that party. Art. 49 reiterates that the level of protection is not subject to obligations under the NAALC.

It is positive that child labour may be subject to this evaluation mechanism. However, here again, it is stressed that the level of protection is established at the national level.

In addition, it is a major shortcoming that, according to Art. 49 of the NAALC, a party has not failed to comply with child labour standards where the action or inaction reflects a reasonable exercise of the agency’s discretion with respect to investigatory or other matters or results from bona fide decisions to allocate resources to enforcement of other labour matters. This discretionary provision constitutes an unacceptable loophole for the parties. Whilst the problem of allocation of resources has to be addressed, the state obligation to protect children from economic exploitation should not be made dependent upon the provision of adequate financial resources. For under international law, such as Art. 10 of the ICESCR and Art. 32 of the CRC, state obligations relating to the protection of children from economic exploitation are immediate. Yet, the problem of resources should be addressed in the determination of appropriate enforcement measures like the suspension of trade benefits. This is in accordance with the proportionality requirement of Art. 51 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. According to Art. 51, countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

65 Art. 23 (1) of the NAALC.
It will be seen below whether the enforcement system adequately addresses the proportionality requirement.

It has been criticised that the first three labour principles cannot be the subject of an ECE report.67 Whilst this criticism might be justified, a detailed discussion of this problem goes beyond the scope of this work focusing on child labour.

According to Art. 23 (3) of the NAALC, the matter considered by the ECE must be trade-related and covered by mutually recognised labour laws. ‘Trade-related’ means related to a situation involving workplaces, firms, companies or sectors that produce goods or provide services that are either traded between the territories of the parties or that compete, in the territory of the party whose labour law was the subject of ministerial consultations, with goods or services produced or provided by persons of another party.68 ‘Mutually recognized labour laws’ means laws of both the requesting party and the party whose laws were subject of ministerial consultations and that address the same general subject matter.69 According to Annex 23 to the Agreement, the Council shall, on the request of any party, select an independent expert to make a ruling on whether the matter is trade-related or covered by mutually recognised labour laws. Some authors argue that it is a weakness of the NAALC to exclude labour matters other than trade-related.70 Yet, it has to be taken into account that the NAALC is a side agreement to a trade agreement that provides for economic countermeasures. Since trade measures represent a strong measure having an enormous impact for the economy of the party against which the measures are implemented, labour standards to be incorporated into the trade agreement have to be carefully chosen in order to avoid any potential misuse such as protectionism. Therefore, it is a convincing rationale for the eligibility of labour law matters that they have to be trade-related. In the same vein, it has been stated in the Review of the NAALC of 1997 that labour standards subject to evaluations have to be trade-related because the NAALC is a companion of NAFTA and its intervention in domestic affairs is justified on the basis of a special trade relationship.71 However, as mentioned in the introduction, the inclusion of labour standards can be

68 Art. 49 of the NAALC.
69 Art. 49 of the NAALC.
70 See for example Weiss, ‘Two Steps Forward, One Step Back’, 711.
perceived per se as being proof of disguised protectionism. In particular, developing countries argue that low labour standards are their comparative advantage.\(^{72}\) Indeed, part of the rationale for including labour rights into NAFTA was the fear that US workers’ jobs would move south to Mexico under NAFTA.\(^{73}\) Without going into detail, it should be noted that most countries have signed the CRC and are members of the ILO. Hence, in the case of child labour, most countries are prevented from relying on their comparative advantage. This is even more the case if the parties – as under the NAALC – are only obliged to enforce their own laws.

As both of the extra-conventional UN procedures developed by the Commission on Human Rights,\(^{74}\) the Agreement refers to ‘patterns of practice’ rather than to individual cases. This indicates that the Agreement does not aim at corrective action in individual cases but rather focuses on long-term changes of the governments’ labour law administration.

The Council also has to develop rules of procedure. They must provide that an ECE normally comprises three members selected from a roster developed in consultation with the ILO.\(^{75}\) ECE members are chosen strictly on the basis of objectivity and reliability and are independent of the parties.\(^{76}\) The ECE may invite submissions of the parties and may consider any information provided by the Secretariat, the NAOs, other experts and the public.\(^{77}\) Finally, the parties have a chance to review and comment on the information provided.\(^{78}\) According to Art. 25 of the NAALC, within 120 days, the ECE must present a draft report for consideration by the Council, containing a comparative assessment of the matter, a conclusion and practical recommendations. The ECE must present its final report to the Council within sixty days after the presentation of the draft.\(^{79}\) The report must be published thirty days later and the parties and the Secretariat must provide written responses to the recommendations.\(^{80}\) The final report including written responses is presented to the Council for consideration.\(^{81}\)

\(^{72}\) See above, p. 7.

\(^{73}\) Weiss, ‘Two Steps Forward, One Step Back’, 702.

\(^{74}\) See above p. 145.

\(^{75}\) Art. 24 (1.2) of the NAALC.

\(^{76}\) Art. 24 (1.3) of the NAALC.

\(^{77}\) Art. 24 (1.4) and (1.5) of the NAALC.

\(^{78}\) Art. 24 (1.6) of the NAALC.

\(^{79}\) Art. 25 (1) of the NAALC.

\(^{80}\) Art. 26 (2) and (3) of the NAALC.

\(^{81}\) Art. 26 (4) of the NAALC.
The timetable can be criticised as rather lengthy. However, compared with the complaint mechanisms of the ILO or the UN, which lack any precise timetable, the timetable of the NAALC for ECEs is to be welcomed.

It has to be appreciated that the roster for the ECE is developed in consultation with the ILO and consists of independent experts. As will be examined below, under the US Generalized System of Preferences (GSP) review system, the final decision is taken by trade staff, i.e. the Trade Policy Staff Committee and the US Trade Representative. However, the cooperation with the ILO could be intensified. For example, it could be stipulated that ILO experience and decisions have to be referred to when drafting the reports. As will be seen below, this is the case under the current EU GSP.

f) Resolution of disputes

(1) The panel process

After the presentation to the Council, any party may request consultations with the party whose enforcing system has been analysed, to ascertain whether there has been a persistent pattern of failure by that party to enforce such standards effectively in respect of the general subject matter addressed in the report.82 Yet, requests may only be submitted if standards regarding occupational safety and health, child labour or minimum wage technical labour standards were the subject matter of the final report.83 Thus, only three ‘technical standards’ of the labour principles defined in Art. 49 of the Agreement can be subject to dispute resolution.

This distinction has been widely criticised as fostering a two or three-tiered system in which only a small number of labour standards can be effectively enforced.84 Instead of being built on well-founded arguments, the distinction is the result of a political compromise.85

---

82 Art. 27 (1) of the NAALC.
83 Art. 27 (1) of the NAALC.
Whilst the latter point has rightly been criticised, one can conceive of some arguments in favour of this distinction. For example, the distinction could be based on the argument that the three labour standards eligible for dispute resolution are technical standards that are more product-related than for example the right to bargain collectively. Product-related in this sense means that the labour standards are process and production measures that require products to be produced in a certain manner. The specific relationship between the process and production method (ppm) and the product could be used as a criterion to determine the eligibility for the labour standard. For instance, child labour standards, occupational health requirements and minimum wage standards have a direct effect on the price of the product, as is the case with packaging or sanitary technical standards. In contrast, the existence of the right to strike does not have any direct bearing on the price of the product. It is argued that the requirement of a specific relationship between the ppm and the product could be used to avoid possible misuse when applying the enforcement mechanism through trade measures for violation of labour standards. Trade measures could only be used if the violating party had an unfair trade advantage by exporting cheap products produced under violation of labour standards, using ‘social dumping’. This could be a convincing rationale for linking labour standards to trade.

However, in the case of the NAALC, the rationale described above has not been chosen: the distinction made is a political compromise and, therefore, a deficiency of the Agreement. For example, it cannot be explained why forced labour cannot be the subject of a dispute but child labour can. Both labour standards have a similar bearing on the price of a product. Hence, the choice of labour standards to be eligible for dispute settlement is arbitrary.

Art. 27 (4) of the NAALC explicitly stipulates that the consulting parties must make every effort to arrive at a mutually satisfactory resolution of the matter through consultations. If the parties do not resolve the matter within sixty days, any consulting party may request

---

86 For the distinction between product-related measures and general sanctions or countermeasures see Cottier and Caplazi, ‘Labour Standards and World Trade Law’, p. 497 et seq.
87 Ibid., p. 498.
a special session of the Council. The Council shall attempt to resolve the matter by reaching a mutually satisfactory solution.

If the matter is not resolved within sixty days after the special session, any consulting party may request the establishment of an arbitral panel to consider the matter. The panellists have to be independent experts. If the parties fail to agree on the members of the panel, they are chosen by lot from among the roster members. It has to be noted that, in contrast to ECEs, roster members are not chosen in consultation with the ILO. The Council introduces Model Rules of Procedure that provide for a right to at least one hearing before the panel and the opportunity to make initial and rebuttal submissions. Art. 33 (3) of the NAALC explicitly states the terms of reference:

To examine, in the light of the relevant provisions of the Agreement, including those contained in Part Five, whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labour or minimum wage technical standards, and to make findings, determinations and recommendations in accordance with Article 36 (2).

As mentioned above, the reference to the term ‘patterns of practice’ indicates that the emphasis does not lie on individual corrective action but on long-term changes through government action. This might be due to the fact that, as demonstrated by the rather weak UN and ILO implementation system, in the field of human rights including labour rights, countries still hesitate to interfere with another country’s judicial system and sovereignty. There are still few individual complaints procedures in international human rights law. To examine this issue in detail is however beyond the scope of this work. This work does not focus on individual complaints procedures providing for individual remedies but on collective remedies, i.e. whether and how international mechanisms providing for trade measures can cause governments to improve their domestic labour standards for children.

The panel may seek information and technical advice with the agreement of the disputing parties from any person or body that it deems

---

88 Art. 28 (1) of the NAALC.
89 Art. 28 (3) and (4) of the NAALC.
90 Art. 29 (1) of the NAALC.
91 Art. 30 of the NAALC.
92 Art. 32 of the NAALC.
93 Art. 33 (1) of the NAALC.
94 See above Chapter 3 section B and C.
appropriate. That may also include ILO bodies. According to Art. 36 (1) and (2) of the NAALC, the panel, within 180 days after its election, presents an initial report to the disputing parties containing findings of fact, a determination according to the terms of reference and, if necessary, recommendations and an action plan sufficient to remedy the pattern of non-enforcement. The disputing parties may submit written comments in which case the panel may reconsider its report and make any further examination. The final report is presented to the disputing parties as well as to the Council and has to be published. The establishment of an action plan to remedy the pattern of non-enforcement also indicates that the dispute resolution process does not aim at specific corrective action in individual cases but binding corrective action for a number of cases in the long-term. In this context, it should be noted that the ILO implementation mechanisms merely provide for giving recommendations without explicitly referring to the establishment of an action plan.

(2) Enforcement

The disputing parties may then agree within sixty days on a mutually satisfactory action plan in accordance with the recommendations and determinations of the panel. If not, any disputing party may request that the panel be reconvened (provided that the panel had determined that there had been a persistent failure of obligations in accordance with its terms of reference). If nothing happens within 120 days after the presentation of the final report, the last action plan, if any, submitted by the party complained against shall be deemed to have been established by the panel.

95 Art. 35 of the NAALC.
96 Art. 36, para. 4 and 5 of the NAALC.
97 Art. 37 of the NAALC.
98 Cf. the Art. 24 procedure of the ILO in which a tripartite Committee gives its conclusions and recommendations for decisions to be taken by the Governing Body; the Art. 26 procedure of the ILO in which first the Commission of Inquiry gives its recommendations on the steps that should be adopted to meet the complaint and then the Governing Body may recommend the adoption of ‘such action as it may deem wise and expedient to secure compliance therewith’, described above in Chapter 3 section C V. 2.
99 Art. 38 of the NAALC.
100 Art. 39 of the NAALC.
101 Art. 39 (2) of the NAALC.
Any disputing party may also request within 180 days after an action plan has been accepted that the panel may be reconvened if, in its view, the action plan is not duly implemented.\textsuperscript{102}

If a panel has been reconvened to judge on the action plan itself, it may approve the plan or devise a new one and may impose a monetary enforcement assessment after ninety days have passed since it was reconvened.\textsuperscript{103} Where it has to examine the implementation of an action plan and finds that implementation is unsatisfactory, the panel may impose a monetary enforcement assessment within sixty days after it has been reconvened.\textsuperscript{104} According to Art. 39 (6) of the NAALC, the provisions of the reconvened panel shall be final.

A complaining party may request to reconvene another panel after 180 days to determine whether the party is fully implementing the action plan.\textsuperscript{105} The panel must decide within sixty days.\textsuperscript{106}

If a party fails to pay the monetary enforcement assessment within 180 days after it has been imposed by a panel, any complaining party or parties may suspend the application of NAFTA trade benefits in an amount no greater than that sufficient to pay the monetary enforcement assessment.\textsuperscript{107} If a party has previously failed to pay a monetary enforcement assessment or the panel has subsequently determined that a party is not fully implementing an action plan, the complaining parties may suspend annually the application of NAFTA benefits in an amount no greater than the monetary enforcement assessment imposed.\textsuperscript{108} Where more than one complaining party suspends benefits, the total amount shall be no greater than the amount of the monetary enforcement.\textsuperscript{109}

The party complained against may request to reconvene the panel to determine whether the monetary enforcement assessment has been paid or whether it is implementing fully the action plan.\textsuperscript{110} If so, the suspension of benefits shall be terminated.\textsuperscript{111} It may also request to reconvene a panel to determine whether the benefits suspended are

\begin{enumerate}
\item Art. 39 (3) of the NAALC.
\item Art. 39 (4) of the NAALC.
\item Art. 39 (5) of the NAALC.
\item Art. 40 of the NAALC.
\item Art. 40 of the NAALC.
\item Art. 41 (1) of the NAALC.
\item Art. 41 (2) of the NAALC.
\item Art. 41 (3) of the NAALC.
\item Art. 41 (4) of the NAALC.
\item Art. 41 (4) of the NAALC.
\end{enumerate}
manifestly excessive.\textsuperscript{112} In either case, the panel must deliver its report within forty-five days after it has been reconvened.\textsuperscript{113}

According to Annex 39 to the Agreement, any monetary enforcement assessment shall be no greater than 0.007 per cent of the total trade in goods between the parties. In determining the amount of assessment, the panel shall take into account at least the pervasiveness and duration of the persistent failure of the party to enforce, for example, its child labour technical standards; the level of enforcement that could reasonably be expected of a party under resource constraints, the reasons provided by the party for not fully implementing an action plan; and the efforts made by the party to begin remedying the pattern of non-enforcement. The monetary enforcement assessments shall be paid into a fund established by the Council to improve or enhance the labour law enforcement in the party complained against, consistent with its law.

According to Annex 41 B to the NAALC, a party suspending NAFTA tariff benefits may increase the duty rates of goods imported by the party complained against to levels no less than the rate applicable to those goods immediately prior to the date of entry into force of the NAFTA, and the Most-Favoured-Nation rate applicable to those goods on the date the party suspends such benefits and such increase may be applied only for such time as is necessary to collect the monetary enforcement assessment. The party suspending benefits shall first seek to do this in the same sector as the failure of enforcement of labour standards has occurred, and if that is not practicable in other sectors.

This graded system of penalties providing for monetary assessments followed by trade measures is more appropriate for the enforcement of labour rights than the automatic suspension of trade benefits in case of failure to enforce labour rights. Since governments often lack the political will to implement labour rights,\textsuperscript{114} it is fitting that they are forced to pay a fine into a fund designed to implement labour rights. Moreover, it is to be welcomed that the monetary assessment has to be based on criteria such as the resource constraints of the party concerned, the reasons for non-compliance and the efforts to remedy the failure. This addresses the causes of non-enforcement of labour standards and ensures a fair treatment of the country violating labour standards. It is also in accordance with the proportionality requirement of

\textsuperscript{112} Art. 41 (5) of the NAALC.
\textsuperscript{113} Art. 41 (4) and (5) of the NAALC.
\textsuperscript{114} See above p. 27 et seq.
public international law mentioned above. Future social clauses should in addition provide for technical and financial assistance provided by developed countries or international organisations such as the ILO to help to enforce labour standards. In this case, one would nevertheless have to devise a mechanism to maintain the deterrent effect of fines. The possibility of suspension of trade benefits creates the necessary deterrence. They also provide an incentive for companies not to employ children. However, since such trade measures are trade distorting and can have negative consequences, for example for the child labourers losing their jobs, it is a positive factor that the amount of benefits that can be withdrawn is limited. In a future social clause, the appropriate amount should be tailored to the specific situation of the country concerned while keeping in mind that it should not be too low to have a deterrent effect.

The dispute resolution process has been criticised for its lengthy and cumbersome procedure.\textsuperscript{115} From the establishment of an ECE to the issuance of a panel report, it can take over 500 days. In contrast, disputes under the NAFTA dispute settlement procedure contained in Chapter 20 normally do not last more than approximately 200 days, less than half of the time. In addition, in the NAALC dispute settlement, benefits can only be withdrawn usually at least 330 days\textsuperscript{116} after the final report of the panel whereas, in the NAFTA dispute settlement, a party may suspend benefits thirty days after the issuance of the final panel report.\textsuperscript{117} This stark contrast might be due to the fact that NAALC, being a labour rights agreement, heavily relies on cooperation and consultation with great concern to preserve the sovereignty of its parties. However, the American Federation of Labour – Congress of Industrial Organizations (AFL–CIO) rightly stated that, in case of child labour, before the final remedy was imposed, the underage child worker would be an adult.\textsuperscript{118} This last point relates to the question of the nature of the dispute settlement. As already noted, the NAALC dispute resolution process aims at long-term changes of the parties’ enforcement of their labour laws. Thus,

\begin{addmargin}[1cm]{0cm}
\footnotesize
\textsuperscript{115} The AFL–CIO has calculated that including the withdrawal of benefits, the period from when the ECE is established to final resolution could last as long as 1,225 days – more than three years, AFL–CIO, T. Lee, quoted in Commission for Labour Cooperation, \textit{Review, Annex 5, Public Comments, United States}, p. 3.
\textsuperscript{116} Art. 39 (1.1) and (4.2) and Art. 41 of the NAALC.
\textsuperscript{117} Art. 2019 of the NAFTA.
\end{addmargin}
although the consequences for individuals have to be taken into account, they cannot be the main criterion. In addition, a timetable for dispute resolution relating to labour rights should be longer than one relating to trade matters, providing for more time for consultations. Given that even under WTO dispute settlement procedures, the time from the beginning of consultations to the issuance of a panel report can take about 320 days, the timetable provided for by the NAALC is not too long.

It has also been criticised that only governments can initiate the establishment of ECEs or panels, which eventually may recommend the suspension of trade benefits. Here it has to be borne in mind that it is the government of another party that can be punished with trade measures. Governments would be under great pressure if private parties could initiate dispute resolution. Governments, as experience with interstate complaints systems of human and labour rights suggest, tend to be more cautious in bringing complaints than private parties since they do not want to risk their foreign relations. To date, no international complaint system provides for a right of private parties to submit cases on labour rights violations except for cases where labour rights are also human rights protected under the ICCPR or the Convention on the Elimination of All Forms of Discrimination against Women. According to Art. 24 of the ILO Constitution, workers’ and employers’ organisations can only make presentations on the non-observance of ILO conventions by ILO member states, which may only lead to a publication of the representation, not to trade measures. Thus, the time might not have been ripe for the inclusion of a right of private parties to initiate dispute resolution backed by trade measures.

Nevertheless, this exclusion of private parties is in sharp contrast with investors and defenders of intellectual property rights having direct access to court under the NAFTA dispute settlement procedures. This might be due to the fact that investors’ rights rank higher on the political agenda than workers’ rights. In addition, states may

119 Art. 5 (4), 8 (7), 12 (8) and 16 (4) of the DSU.
121 For example the interstate complaints procedure of the ICCPR to date has never been used, see above p. 130 et seq. The Art. 24 and 26 procedures of the ILO have neither been used very often, see above p. 172 et seq.
have a higher interest in maintaining sovereignty in labour issues. However, as will be illustrated in the next section, the NAALC provides for an intermediate solution, giving private parties the right to submit public communications.

g) Application of the NAALC

(1) Cooperative activities

Most cooperative activities consist of meetings, courses, seminars and the planning of annual conferences on labour law matters. The US NAO undertook a sampling and an analysis of protecting children at work.

In general, there has been a broad consensus that the NAALC has established a much needed and important new institutional framework for international cooperation relating to labour law matters.

Whilst cooperation is important and an indispensable starting point for creating awareness for the situation of adult and child labourers, cooperation alone is not enough if it does not lead to concrete results. So far, cooperative activities have consisted in most cases of seminars, reports and studies. These activities cannot substitute policies designed to improve labour conditions. Such policies might however be initiated by an effective use of dispute resolution.

(2) Public communications: Filings and outcomes

As of October 2007, thirty-four submissions have been filed with NAOs by private parties. In a period of over fourteen years, this number of cases brought before the three NAOs is not very high.

---

123 Greven, Social Standards, p. 38.
125 The US NAO changed its name and is now called Office of Trade Agreement Implementation (OTAI). For the purpose of this work, for reasons of clarity, it will still be called US NAO.
126 Human Rights Watch, The NAFTA Labour Side Accord, p. 3.
(a) Acceptance for review
Most of the cases were filed in the US and dealt with labour law matters in Mexico. 130 Six cases were not accepted for review by the US NAO 131 In most of the cases not accepted for review, the NAO decided that no violation of the NAALC had occurred because it was the law itself and not its enforcement that had been challenged. One case was particularly controversial, where the legalistic view of the US NAO wrongly limited the scope of review. 132

(b) Subject-matter of disputes
Only one case concerned labour protections for children. It dealt with violations of children’s rights in Mexico and was brought before the US NAO by the Florida Tomato Exchange, an industry group. 133 Most of the US submissions filed concerned freedom of association, the right to bargain collectively and the right to strike. 134 The reason for the high number of cases concerning trade union rights was that trade unions in most cases funded the submissions. 135

(c) Weaknesses of reports
Except for the cases that were not accepted for review or where submissions were withdrawn, the NAOs issued reports. 136 Almost all reports recommended ministerial consultations.

According to some critics, NAOs in general failed to establish a body of information and interpretation of NAALC obligations. 137 It would have been better to set standards for government action.

In addition, NAOs reports were cautious and failed to address all the issues raised in a direct and thorough manner. The Mexican NAO

---

130 Ibid.
131 Ibid.
134 US Department of Labor, Bureau of International Labor Affairs, Public Submissions.
136 Ibid., 742.
explicitly stated that the NAOs were not empowered to conduct in-depth analyses of the failure to enforce labour law.  

The Sony and TAESA cases illustrate the weakness of the NAO proceedings: in both cases, the NAOs arbitrarily ignored important issues such as minimum employment standards.

(d) The obligation ‘to strive to improve’

The NAOs dealt differently with the obligation of the parties contained in Art. 2 to ‘continue to strive to improve’ their labour standards. The submission in the Washington State apple case inter alia referred to the application of Art. 2. Although the petitioners in the Washington State apple case alleged that US law concerning the right to organise had not changed since 1935, the Mexican NAO did not deal with Art. 2 of the NAALC in its report. The US NAO in the Canada Post case equally declined to deal with this obligation. So far, only the Canadian NAO strove to interpret the NAALC.

This reluctance to refer to Art. 2 might be attributable to the fact that the NAOs in their rules of procedure limited their scope of review to enforcement of domestic law. Such a dilemma would however be prevented by making the obligation to implement international labour standards in law and practice subject to complaints procedures.

(e) Outcomes of cases

While at least one case could be considered as having been fully settled, most cases have been settled by ministerial agreement, providing for seminars, studies and conferences.

---


139 Ibid., p. 18.

140 Ibid., pp. 4–5.

141 Ibid., p. 5.

142 Ibid.

143 Ibid.


In the Sony case,\textsuperscript{146} this led to significant developments regarding labour law in Mexico.\textsuperscript{147} In the ‘Pregnancy Testing’ case,\textsuperscript{148} the Mexican Government made an announcement to clarify that the statute prohibiting sex discrimination also covered applicants for hire.\textsuperscript{149} Although not providing for individual remedies, some progress was achieved and women’s rights activists rightly judged that case as ‘validating the women workers in their fight to bring attention to this problem and to stop it’.\textsuperscript{150}

In the Han Young case, filed with the US NAO,\textsuperscript{151} while in Mexico, improvements were made at the federal level, workers did not benefit since most of their enterprises fell under local state labour tribunals.\textsuperscript{152} However, the case caused significant transnational mobilisation of labour activists.\textsuperscript{153}

The case involving child labour had originally been brought in 1997 by an industry group, the Florida Tomato Exchange, to the US Department of Labor, alleging that Mexico failed to enforce NAALC principles related to child labour on tomato farms.\textsuperscript{154} The reason apparently was that the Department of Labor and the Department of Agriculture had announced an investigation into child labour practices in the US.\textsuperscript{155} The Florida Tomato Exchange wanted to accept that only on the condition that similar investigations took place in Mexico, maintaining that illegal child labour practices created an unfair trade advantage for Mexico.\textsuperscript{156} But the Florida Tomato Exchange provided no further information because it did not expect an effective outcome of the case.\textsuperscript{157} The US NAO then closed the case.


\textsuperscript{147} Ibid.; Human Rights Watch, \textit{The Results of NAFTA Labour Rights Cases}, p. 7.


\textsuperscript{149} Ibid.

\textsuperscript{150} Human Rights Watch, \textit{The Results of NAFTA Labour Rights Cases}, p. 17.


\textsuperscript{152} Human Rights Watch, \textit{The NAFTA Labour Side Accord}, p. 12.


\textsuperscript{155} Ibid.

\textsuperscript{156} Ibid.

\textsuperscript{157} Ibid.
This case thus clearly involved trade interests rather than concern for workers, i.e. the children concerned. However, the motif is irrelevant as long as the outcome serves the children. So far, few business stakeholders have participated in public communications procedures. A higher participation rate would give the outcome more weight. Consequently, the NAOSs and governments involved should seek to provide more concrete results other than seminars in order to encourage business stakeholders to bring complaints. The NAOSs ideally should devise action plans on how to remedy specific situations.

(f) The length of proceedings
Most cases were settled by ministerial agreements between one and two years after they were brought. As was the case here, proceedings that take too long, especially in combination with weak outcomes, can create a disincentive for private stakeholders to file petitions. There should be clear timelines not exceeding one and a half years.

(3) Evaluation procedure and dispute settlement
To date, neither public communications nor ministerial consultations under Art. 22 of the Agreement have led to further action such as the establishment of an ECE. In addition, no ministerial consultations have taken place without preceding public communications. This is proof of the reluctance of governments to interfere with foreign labour law matters. Although ECEs are intended to be non-adversarial in nature, they have not been established. This is particularly disturbing because they could provide for objective fact-finding, consisting of independent experts. Therefore, the question is whether in future multilateral clauses, private parties or a supranational body like the secretariat should have the right to initiate the dispute settlement procedure.

h) Conclusion
There are many different views on whether the NAALC represents a success or not for the workers’ rights situation. There is a widely-held

159 Commission for Labour Cooperation, Summary of Public Communications.
\footnote{See above p. 67 and p. 95.}} However, it was the first labour agreement linked to a trade agreement and has been breaking ground. Yet so far, it has not been very effective in bringing about concrete results for child labourers and workers. Some achievements have however been reached, especially by the public communications procedure. Hence, before making a final conclusion on the effectiveness of labour clauses, other social clauses should be analysed.

Several lessons may nevertheless be drawn with regard to the design of a future social multilateral clause. The main obligation of the NAALC is the enforcement of domestic labour standards. Whilst this clearly was a political compromise, it should be politically feasible today – at least in the case of child labour – to refer in a trade-related agreement on labour issues to international standards. Besides the fact that the CRC is almost universally ratified, the ILO Convention on the Worst Forms of Child Labour has been ratified by 169 states.\footnote{See above p. 67 and p. 95.}

Much criticism concentrated on the choice of labour standards that can be subject to evaluation processes or dispute settlement procedures. It is however to be welcomed that child labour matters can be the subject of public communications as well as of ECEs and arbitral panels. This should also be the case in future trade-related agreements on child labour.

As mentioned above, the cooperative activities of the Secretariat and the NAOs were generally approved of. However, they need to be complemented by policy changes. This could be achieved by a more effective use of the dispute settlement procedures.

The establishment of a complaint mechanism for private parties under the NAOs was in principle a major success and should be copied by future social clauses. It should however be noted that the public communication procedure under the NAALC does not provide for legal corrective action and can only be of limited impact for children. In contrast to the right of companies under NAFTA to sue a government directly and to claim compensatory damages, public communications – followed by dispute settlement procedures contained in the NAALC – may at best lead to action plans backed by trade measures. Whilst this
discrepancy clearly is to be disapproved of, it probably was the only politically feasible solution. It also has to be taken into account that corporations bring claims on their own behalf whilst trade unions or NGOs bring collective complaints on behalf of workers of another state, who in theory may sue their government directly.

Having said that, under a future multilateral clause, one should consider the possibility of including the right of private parties to bring cases not only against governments but also against transnational corporations.

In order to prevent cases from being rejected because they do not refer to law enforcement – and in order to focus on the implementation of international standards – both the law itself and the failure to enforce it should be subject to review by national complaints procedures.

The major success of the public complaint mechanism was the development of a ‘labour internationalism’: in all public submissions various NGOs, several trade unions and international labour activists were involved, leading to government action such as conferences, workshops and public forums and outreach sessions.163 This clearly created more labour rights awareness and can be an important starting point for the improvement of the labour rights conditions including children’s rights in each party’s territory.164 Moreover, in some cases such pressure was created on governments that, for example, in the Pregnancy Test case, the Mexican Government finally changed its position and also included applicants for hire under its anti-discrimination law.165 However, as illustrated by the Han Young case, transnational labour movements do not necessarily lead to concrete results and are hard to assess.

Thus, whilst activities such as seminars, conferences and public outreach sessions are an important first step in the implementation process, they are not sufficient to bring about change for child labourers. An effective complaints system should call for domestic policy changes.

In general, however, the reports of the NAOs have been weak. Instead of addressing the issues in a direct and thorough manner, reports have often been vague and failed to give specific recommendations for government action. It has rightly been recommended that clear guidelines

164 Greven, Social Standards, p. 38.
for reports should be devised. These guidelines should refer to the following issues: initiation and acceptance of cases; gathering information related to complaints; reporting on the issues raised; detailing findings; and announcement of specific recommendations. Ideally, there should be concrete action plans for government enforcement action. There should also be clear deadlines for every step of the procedure to give incentives to private parties to file petitions. These recommendations are valid for any future complaints mechanism for private parties.

The parties to the NAALC were generally unwilling to solve the cases under the NAOs effectively by providing for long-term improvements in their ministerial agreements. Neither have they initiated the evaluation process under the ECEs. Consequently, at the time of writing, no ECE or arbitration panel has been established. These deficiencies could be addressed by devising guidelines relating to the content of ministerial consultations, the development of ministerial agreements and follow-up procedures, including steps to ensure that ministerial agreements are carried out, and if not, measures such as the establishment of ECEs are adopted.

As regards the complaints system of a future multilateral social clause, besides these recommendations, one should also take into account the possibility of providing for a right of private parties including NGOs or trade unions to initiate evaluation processes or dispute resolution procedures leading to trade measures. As mentioned above, private parties are generally more willing to take recourse to dispute resolution.

In addition, in a future multilateral social clause, since the focus of a trade-related agreement on labour standards should be on the implementation of international standards, the law itself as well as the failure to enforce it adequately should be made subject to dispute resolution.

It is to be welcomed that the NAALC provides for a graded system for penalties including monetary assessments followed by trade measures. This is a more appropriate system for the enforcement of labour rights than the automatic imposition of trade measures. As will be seen below, this can have negative consequences for child labourers.

Finally, the question is whether the labour rights dispute resolution procedures should be included into the main body of the respective

---

167 Ibid.
168 See below p. 368 et seq.
trade agreement. With regard to the NAALC, this has been requested for example, by the AFL–CIO in order to give workers the same rights as investors and other companies.\textsuperscript{169} This would clearly be an advantage, also reducing the risk for the NAALC to become an irrelevant side agreement. However, if the drafters had wanted to accord workers more rights, they could have done that under the NAALC. Thus, the fact that the NAALC provides for a different procedure does not mean per se that it is ineffective. By contrast, it has the advantage that labour rights experts deal with these matters and adequate timetables are set. As in national law, it is preferable to have different panels and procedures for different areas of law.

2. The US–Jordan FTA

a) Introduction

The Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area (US–Jordan FTA) was signed on 24 October 2000.\textsuperscript{170} It was the third free trade agreement of the US. It incorporates labour standards, which may be the subject of the main dispute settlement mechanism. In order to assess its effectiveness to improve the situation of workers with a focus on child labourers, the following section will analyse the enforcement obligations with regard to labour standards, cooperation and dispute settlement provisions. At the time of writing, there has only been one case concerning labour standards.

b) Enforcement obligations

Art. 6 of the US–Jordan FTA provides for the protection of labour rights. It refers to international as well as domestic standards.

According to Art. 6 (6) of the Agreement, ‘labour law’ means regulations that relate to the following internationally recognised labour rights: the right of association; the right to organise and bargain collectively; a prohibition on the use of any form of forced or compulsory labour; a minimum age for the employment of children; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. The number of labour standards chosen


\textsuperscript{170} www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf.
is considerably less than in the case of the NAALC. There is no reference to the worst forms of child labour as prohibited by ILO Convention No. 182.\textsuperscript{171} The choice of standards defined as ‘labour law’ rather corresponds to the US GSP law.\textsuperscript{172} In contrast to the NAALC, there is no obligation relating to procedural guarantees. The provision however refers to a minimum age for children.

As regards the level of protection, the major advantage in comparison with the NAALC is the reference to ILO labour standards in Art. 6 (1), first sentence. This provision of the US–Jordan FTA relates to the membership of the parties in the ILO and their commitments thereunder as well as under the ILO Declaration on Fundamental Principles and Rights at Work.\textsuperscript{173} According to Art. 6 (1), second sentence of the US–Jordan FTA, the parties are obliged to strive to ensure that the labour rights contained in the ILO Declaration and the internationally recognised labour rights contained in Art. 6 (6) are protected by domestic law. Whilst this reference to international labour standards is an achievement, it has to be noted that the parties are merely obliged ‘to strive’ to provide for the protection of these rights. This obligation clearly is more difficult to enforce than an obligation to ensure the full incorporation into domestic law. This restriction is probably attributable to the fact that the obligation is incorporated into a trade agreement and backed by trade measures. The ILO Declaration ‘merely’ obliges ILO member states to respect the principles of the fundamental ILO conventions and to report on changes in law and in practice. However, in the light of the fact that child labour is part of \textit{ius cogens},\textsuperscript{174} there is a strong argument in relation to future social clauses that, at least in the case of child labour, the parties should be obliged to fully comply with international standards.

According to Art. 6 (2) of the Agreement, the parties must strive to ensure that they do not waive or otherwise derogate from labour laws to encourage trade. Although merely requiring to ‘strive’ to refrain from relaxing labour laws is difficult to define, the existence of this obligation is to be welcomed. The obligation to refrain from lowering standards is

\textsuperscript{171} ILO Convention No. 182 is however mentioned in Art. 6 (1), first sentence of the Agreement.

\textsuperscript{172} In the US GSP, this choice of labour standards is referred to under the term ‘internationally recognized labour rights’, see below p. 103 et seq.

\textsuperscript{173} As mentioned above under the ILO Declaration on Fundamental Principles and Rights at Work, all parties to the ILO have to report on changes in law and practice on the fundamental ILO conventions contained therein, see above p. 103 et seq.

\textsuperscript{174} See above p. 114 et seq.
more concrete than the general obligation contained in Art. 2 of the NAALC to strive to improve labour standards. Therefore, it is more easily enforceable. Although the obligation to refrain from lowering standards could be said to be part of the obligation to strive to improve standards, it is to be welcomed that it has been made explicit. However, this obligation merely refers to the lowering of standards in the case of trade encouragement.

In addition, according to Art. 6 (3) of the Agreement, each party must strive to ensure that its laws provide for labour standards consistent with the internationally recognised labour rights contained in Art. 6 (6) of the Agreement and must strive to improve its domestic standards in that light. This obligation corresponds to the obligation contained in Art. 2 of the NAALC. In contrast to the obligation merely to refrain from lowering standards, it obliges parties to gradually introduce higher labour standards. Yet, the obligation is modified by the recognition that each party may adopt its own labour standards and change them.

The strongest obligation of the parties is to enforce their domestic labour laws, contained in Art. 6 (4) lit. a of the Agreement. It is to be deplored that this enforcement obligation does not relate to international standards contained in the ILO Declaration on Fundamental Principles and Rights at Work. In contrast to the definition of labour laws contained in Art. 6 (6) of the US–Jordan FTA, the ILO Declaration for example also refers to non-discrimination. As regards children’s rights, it would have been preferable if the parties were obliged to implement the full scope of ILO Convention No. 138 and 182 referred to in the ILO Declaration.

As in the NAALC, the obligation to enforce domestic labour law only refers to trade-related issues, i.e. the parties must not fail to enforce their labour laws effectively in such a way as not to distort trade. This restriction is acceptable given the fact that the enforcement obligation is contained in a trade agreement and its intervention into domestic affairs is justified in a special trade relationship. As far as the problem of disguised protectionism is concerned, the same as what has been said in relation to the NAALC should apply here.

As under the NAALC, the parties have the right to exercise discretion with respect to investigatory and compliance matters and to make decisions on the allocation of resources to enforcement with respect

---

175 Art. 6 (4) lit. a of the US–Jordan FTA.
176 See above p. 208.
to other labour matters determined to have higher priorities.\textsuperscript{177} In addition, a party may act or not act where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.\textsuperscript{178} While this might be attributed to the fact that the implementation of labour standards has to be commensurate with the economic development of the party concerned, the provision bears the risk of being used as a pretext for non-implementation. In future trade agreements, such a provision should contain more safeguards and exempt rules relating to the fundamental ILO conventions concerning child labour. As already mentioned, the prohibition of child labour as defined in these conventions requires immediate implementation.

Whilst the US law on child labour still suffers from several shortcomings,\textsuperscript{179} the Jordanian child labour law has been continuously improved in the last few years. It is however not possible to establish a direct link between the US–Jordan FTA and the child labour law improvement. In 1996, the minimum age for employment was raised from thirteen to sixteen years, and in February 2003 from seventeen to eighteen years in dangerous and hazardous work.\textsuperscript{180} The Ministry of Labour enforces the laws, making use of eighty labour inspectors.\textsuperscript{181} According to ILO estimates, in 2001, less than 1 per cent of children aged ten to fourteen years in Jordan were working.\textsuperscript{182} Children are employed in automobile repair, carpentry, sales, blacksmith shops, tailoring, construction and food services.\textsuperscript{183} Jordan has been a member of ILO/IPEC since 2000 and has successfully implemented several programmes.\textsuperscript{184} It has ratified both fundamental ILO conventions relating to child labour.\textsuperscript{185} Hence, its labour laws and enforcement mechanisms do not fall too short of international standards.

\begin{itemize}
\item \textsuperscript{177} Art. 6 (4) lit. b of the US–Jordan FTA.
\item \textsuperscript{178} Art. 6 (4) lit. b of the US–Jordan FTA.
\item \textsuperscript{179} For example, according to the Fair Labor Standards Act of 1938, children under the age of twelve may be employed outside of school hours with parental consent on certain farms. There is not such an exemption under ILO Convention No. 138, see above p. 92 et seq.
\item \textsuperscript{181} Ibid.
\item \textsuperscript{182} Ibid., p. 213.
\item \textsuperscript{183} Ibid.
\item \textsuperscript{184} Ibid., p. 212.
\item \textsuperscript{185} Ibid., p. 214.
\end{itemize}
Finally, as under the NAALC, it is explicitly made clear that the Agreement does not provide for a right of action under its domestic law against the other party on the ground that a measure of the other party is inconsistent with this Agreement, Art. 18 (1) of the Agreement.

c) Cooperation and consultations

As in the NAALC, the parties consider cooperation as an important means of improving labour standards, Art. 6 (5) of the US–Jordan FTA. However, the obligation of the ‘Joint Committee’ to consider any such opportunity identified by a party is much weaker than the cooperation system provided for in the NAALC.186 According to Art. 15 (3) lit. a of the US–Jordan FTA, the Joint Committee is composed of representatives of the parties and headed by the office of the US Trade Representative (USTR) and Jordan’s Minister for Trade. By contrast, the Council of the NAALC consists of labour ministers, and the staff of the Secretariat is independent and chosen on the basis of efficiency. In addition, the NAALC provides for NAOs established at the national level. The function of the Joint Committee is to supervise the proper implementation of the whole Agreement whereas the implementation bodies of the NAALC are only responsible for labour matters. In the NAALC, cooperative activities are more concretely defined and include joint studies, seminars and technical assistance.

According to Art. 16 (1) of the US–Jordan FTA, the parties must strive to agree on the interpretation and application of the Agreement. Each party may request consultations with the other party to resolve any matter regarding the operation or interpretation of the Agreement, Art. 16 (2) of the US–Jordan FTA. This provision corresponds to the provision of the NAALC providing for ministerial consultations. However, under the NAALC, consultations may be also conducted by the NAOs.

Moreover, the NAALC provides for objective and non-adversarial evaluation reports on labour matters not resolved by ministerial consultations, drafted by independent labour rights experts participating in an ECE. This constitutes a desirable opportunity to resolve labour law matters in a mutually satisfactory way for the parties concerned.

Finally, the US–Jordan FTA does not provide for a public communication procedure. This is a major shortcoming.

186 Art. 6 (5) of the US–Jordan FTA.
d) Dispute settlement

In contrast to the NAALC, disputes relating to labour standards fall under the same dispute settlement mechanism as trade disputes. Art. 17 (1) lit. d of the Agreement sets forth that the terms of reference of a dispute settlement panel are the determination that a party has failed to carry out its obligations under the Agreement or whether a measure taken by either party severely distorts the balance of trade benefits accorded by the Agreement or substantially undermines its fundamental objectives. Thus, all obligations with respect to labour rights can be subject to the main dispute settlement mechanism.

The advantage of labour disputes coming under the main trade dispute mechanism is that labour rights enjoy the same protection as trade benefits.\(^{187}\) However, the disadvantage is that it is less probable that labour rights experts will decide the case, making it possible that trade interests will determine the outcome of the case. Art. 17 (1) lit. c of the US–Jordan FTA merely regulates that the dispute settlement panel shall consist of members appointed by the parties. Thus, a more differentiated scheme like the one in the NAALC is preferable.

It has rightly been appreciated that there is no limitation as to the choice of standards that can be scrutinised under the dispute settlement mechanism as there is in the three-tiered system of the NAALC.\(^{188}\)

It has to be pointed out that in contrast to the terms of reference of an arbitral panel under the NAALC, the terms of reference of the panel under the US–Jordan FTA are not limited to the enforcement of domestic law. Thus, a party can submit a complaint alleging that the other party has failed to strive to ensure that its laws provide for child labour standards consistent with those provided for in the fundamental ILO conventions, Art. 6 (1), second sentence. Although the failure might be difficult to determine, it constitutes a success that an obligation relating to international standards can be the subject of dispute settlement procedures.

Moreover, the obligation to refrain from lowering domestic standards or even to improve them can be the subject of dispute settlement procedures. This also represents a major advantage over the NAALC.

---

\(^{187}\) The inclusion into the main agreement was required e.g. by the AFL–CIO, T. Lee, quoted in Commission for Labour Cooperation, Review, Annex 5, Public Comments, United States, p. 2.

where it has been argued that this obligation cannot even be the subject of the public communication procedure under the NAOs. 189

It has to be recalled however that the enforcement obligation contained in Art. 6 (4) lit. a of the Agreement only relates to domestic law. Thus, a party may not submit a complaint alleging, for example, the failure of another party to implement the ILO conventions on child labour through administrative measures. According to Art. 6 (4) in conjunction with Art. 6 (6) lit. d, only the failure of a party to enforce domestic law regarding the minimum age for employment may be subject of dispute settlement.

In sum, since the obligations with respect to domestic and international standards differ, the extent to which these standards can be enforced by the dispute settlement mechanism also differs.

As under the NAALC, in the case of a dispute arising, the parties must make every attempt to arrive at a mutually agreeable resolution through consultations. 190 According to Art. 17 (1) lit. b, if the parties fail to resolve a matter through consultations within sixty days after a request for consultations, either party may refer the matter to the Joint Committee. If the Joint Committee does not resolve the case within a period of ninety days, either party may refer the case to a dispute settlement panel. 191 The panel consists of two members appointed by the parties and a chairman appointed by the members. 192 In contrast to the NAALC, there is no requirement that the members have to be independent experts. Within ninety days, the panel must draft a report including findings of fact and its determination according to its term of reference, for example as to whether either party has failed to carry out its obligation under the Agreement. 193 The panel may also make recommendations for the resolution of the dispute. 194 However, it is explicitly stated that the report is non-binding. 195 The Joint Committee then resolves the dispute taking the report into account. 196 If the dispute is not resolved within thirty days after the presentation of the panel

189 The Mexican and US NAO declined to deal with the obligation to improve labour standards contained in Art. 2 of the NAALC, see above p. 220.
190 Art. 17 (1) lit. a of the US–Jordan FTA.
191 Art. 17 (1) lit. c of the US–Jordan FTA.
192 Art. 17 (1) lit. c of the US–Jordan FTA.
193 Art. 17 (1) lit. d of the US–Jordan FTA.
194 Art. 17 (1) lit. d of the US–Jordan FTA.
195 Art. 17 (1) lit. d of the US–Jordan FTA.
196 Art. 17 (2) lit. a of the US–Jordan FTA.
report, the complainant party may take any appropriate and commensurate measure.\textsuperscript{197}

In comparison with the NAALC dispute settlement mechanism, this dispute settlement mechanism appears to be rather rudimentary. It does not provide for an action plan to be devised by a panel selected from a roster, a monetary enforcement assessment in case of failure by the parties to enforce the established plan and, as a measure of last resort, the possibility of suspending trade benefits. The panel under the US–Jordan FTA is chosen by the parties. Its report is not binding and its determinations do not necessarily have to be enforced; instead, the Joint Committee has to resolve the case with reference to the panel report. There is no graded system of penalties including the payment of a monetary enforcement assessment and no provisions regulating the suspension of trade benefits. On the whole, the dispute settlement rather appears to have the characteristics of a political arbitration process in contrast to an objective judicial procedure.

The advantage of this mechanism is its tight timetable, providing for 240 days in total from the request for a panel and a party being able to take measures. The timetable corresponds to the one of NAFTA, providing for 235 days, and might be adequate for trade issues. A timetable concerning labour law should provide more time for consultations and transitional measures.

e) Cases
In September 2006, the AFL–CIO, the largest labour federation in the US, and the National Textile Association representing US textile producers jointly called on the US Government to initiate dispute settlement under the US–Jordan FTA.\textsuperscript{198} The complaint asserted that the Jordanian Government is in violation of its commitment to ‘respect, promote, and realize’ the core labour standards embodied in the ILO Declaration on Fundamental Principles and Rights at Work according to Art. 6 (1) of the Agreement as well as its commitment to enforce its own laws effectively according to Art. 6 (4) of the Agreement.\textsuperscript{199}

\textsuperscript{197} Art. 17 (2) lit. b of the US–Jordan FTA.
In this context, it should be noted that the obligation in relation to the rights contained in the ILO Declaration is merely ‘to strive’ to ensure those rights.

If the US Government reacts, the first step would be to start consultations with the Jordanian Government.

In particular, the complaint comprises allegations such as the lack of union representation for foreign workers working in the Qualified Industrial Zones, the failure to enforce its domestic laws regarding maximum hours of work, overtime pay, minimum wage and health and safety regulations, and the right to organise and to form a trade union and to bargain collectively.200

So far, the Jordanian Government has closed at least seven factories where abuses were occurring and has started to improve the labour inspection regime.201

In 2006, the US and Jordan also established a Labour Working Group to discuss labour enforcement issues. USAID contributed US $2.7 million to the ILO to start a ‘Better Factories’ project that aims at improving labour conditions in the Qualified Industrial Zones.202

Whilst so far no clear outcome of the case exists and, therefore, its impact is hard to assess, it constitutes a success that an attempt has been made to initiate dispute resolution in a trade agreement with regard to labour rights.

f) Conclusion
The US–Jordan FTA is generally considered to be the ‘gold standard’ for incorporating labour rights.203 It is maintained that many of its regulations were incorporated into the FTA as a response to widespread criticism of the NAALC.204 However, the analysis above has demonstrated that only some aspects of the US–Jordan FTA constitute an advantage over the NAALC. Before comparing in detail the social clauses of the different agreements, it must be pointed out that it is a major success that, for the first time, an attempt has been made to initiate dispute resolution in a labour rights case. Its outcome will be important to assess

---

200 Ibid.
201 Ibid.
further whether and how social clauses can improve the situation of workers. So far, the Jordanian Government appears to be willing to improve the situation.

Overall, in comparison with the NAALC, it seems that the workers’ situation improved less. The lack of a public communication procedure might be one reason. In any event, both agreements so far do not give a definite answer as to whether social clauses are an effective means of combating child labour.

With respect to the design of social clauses, there are several lessons that may be drawn. Whilst the number of incorporated labour standards in the US–Jordan FTA is considerably less than in the NAALC, it is a major achievement that reference is made to the fundamental ILO conventions. However, the main obligation of the parties is to enforce domestic standards. With regard to international labour standards, the parties ‘merely’ have to strive to ensure to introduce those standards into domestic law. A future social clause should contain the obligation to implement the fundamental ILO conventions on child labour in law and practice.

It is positive that the obligation to refrain from lowering labour standards in order to encourage trade has been made explicit. As apparently was the case in Mexico, 205 a great temptation exists to attempt to improve the economy by lowering labour standards to attract foreign investors.

As regards cooperation and consultation activities, the NAALC scheme provides for more possibilities. In this regard, it is preferable to the US–Jordan FTA.

The major advantage of the dispute settlement mechanism in comparison to the NAALC is that all obligations relating to labour standards can be made the subject of dispute settlement procedures. However, few obligations relate to international standards.

In contrast to the view of other authors, 206 the fact that labour standards are dealt with under the same dispute settlement as trade issues is not an advantage. To the contrary, the NAALC dispute settlement mechanism is a lot more detailed and much more appropriate for the resolution of labour disputes.

205 Ibid.
Finally, it has to be taken into account that the US has much negotiating power vis-à-vis Jordan. A similar social clause in a global trade agreement would clearly be much more difficult to negotiate.

3. The US–Chile FTA

a) Introduction

The US–Chile Free Trade Agreement entered into force on 1 January 2004.207

As in the US–Jordan FTA, labour standards have been incorporated into the main agreement. The following section will analyse the enforcement obligations of the parties regarding labour standards, cooperation and dispute settlement provisions. So far, there has not been any case concerning labour standards. Therefore, the analysis concentrates on the design of the social clause.

b) Enforcement obligations

It was clear in the negotiations that including labour standards was not any sort of response to social welfare concerns, but rather the main objectives were strictly trade-oriented: labour standards were only taken into account to impede a reduction in labour standards as it was recognised by the FTA that this could operate as unfair commercial competition.208 This reasoning is reflected in the choice of labour standards referring to only minimum standards and, as will be seen below, in the resulting obligations. As was the case with the NAALC, the FTA was negotiated on the assumption that the labour laws of both parties were adequate.

The US–Chile FTA however has a wider choice of labour standards than the US–Jordan FTA: Art. 18.8 of the Agreement defines ‘labour law’ as statutes and regulations relating to the right of association, the right to organise and bargain collectively, a prohibition on the use of any form of forced or compulsory labour, a minimum age for the employment of children, the prohibition and elimination of the worst forms of child labour and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. While less

---

207 www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.
208 Pursuant to section 2102(c)(5) of the Trade Act of 2002, the President of the US shall review the impact of future trade agreements on US employment including labour markets. Thus, the inclusion of labour rights into trade agreements shall prevent negative impacts of free trade on US employment.
in number than in the NAALC,\textsuperscript{209} it is to be welcomed that these labour standards include the elimination of the worst forms of child labour, thereby alluding to ILO Convention No. 182. Hence, the failure of the US–Jordan FTA to include this standard into its definition of ‘labour law’ has been avoided.

As in the US–Jordan FTA, according to Art. 18.1 (1) of the US–Chile Agreement, the parties must strive to ensure the provision of labour standards compliant with the fundamental ILO conventions contained in the ILO Declaration on Fundamental Principles and Rights at Work. This reference to international labour standards constitutes a major advantage in comparison with the NAALC that only provides for the enforcement of domestic laws.

According to Art. 18.1 (2) of the US–Chile FTA, the parties must provide for the labour standards referred to in Art. 18.8 of the US–Chile FTA and strive to improve those standards. However, as in the US–Jordan Agreement, this obligation is somehow modified by the right of the parties to establish their own standards and to change and modify them, Art. 18.1 (2) of the Agreement. Yet, as argued under the NAALC, taken together, the obligations prevent the parties from lowering their labour standards. Otherwise, the obligation to improve labour standards would be rendered meaningless.

The main obligation of the parties is not to fail to enforce their domestic labour laws effectively, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties.\textsuperscript{210} This is the same formulation as used in the US–Jordan FTA. The requirement of ‘a sustained or recurring course of action or inaction, in a manner affecting trade’ reflects the underlying objective of the labour clauses to prevent unfair trade advantages based on low labour standards. While the rationale of preventing unfair competition risks being used as disguised protectionism, it might prove a justified distinction for labour standards to be included into trade agreements. In the case of child labour, it should also be noted that the majority of countries have ratified the CRC and ILO Convention No. 182 and are, as members of the ILO, obliged to respect the principles of the fundamental ILO conventions and report on relevant changes in law and practice. Hence, the majority of countries have to implement the ILO conventions on child labour in any event.

\textsuperscript{209} The NAALC also refers to the right to non-discrimination.

\textsuperscript{210} Art. 18.2 (1) lit. a of the US–Chile FTA.
In the light of the fact that the cause-and-effect relationship between labour standards and changes of trade flows are difficult to prove, in order to prove trade-relatedness it should be sufficient to show that trade flows in theory could be affected.

As Jordanian laws, Chilean child labour laws do not fall too short of international standards. The minimum age for employment is set at fifteen years. Children aged fifteen may only perform light work not affecting their health or development. However, prostitution is legal and the age of consent for sexual relations is fourteen years. There are no penalties for adults engaging in sexual relations with minors of the age of fourteen. Chile has ratified both fundamental ILO conventions relating to child labour.

In 2000, according to ILO estimates, there were less than 1 per cent of children aged ten to fourteen working. They were working in the following sectors: agriculture, ranching, shepherding, meat and shellfish processing, fishing, bagging groceries in supermarkets, domestic service, and street sales. In 2002, Chile adopted together with other MERCOSUR Governments and IPEC a regional plan to combat child labour. In addition, an IPEC survey was started in 2002 to gather information on child labour, especially the worst forms of child labour. Hence, Chile is engaged in several initiatives to combat child labour that should be pursued and strengthened.

In contrast to the US–Jordan FTA, Art. 18.3 of the US–Chile FTA obliges the parties to provide for procedural guarantees with regard to their labour law enforcement such as appropriate access to judicial tribunals, due process and adequate remedies. This is to be welcomed since the inefficiency of judicial protection for labour rights is a major problem in Chile.

The right of the parties to exercise discretion with respect to investigatory or compliance matters and matters resulting from a bona fide decision regarding the allocation of resources is to be criticised on the same grounds as in the US–Jordan FTA.

---

211 US Department of Labor, Bureau of International Labor Affairs The US Department of Labor’s 2003 Findings on the Worst Forms of Child Labor, p. 89.
212 Ibid.
213 Ibid., p. 90.
214 Ibid., p. 90.
215 Ibid., p. 88.
216 Ibid.
217 Ibid., p. 87.
218 Art. 18.2 (1) lit. b of the US–Chile FTA; see above p. 229.
It is positive that the US–Chile Agreement also contains the obligation to refrain from lowering domestic labour standards to encourage trade.\textsuperscript{219} The provision is much more detailed and also refers to the establishment, acquisition or retention of an investment.\textsuperscript{220}

Finally, as in the NAALC, the US–Chile FTA stipulates that nothing shall be construed to empower a party’s authorities to undertake labour law enforcement activities in the territory of another party. This provision provides evidence that the aim of the Agreement is not to provide remedies in single cases but to achieve long-term improvements of the labour rights situation. The provision also shows that, as in the NAALC, the parties were very concerned about maintaining their sovereignty with respect to administrative labour law enforcement.

c) Cooperation and consultations

Art. 18.4 of the US–Chile FTA provides for the establishment of a Labour Affairs Council to implement and review progress under the labour law provisions of the Agreement, and to conduct activities of the Labour Cooperation Mechanism provided for in Art. 18.5 of the Agreement. The Council consists of government representatives of the parties.\textsuperscript{221} It is noteworthy that the Council must establish expert groups and consult with NGOs and independent experts, Art. 18.4 (4).

In addition, each party must establish an office within its labour ministry serving as a point of contact to support the work of the Council.\textsuperscript{222} They also may convene national consultative or advisory committees consisting of workers’ and employers’ representatives.\textsuperscript{223} Most importantly, as in the NAALC, the points of contact shall provide for the submission, receipt and consideration of public communications on labour law matters as defined under the Agreement.\textsuperscript{224} In contrast to public communication procedures under the NAALC, according to Art. 18.4 (7) of the Agreement, there is no requirement that the matter is restricted to labour law enforcement. Thus, all of the obligations contained in Chapter 18 regarding labour law are subject to the public communications procedure. It is particularly an advantage in comparison with the NAALC that the obligation to strive to improve labour

\textsuperscript{219} Art. 18.2 (2) of the US–Chile FTA.
\textsuperscript{220} Art. 18.2 (2) of the US–Chile FTA.
\textsuperscript{221} Art. 18.4 of the US–Chile FTA.
\textsuperscript{222} Art. 18.4 (3) of the US–Chile FTA.
\textsuperscript{223} Art. 18.4 (6) of the US–Chile FTA.
\textsuperscript{224} Art. 18.4 (7) of the US–Chile FTA.
standards, to refrain from lowering them and to introduce labour standards compliant with the ILO core labour standards are all subject to the complaints mechanism. However, since so far there has not been any submission to the national contact points, it is difficult to assess whether the parties will make better use of this provision than in the case of the NAALC, where the major success was the development of a ‘labour internationalism’. As in the NAALC, because of the prohibition against undertaking labour rights enforcement in another party’s territory, it will be difficult to achieve concrete results in single cases.

Art. 18.5 of the Agreement in conjunction with its Annex provides for a labour rights cooperation mechanism to implement the labour rights obligations of the parties. The parties must establish within their labour ministries an office to support the work of the Labour Cooperation Mechanism, Annex 18.5 (2). The principal functions of the mechanism are to establish priorities for cooperative activities, to exchange information, to encourage best practices adopted by companies and to advance the effective implementation of the labour standards contained in the ILO Declaration. Cooperative activities concern, for example, the effective application of the labour standards contained in the ILO Declaration, labour relations between workers and management including disputes, social programmes for workers and their families, and technical issues and information exchange. Cooperative activities must be implemented through exchanging government delegations, sharing information, developing collaborative projects, organising public outreach sessions, undertaking joint research projects and engaging in technical exchanges and cooperation. Civil society as well as workers’ and employers’ representatives must participate in these activities. In comparison with the NAALC and the US–Jordan FTA, the Labour Cooperation Mechanism is the most detailed and the most advanced. Hence, the Labour Cooperation Mechanism should serve as a model for a future social clause.

According to Art. 18.6 of the US–Chile FTA, each party may request consultations with the other party concerning any labour law matter arising under the Agreement. If the parties fail to arrive at a mutually

---

225 Annex to Art. 18.5 (3) of the US–Chile FTA.
226 Annex to Art. 18.5 (4) of the US–Chile FTA.
227 Annex to Art. 18.5 (5) of the US–Chile FTA.
228 Annex to Art. 18.5 (6) of the US–Chile FTA.
satisfactory solution, either party may request that the Council be convened to resolve the matter.\textsuperscript{229} If the Council fails to do so, and if the matter concerns whether a party is conforming to its obligations to enforce its domestic law in accordance with Art. 18 (1) lit. a, either party may request within sixty days of a request, consultations or a meeting of the Free Trade Commission under Chapter 22 of the Agreement concerning dispute resolution.\textsuperscript{230} In contrast to the NAALC, there is no provision for the establishment of an ECE to report on the case in a non-adversarial, objective manner.

d) Dispute resolution

(1) The panel process

Whilst enforcement obligations regarding labour standards are subject to the main dispute settlement mechanism, there are several deviations in the case of labour disputes.

As in the NAALC, only the obligation to enforce domestic labour standards effectively can be the subject of dispute settlement procedures.\textsuperscript{231} This is a major shortcoming in comparison with the US–Jordan FTA where all obligations related to labour standards can be enforced by the dispute settlement mechanism. As mentioned above, the failure to enforce labour standards must affect trade. Whilst a limitation to trade-related matters is useful, it is not appropriate to require a quantifiable trade effect. This would inadequately limit the number of potential cases.

The obligation not to reduce labour standards in order to attract investment is not subject to dispute settlement. However, it may be argued that a violation of this obligation would be a violation of the principles of \textit{pacta sunt servanda} and good faith. Consequently, in the case of a violation, the other party would be entitled to terminate the treaty.

According to Art. 60 (1) of the VCLT, a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. Art. 60 (3) lit. b states that a material breach of a treaty consists of the violation of a provision essential to the accomplishment of the object or purpose of the treaty. The US–Chile FTA was concluded under the legislative mandate of the US Trade Act of 2002, which stated

\textsuperscript{229} Art. 18.6 (4) of the US–Chile FTA.
\textsuperscript{230} Art. 18.6 (6) of the US–Chile FTA.
\textsuperscript{231} Art. 18.2 (1) lit. a in conjunction with 18.6 (7) of the US–Chile FTA.
as one of the negotiating objectives for the incorporation of labour standards into trade agreements the obligation to seek provisions in trade agreements by which the parties strive to ensure not to weaken or reduce the protections afforded in domestic labour law as an encouragement for trade.\textsuperscript{232} Hence, it could be argued that this obligation was essential to the accomplishment of the purpose of the treaty. Thus, non-compliance could be considered as a material breach that entitles the other party to suspend the treaty. However, Art. 60 (3) lit. b of the VCLT relates to the objectives or purpose of the treaty, not the negotiating objectives. Art. 1.2 (c) of the US–Chile FTA relates to fair competition, not explicitly to labour standards. However, in light of the fair trade/free trade debate that emerged on the issue of a social clause under the WTO,\textsuperscript{233} fair competition could be read to include the obligation not to lower labour standards in order to encourage trade or attract investment. Hence, if one party relaxed its labour standards in order to attract investment, the other party would be entitled to suspend the treaty in accordance with the provisions of Art. 60 of the VCLT. A better solution would however be to make the obligation not to lower labour standards to encourage trade subject to the dispute resolution mechanism.

According to Art. 18.7 of the US–Chile FTA, the parties must establish a labour roster for panellists. Panellists must be non-party nationals, have labour law expertise and be independent of the parties. This is a major advantage over the US–Jordan FTA, which does not require panellists to be labour law experts.

A complainant party may request consultations under Art. 22.4 of the US–Chile FTA or a meeting of the Commission\textsuperscript{234} under Art. 22.5 (2) of the Agreement to resolve the matter. The Commission provides for good offices, conciliation and mediation, and may consult expert groups.\textsuperscript{235} This second round of consultations is not obligatory. Although criticism has been raised that this provision would unnecessarily extend dispute resolution, it might be adequate for difficult labour law matters and


\textsuperscript{233} See above in the introduction p. 6 et seq.

\textsuperscript{234} According to Art. 21.1 of the US–Chile FTA, the parties establish a Free Trade Commission, comprising cabinet-level representatives of the parties, to supervise implementation of the Agreement. According to Art. 21.2 of the US–Chile FTA, each party must establish an administrative office to assist the Commission to perform its functions.

\textsuperscript{235} Art. 22.5 of the US–Chile FTA.
provides a useful opportunity to resolve the matter in a mutually satisfactory way.

If the parties fail to resolve the matter within thirty days after the Commission has been requested to consider it or, in case of consultations under Art. 22.4 of the Agreement, seventy-five days after the consultations have been requested, each party may request the establishment of an arbitral panel. The chair and the panellists will be selected from the roster members. The rules of procedure provide for at least one public hearing and submissions from NGOs located in the parties’ territories. NGOs may also take part in public hearings. The acceptance of NGO submissions constitutes a major advantage over both the US–Jordan FTA and the NAALC.

The terms of reference of a panel are to make findings, determinations and recommendations in the light of the relevant provisions of this Agreement. According to Art. 22.12 (3) of the Agreement, the panel must deliver within 120 days after its selection the initial report containing findings of fact, its determination as to whether a party has not conformed with its obligations under this Agreement and its recommendations for the resolution of the dispute. The panel may seek technical advice from labour experts on which the parties may comment. This requirement is to be appreciated. The parties may comment on this report within fourteen days of its delivery. The final report must be delivered within thirty days after the presentation of the first report. The parties may agree on the resolution of the report or agree on a mutually satisfactory action plan to resolve the dispute, in accordance with the recommendations contained in the report.

(2) Enforcement

If the parties fail to agree on a resolution within forty-five days of receiving the final report or if the party complained against does not implement the resolution, the complaining party may request the panel

---

236 Art. 22.6 (1) of the US–Chile FTA.
237 Art. 18.7 of the US–Chile FTA.
238 Art. 22.10 (1) of the US–Chile FTA.
239 Art. 22.10 (4) of the US–Chile FTA.
240 Art. 22.11 (1) and (2) of the US–Chile FTA.
241 Art. 22.12 (5) of the US–Chile FTA.
242 Art. 22.13 (1) of the US–Chile FTA.
243 Art. 22.14 (3) of the US–Chile FTA.
to be reconvened to impose an annual monetary assessment on the
other party.\textsuperscript{244} The panel determines the amount of the monetary assessment in US dollars within ninety days. The assessment is determined according to the following criteria: the bilateral trade effects of the party’s failure to effectively enforce the relevant law, the pervasiveness and duration of the party’s failure to effectively enforce the relevant law, the reasons for the party’s failure to effectively enforce the law, the level of enforcement that could reasonably be expected of the party given its resource constraints and the efforts made by the party to begin remedying the non-enforcement as well as other relevant factors.\textsuperscript{245} The amount shall not exceed US $15 million annually.\textsuperscript{246} The monetary assessment must be paid to the complaining party in quarterly instalments beginning sixty days after the party complained against had announced its intention to pay.\textsuperscript{247} Assessments are paid into a fund established by the Commission and expended at the direction of the Commission for appropriate labour law enforcement.\textsuperscript{248} The views of the parties must be taken into account.\textsuperscript{249}

Criticism has been raised that the level of fines is so low that the fines will have little deterrent effect, being equivalent only to less than 0.24 per cent of total bilateral trade and less than 3 per cent of the import charges collected on Chilean products.\textsuperscript{250} However, in the NAALC, the monetary assessment can be no greater than 0.007 per cent of total trade in goods between the states parties and is considered to be of deterrent effect. In addition, according to the report of the US Trade Representative, US duties on imports from Chile equalled US $23.5 million in 2002.\textsuperscript{251} Thus, a fine of US $15 million would be equivalent to three quarters of the Chilean benefits from import duties and of considerable deterrent effect.

\begin{itemize}
\item \textsuperscript{244} Art. 22.16 (1) of the US–Chile FTA.
\item \textsuperscript{245} Art. 22.16 (2) of the US–Chile FTA.
\item \textsuperscript{246} Art. 22.16 (2) of the US–Chile FTA.
\item \textsuperscript{247} Art. 22.16 (3) of the US–Chile FTA.
\item \textsuperscript{248} Art. 22.16 (4) of the US–Chile FTA.
\item \textsuperscript{249} Art. 22.16 (4) of the US–Chile FTA.
\item \textsuperscript{251} USTR, Response to Labor Advisory Committee Report on the Proposed Chile and Singapore FTAs, [URL], p. 4.
\end{itemize}
In contrast to the view of some commentators,\(^\text{252}\) it is an advantage that the monetary assessments have to be determined according to criteria such as the reasons for non-compliance. As demonstrated in Chapter 1, besides poverty, one of the major causes of child labour is the lack of political will. The latter cases should be treated differently from those where just a lack of resources is the main cause for the incidence of child labour. Taking into account the parties' own efforts to combat child labour for example, it is possible to achieve a just and non-protectionist solution.

Finally, the possibility of paying a fine into a fund for labour law enforcement initiatives has been criticised as robbing the fines of all deterrent effect.\(^\text{253}\) Instead, there should be the possibility of imposing immediately trade measures equivalent to those imposed in commercial disputes.\(^\text{254}\) However, labour law is a different subject-matter from trade and commercial law. As already said, poor working conditions are often the result of a combination of public resource constraints and lack of political will. Hence, fines directed at governments might in some cases be more adequate than trade measures hitting private companies. Moreover, trade measures may hurt child labourers if they lose their jobs.\(^\text{255}\) Thus, it is more effective for a government to pay a fine into a fund than lose trade benefits. Finally, experience has shown that most developing countries will not sign trade agreements that directly trigger trade measures if labour clauses are violated.\(^\text{256}\)

If the party complained against fails to pay a monetary assessment, the complaining party may take other steps to collect the assessment.\(^\text{257}\) This may include suspending trade benefits as necessary to collect the assessment while bearing in mind the Agreement's objective of eliminating barriers to bilateral trade.\(^\text{258}\) This provision provides a good example for a gradual enforcement mechanism that is not excessively intrusive.

If the party complained against considers that it has eliminated the non-conformity, it may request a panel be convened to decide within


\(^{\text{253}}\) Ibid., p. 8.

\(^{\text{254}}\) Ibid.


\(^{\text{256}}\) Clatanoff, ‘From NAFTA/NAALC To The FTAA Via TPA’, 55.

\(^{\text{257}}\) Art. 22.16 (5) of the US–Chile FTA.

\(^{\text{258}}\) Art. 22.16 (5) of the US–Chile FTA.
ninety days on that question. The panel may decide that the party complained against may no longer be required to pay the assessment or that the other party has to reinstate its trade benefits.

From the request for consultations until the issuance of the final report, a dispute will take approximately 270 days. Benefits can be withdrawn within at least 135 days after the final panel report. The total period is a little longer than in the NAFTA dispute settlement process but much less than in the NAALC mechanism where the withdrawal of trade benefits can take over 800 days after an ECE has been established. Hence, the timetable is acceptable.

e) Cases
To date, there has not been a complaint submitted under the dispute resolution mechanism. However, Chile and the US have started to cooperate on labour law enforcement and promoting respect for core labour standards in Chile. In particular, both governments are engaged in technical cooperation on modernising aspects of labour inspection, investigation, enforcement and compliance practice. Efforts have included visits of Chilean officials to the US to gain a better understanding of the US system in order to identify aspects appropriate for Chile and develop more directed training. In 2005, a training seminar for Chilean judges was held.

Whilst these efforts are certainly to be welcomed, they are only the beginning and should focus more on joint projects and training for workers. In addition, child labour issues should be addressed.

f) Conclusion
As the US–Jordan FTA, the US–Chile FTA has also been called the ‘gold-standard’ for a trade agreement incorporating labour standards. Whilst being more advanced in some aspects than the NAALC and the US–Jordan FTA regarding labour standards, it also has several shortcomings.

259 Art. 22.17 (1) of the US–Chile FTA.
260 Art. 22.17 (2) of the US–Chile FTA.
262 Ibid.
263 Ibid., p. 39.
265 Weiss, ‘Two Steps Forward, One Step Back’, 700 with further references.
The enforcement obligations of labour standards are subject to the same criticism as the US–Jordan FTA. While referring to the fundamental ILO conventions, the number of labour standards incorporated into the Agreement is much smaller than in the NAALC. In addition, the enforcement obligation with respect to international standards is only to ‘strive’ to ensure they are incorporated into domestic law. Considering that child labour is part of *ius cogens*, the corresponding obligation should be to enforce the relevant fundamental ILO conventions in law and in practice. The main obligation is to enforce the parties’ domestic labour law. It is however positive that explicit obligations to refrain from lowering standards in order to encourage trade and to strive to improve labour standards exist.

In contrast to the US–Jordan Agreement, both the US–Chile FTA and the NAALC provide for detailed cooperation mechanisms, which represents a major advantage. The advantage of the NAALC mechanism is that it provides for an independent body – the Secretariat – to conduct cooperative activities and a non-adversarial evaluation process under the ECEs. By contrast, the Labour Affairs Council of the US–Chile FTA consists of government representatives. However, the US–Chile FTA explicitly mentions the establishment of expert groups including NGOs and their participation in cooperative activities. Thus, a combination of both mechanisms would be recommendable for a future multilateral social clause. As regards cooperative activities, the US–Chile FTA mechanism is the most far-reaching, *inter alia* offering social programmes for workers and their families, joint projects and technical exchanges.

It is most welcomed that the parties have started cooperative efforts. They should be intensified in the future.

It is positive that the Agreement contains a public communication procedure.

In contrast to the US–Jordan FTA, only the obligation to enforce domestic labour law can be the subject of dispute settlement. This represents a drawback. In addition, in accordance with the objective of the US–Chile FTA to prevent unfair competition based on low labour standards, only trade-related labour matters may be the subject of dispute resolution. This might however be a justified distinction. In the light of the fact that the cause-and-effect relationship between labour standards and changes of trade flows are difficult to prove, it should be enough to show that trade flows in theory could be affected.

However, the dispute settlement mechanism relating to labour standards is the most advanced in comparison to the ones in the US–Jordan
FTA and the NAALC. In the US–Chile FTA, the obligations relating to labour standards are subject to the same dispute settlement mechanism as trade rules. The mechanism relating to labour standards is however somewhat modified, taking into account the different nature of labour law. As in the NAALC, the US–Chile FTA provides for a graded implementation mechanism, allowing for a monetary assessment to be paid by the government, followed by trade measures as measures of last resort. In addition, the panellists will be chosen from a different roster consisting of labour law experts. The consultation period is longer than in commercial disputes, the monetary assessment based on criteria such as the reasons for the failure of a party to enforce its law and its financial resources, and the absolute amount is limited. Most importantly, the money paid has to be used to improve labour law enforcement. This provision takes into account the causes of the breach, for example, child labour, which are *inter alia* resource constraints and lack of political will. In the case of child labour, technical and financial assistance for implementation of relevant standards provided by developed parties would also be recommendable.

In sum, apart from the shortcomings mentioned, in comparison with the other US FTAs many provisions would be the most appropriate to serve as a model for a multilateral social clause. However, it has to be kept in mind, that, to date, no use has been made of the dispute settlement mechanism.

4. The US–Cambodia Textile Agreement
   a) Introduction
   Under the US–Cambodia Textile Agreement (US–Cambodia TA), the US grants Cambodia specific quotas for textile and apparel exports from Cambodia to the US in exchange for lower tariffs on US exports to Cambodia.

266 Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Production Between the Government of the United States of America and the Royal Government of Cambodia.

267 Until the end of the Uruguay Round, the trade was governed by the Multifibre Arrangement. This was a framework for bilateral agreements or unilateral actions that established quotas limiting imports into countries whose domestic industries were facing serious damage from rapidly increasing imports. Since 1995, the WTO’s Agreement on Textiles and Clothing has taken over from the Multifibre Arrangement. In January 2005, the quotas came to an end. The Agreement on Textiles and Clothing no longer exists. See www.wto.org/english/docs_e/legal_e/ursum_e.htm#cAgreement.
2002 until December 2004. When the global system of quotas ended in December 2004, the Agreement was not extended. Nevertheless, the Agreement will be examined here because it is a good example of a bilateral trade agreement providing for trade incentives instead of economic countermeasures in order to improve labour standards. It was also mentioned that the Agreement was a response to mass media revelations of child labour that discouraged sourcing by image-sensitive international buyers.

b) The labour rights provisions and their implementation
According to para. 10 (A) of the US–Cambodia TA, the parties seek to improve working conditions through an enhanced trading relationship and to ensure that labour laws and regulations provide for high quality and the effective enforcement of existing labour law. In addition, the Government of Cambodia must support the implementation of a programme to improve working conditions in the textile and apparel sector, including internationally recognised labour rights, through the application of Cambodian labour law. The governments of the parties must also conduct annual consultations relating to the implementation of these provisions.

(1) Enforcement obligations
In contrast to the other FTAs, neither is explicit reference made to the fundamental ILO conventions nor are internationally recognised labour standards defined.

Internationally recognised labour standards have to be implemented 'through Cambodian labour law'. This is a shortcoming. As will be seen, the term 'internationally recognised labour standards' is also used in the US GSP and defined there. These standards include a minimum age for employment of children and prohibit the worst forms of child labour. Although overlapping with the fundamental ILO conventions,

---


270 Para. 10, (B) of the US–Cambodia TA.

271 Para. 10, (C) of the US–Cambodia TA.

272 See below p. 287.
the standards referred to are less precise. Regarding child labour, it would have been recommendable to refer to both of the fundamental ILO conventions.

As in the trade agreements analysed above, the level of protection relates to domestic law. However, as regards child labour law, Cambodian standards are not too low. The minimum age for employment is set at fifteen years, and children between the ages of twelve and fifteen are permitted to do light work that is not hazardous and does not affect regular school attendance. The Labour Law also prohibits work that is hazardous to the mental and physical development of children under the age of eighteen, but the law does not define what types of work are considered hazardous. Lists of working children below the age of eighteen must be kept with employers and submitted to the labour inspector. However, the laws only apply to the formal sector and law enforcement is difficult. In 1999, Cambodia ratified ILO Convention No. 182. There is however no proof that this was the result of the conclusion of the US–Cambodia TA.

There is still a high incidence of child labour. In 2001, according to estimates of the National Institute of Statistics, 44.8 per cent of children aged five to fourteen years in Cambodia were working.

(2) Implementation
According to para. 10 (D) of the US–Cambodia TA, the US Government determines each year whether the Cambodian working conditions referred to substantially comply with Cambodian labour law and internationally recognised standards. If so, the import quotas are increased by 14 per cent for the following year. In the Memorandum of Understanding, the US and Cambodian Governments increased the potential quota reward for full compliance from 14 to 18 per cent. If the US Government determines that the Government of Cambodia subsequently fails to take major action resulting in a significant change in working conditions, the US Government may withdraw such an increase of quotas.

274 Ibid., p. 72.
275 Ibid., p. 72.
276 Ibid., p. 71.
278 Para. 10 (D) of the US–Cambodia TA.
The Government of Cambodia must endeavour to finance this programme with the help of the Cambodian textile and apparel industry and international organisations.\textsuperscript{279} In addition, the US Government must help Cambodia to obtain financial assistance.\textsuperscript{280}

The ILO with its ‘Better Factories Cambodia’ multi-donor project helped the industry to improve working conditions.\textsuperscript{281} The ILO introduced a monitoring and reporting system including unannounced visits to the factories and publishing results on a website.\textsuperscript{282} In addition, the ILO provided training opportunities to improve working conditions.\textsuperscript{283} There is a consensus including workers’ organisations that the ILO project supporting the US–Cambodia TA was successful.\textsuperscript{284}

In contrast to the trade agreements described above, it does not provide for a dispute settlement mechanism.

Although the implementation mechanism for labour standards is rather rudimentary in comparison with the other FTAs mentioned, it has one major advantage: it is based on trade incentives, so-called positive conditionality. This approach has the advantage that trade relations will not be interrupted when labour standards are not adequately enforced; only additional preferences might be withdrawn or not granted in the first place. As will be seen, this approach is also used in the EU and US GSP.\textsuperscript{285}

The other advantage is the provision regarding financial assistance granted to the Government of Cambodia from the private sector, international organisations and, in part, from the US Government.

However, the whole Agreement is rather a unilateral approach risking being used in a biased or protectionist way: the US Government has complete discretion in evaluating the implementation of labour standards and in influencing the resulting trade effects.

Despite the shortcomings mentioned, the approach of the US–Cambodia TA has been perceived as very successful by the US and Cambodian Governments.\textsuperscript{286} There have been significant and widespread

\textsuperscript{279} Para. 10 (E) of the US–Cambodia TA.
\textsuperscript{280} Para. 10 (E) of the US–Cambodia TA.
\textsuperscript{282} Ibid.
\textsuperscript{283} Ibid.
\textsuperscript{284} Ibid., pp. 37 and 41.
\textsuperscript{285} See below p. 285 and p. 300.
improvements in wages, working conditions and respect for workers’ rights. The US Government increased Cambodia’s garment export quotas by 9 per cent in 2000 and 2001, by 12 per cent in 2002, by 14 per cent in 2003 and by 18 per cent in 2004. A key factor contributing to the success of the Agreement was the ILO ‘Better Factories Cambodia’ programme operated in conjunction with the US–Cambodia TA. From 1999 to 2004, the US Government contributed about US $2 million to the ILO ‘Better Factories Cambodia’ programme. The ILO published its findings on its website. Therefore, quota increases could be exactly determined and international retailers could adapt their orders to the social performance of factory managers.

As regards child labour, the Agreement was very successful: whilst there was still evidence of child labour in 2004, there were no confirmed instances of child labour in 2005.

Reasons for the success might have been the following: firstly, possible quota increases were incentives for both the Cambodian Government and individual firms to improve working conditions. Secondly, the quota increase was dependent on the sector-wide social performance of companies. Thus, there could not be any free-riders.

c) Conclusion

The main lesson to be drawn from the success of the US–Cambodia TA is that trade incentives are a more efficient means of improving working conditions than punitive trade measures, in particular when they are linked to ILO/IPEC implementation programmes. In contrast to the vague results of the US FTAs analysed above, in this case concrete results were achieved. The Agreement was most successful regarding child labour: by 2005, no instances of child labour were revealed. It should be noted that the success of the US–Cambodia TA is probably partly due

---

287 Ibid.
288 Wells, “Best Practice”, 363.
290 Wells, “Best Practice”, 364.
293 Ibid.
294 Ibid.
to the fact that the textile industry makes up 80 per cent of Cambodian exports, being of key interest to the Government and industry.\textsuperscript{295}

When devising a future multilateral social clause, several factors have to be taken into account. Firstly, because of the end of the quota system, different trade incentives would have to be introduced. Secondly, a more balanced system taking into account the interests of all parties would have to be conceived. In particular, when determining the quota increase, the country concerned should participate in the evaluation process of the labour rights situation. Most importantly, the labour rights referred to should be based on ILO conventions, in the case of child labour ILO Conventions No. 138 and 182. Thirdly, in the case of failure to enforce labour standards, a withdrawal mechanism including a complaints system with a right of appeal should be introduced. In sum, a future multilateral social clause based on trade incentives would also have to draw upon the experience of the other trade agreements including their cooperation and dispute settlement systems.

When negotiating a multilateral clause, one outcome of the US–Cambodia FTA should be referred to: Cambodia now has a reputation for high labour standards, which is crucial to its continuing export competitiveness.\textsuperscript{296} As mentioned above, high labour standards are of utmost importance for the brand image of trading partners.

It should be kept in mind that the US is one of the strongest economies worldwide whereas Cambodia is amongst the poorest countries in the world. Similar incentive mechanisms on a global level clearly would have to consider the interests of the developing countries more.

III. \textit{EU Economic Agreements}

1. The Cotonou Agreement

\textit{a) The objective of the Cotonou Agreement}

The Cotonou Agreement establishes the framework agreement for the conclusion of EPAs and states as one of its objectives the economic, cultural and social development of the ACP states, Art. 1 of the Agreement. The eradication of poverty is at the centre of the partnership. The partnership provides a support framework for the development strategies adopted by each ACP state. Regarding the new trading arrangements, Art. 36 (3) states that the non-reciprocal trade preferences applied

\textsuperscript{295} Wells, “Best Practice”, 366.

\textsuperscript{296} Ibid., p. 374.
under the Fourth ACP–EC Convention must be maintained during the preparatory period. This preparatory period was intended to finish by the end of 2007 when the EPAs should have been signed.\textsuperscript{297}

The question is whether the abolition of child labour is adequately addressed and, if so, whether this will also be the case under future EPAs.

\textbf{b) Institutional structure}

According to Art. 14 of the Agreement, the joint institutions are the Council of Ministers, the Committee of Ambassadors and the Joint Parliamentary Assembly.

The Council of Ministers is the decision-making body. It consists of members of the Council of the European Union, members of the EU Commission and members of each ACP state, Art. 15 (1) of the Cotonou Agreement. In accordance with Art. 15 (2) and (3), the Council conducts political dialogue, adopts policy guidelines regarding development strategies, resolves conflicts, makes binding decisions and adopts resolutions and recommendations. It is noteworthy that the Council must conduct an ongoing dialogue with representatives of civil society, Art. 15 (3).

The Committee of Ambassadors assists the Council in carrying out its tasks, Art. 16 of the Agreement. It consists of the permanent representatives of each member state to the EU and a representative of the Commission and of the head of mission of each ACP state to the EU, Art. 16 (1).

The Joint Parliamentary Assembly is a consultative body, Art. 17 (2) of the Agreement. It consists of members of the EU Parliament and of members of the parliament of each ACP state. The Assembly adopts resolutions and makes recommendations to the Council of Ministers with a view to achieving the objectives of this Agreement, Art. 17 (2).

It is noticeable that, in contrast to the US FTAs, there is no secretariat consisting of independent staff to carry out the tasks of the Council of Ministers. Although a secretariat alone may not ensure more objectivity, it is recommendable to provide for bodies consisting of independent experts with some power to initiate research when devising international agreements.

On a positive note, Art. 6 of the Agreement states explicitly that civil society will be involved in the implementation. Most importantly, members of parliament are involved in the governance structure.

c) Social clauses
As mentioned above, the Cotonou Agreement provides for a human rights clause as well as a clause on trade and labour standards with different enforcement provisions. In addition, there are provisions on social development including children’s rights.

(1) Wording
The revised human rights clause contained in Art. 9 reads:

Essential elements regarding human rights, democratic principles and the rule of law, and fundamental element regarding good governance.

1. Cooperation shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights.
   Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.

2. The Parties refer to their international obligations and commitments concerning respect for human rights. They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. Human rights are universal, indivisible and inter-related. The Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural. . . .

   Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute essential elements of this Agreement. . . .

4. The Partnership shall actively support the promotion of human rights, processes of democratization, consolidation of the rule of law, and good governance.
   These areas will be an important subject for the political dialogue. In the context of this dialogue, the Parties shall attach particular importance to the changes underway and to the continuity of the progress achieved. This regular assessment shall take into account each country’s economic, social, cultural and historical context.

   These areas will also be a focus for development strategies. The Community shall provide support for political, institutional and legal reforms and for building the capacity of public and private actors and civil society in the framework of strategies agreed jointly between the State concerned and the Community.
Thus, in contrast to former human rights clauses contained for example in Art. 5 of the Lomé IV (1989), Art. 9 not only refers to human rights as an essential element of the Agreement but reiterates the human rights obligations of the parties under human rights law and states explicitly that the parties undertake to promote and protect political, economic, social and cultural rights. In addition, respect for human rights 'shall underpin' their policies. Thus, the Agreement contains a positive obligation.298

As indicated in Art. 9 (4), human rights shall be mainly implemented through political dialogue. The revised Art. 8 of the Agreement on political dialogue explicitly states:

1. The Parties shall regularly engage in a comprehensive, balanced and deep political dialogue leading to commitments on both sides.
2. The objective of this dialogue shall be to exchange information, to foster mutual understanding, and to facilitate the establishment of agreed priorities and shared agendas, in particular by recognizing existing links between the different aspects of the relations between the Parties and the various areas of cooperation as laid down in this Agreement. The dialogue shall facilitate consultations between the Parties within international fora. The objectives of the dialogue shall also include preventing situations arising in which one Party might deem it necessary to have recourse to the consultation procedures envisaged in Art. 96 and 97.
4. . . . The dialogue shall also encompass a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance.
6. The dialogue shall be conducted in a flexible manner. The dialogue shall be formal or informal according to the need, and conducted within and outside the institutional framework, including the ACP Group, the Joint Parliamentary Assembly, in the appropriate format and at the appropriate level, including regional, sub-regional or national level.
6a. Where appropriate, and in order to prevent situations arising in which one Party might deem it necessary to have recourse to the consultation procedure foreseen in Article 96, dialogue covering the essential elements shall be systematic and formalized in accordance with the modalities set out in Annex VII.
7. Regional and sub-regional organisations as well as representatives of civil society organisations shall be associated with this dialogue.

The non-compliance clause contained in Art. 96 relating to human rights implementation reads:

Essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law

1. Within the meaning of this Article, the term ‘Party’ refers to the Community and the Member States of the European Union, of the one part, and each ACP State, of the other part.

1. (a) Both Parties agree to exhaust all possible options for dialogue under Art. 8, except in cases of special urgency, prior to commencement of the consultations referred to in paragraph 2 (a) of this Article;

2. (a) If, despite the political dialogue on the essential elements as provided for under Art. 8 and paragraph 1(a) of this Article, a Party considers that the other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of Article 9 (2), it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the Party concerned to remedy the situation in accordance with Annex VII.

The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution.

The consultations shall begin no later than thirty days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In any case, the consultations shall last no longer than 120 days.

If consultations do not lead to a solution acceptable to both Parties, if consultation is refused, or in cases of special urgency, appropriate measures may be taken. These measures shall be revoked as soon as the reasons for taking them no longer prevail.

(b) The term ‘cases of special urgency’ shall refer to exceptional cases of particularly serious and flagrant violation of one of the essential elements referred to in paragraph 2 of Article 9, that require an immediate reaction. The Party resorting to the special urgency procedure shall inform the other Party and the Council of Ministers separately of the fact unless it does not have time to do so.

(c) The ‘appropriate measures’ referred to in this Article are measures taken in accordance with international law, and proportional to the violation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be a measure of last resort.
If measures are taken in cases of special urgency, they shall be immediately notified to the other Party and the Council of Ministers. At the request of the Party concerned, consultations may then be called in order to examine the situation thoroughly and, if possible, find solutions. These consultations shall be conducted according to the arrangements set out in the second and third subparagraphs of paragraph (a).

Annex VII is titled ‘Political Dialogue as regards Human Rights, Democratic Principles and the Rule of Law’ and provides for detailed modalities for the political dialogue preceding consultations under Article 96. Accordingly, political dialogue pursuant to Art. 8 and 9 (4) of the Agreement preceding such consultations is made obligatory, it should follow the Guidelines for ACP–EU Political Dialogue and be within the parameters of internationally recognised standards and norms, use jointly agreed benchmarks and be systematic and formal. All options must be exhausted prior to consultations under Art. 96. In exceptional cases, parties may go ahead without such intensified political dialogue, para. 4 of Annex VII. Annex VII also stipulates that consultations under Art. 96 must strive to promote equality in the level of representation, be transparent, use flexible timeframes and acknowledge the role of the ACP Group. The parties must also acknowledge the need for structured and continuous consultations under Article 96 of the Agreement.

The clause on trade and labour contained in Art. 50 reads:

Trade and Labour Standards

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

2. They agree to enhance cooperation in this area, in particular in the following fields:
   - exchange of information on the respective legislation and work regulation;
   - the formulation of national labour legislation and work regulation;
   - educational and awareness-raising programmes;
   - enforcement of adherence to national legislation and work regulation.

3. The Parties agree that labour standards should not be used for protectionist trade purposes.
This provision is located in Chapter 5 on trade-related areas. Art. 44 of the Agreement provides for general provisions on trade-related areas and states that the European Community will support the ACP states’ efforts to strengthen their capacity to handle all areas related to trade including improving and supporting the institutional framework.

In addition, Art. 26 lit. a, under the heading of social and human development, stipulates that cooperation shall aim at protecting children’s rights, especially those of girl children. Art. 26 lit. d states that cooperation shall aim at reintegrating into society children in post-conflict situations through rehabilitation programmes. This refers to former child soldiers.

While the Compendium on Cooperation Strategies drafted by the European Commission does not give detailed explanations on trade and labour cooperation, it does explain education and training cooperation provided for in the Agreement. In particular, cooperation must support the ACP states’ efforts to reform basic educational institutions in particular by providing overall primary education coverage. The European Community and its member states must allocate more resources to support education.

Art. 98 provides for dispute settlement stating that any dispute arising from the interpretation or application of this Agreement between one or more member states or the European Community, on the one hand, and one or more ACP states on the other hand must be submitted to the Council of Ministers. Each party may appoint an arbitrator. In case one or both parties fail to do so, either party may ask the Secretary-General of the Permanent Court of Arbitration to appoint the second arbitrator. Unless decided otherwise, the procedure applied shall be that laid down in the optional arbitration regulation of the Permanent Court of Arbitration for International Organizations and States. The parties to the dispute are bound to the measures necessary to carry out the decision of the arbitrators. It should be noted that although the parties are bound to carry out the measures necessary to implement the decision of the arbitrators, there are no rules for compliance or retaliation as in the US FTAs.

Regarding the substance of labour rights, it is notable that both clauses on human rights and trade and labour refer to international human rights law. The latter also explicitly relates to ILO conventions.

Respect for human rights is mainly ensured through political dialogue as provided for in Art. 8 and Art. 9 (4). It is notable that the civil society organisations are involved in this dialogue. In addition, Art. 9 (4) of the Cotonou Agreement envisages development strategies and capacity building provided by the EU as an instrument for implementing human rights.

The human rights clause in conjunction with the non-compliance clause contained in Art. 96 of the Cotonou Agreement provides for a sanction-based system: if a party fails to fulfil its human rights obligations, after an intensified and formalised political dialogue, the other party may invite the defaulting state to hold consultations, and, if these are not successful, the other party may adopt appropriate measures. These include suspension of the treaty as a measure of last resort. Hence, trade measures are possible under the non-compliance clause. The Council of Ministers is provided with information.

The question arises whether the prohibition of child labour is a human rights obligation within the meaning of the human rights clause including its non-compliance clause. As analysed in Chapter 2, the prohibition of economic exploitation of children is contained in various UN and ILO conventions on human rights and can qualify as *ius cogens*. Moreover, the CRC and the ICESCR, which explicitly prohibit the economic exploitation of children, are explicitly mentioned in the Preamble to the Cotonou Agreement. The human rights clause in its Art. 9 (2) also refers to economic and social rights. In addition, the European Commission explicitly mentioned that the core labour standards, which include the effective abolition of child labour, fall within the realm of the human rights clause. Thus, the human rights clause and the non-compliance clause may be read to include the prohibition of child labour. Hence, it would be possible to invite the other party to

---

consultations if the other party violated its human rights obligation in relation to the prohibition of child labour, i.e. the adoption of legislative, administrative, social and educational measures including labour inspection and reintegration measures as well as international cooperation and assistance. As a measure of last resort, it would be possible to impose trade measures if child labour occurs on a large scale.

It should however be noted that Art. 96 (2) lit. c states that ‘appropriate measures’ are only measures in accordance with international law. In particular, measures must be proportionate to the violation. Hence, the measures adopted must comply with the proportionality requirement of international law contained in Art. 51 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, according to which countermeasures must be commensurate with the injury suffered. In addition, Art. 96 (2) lit. a stipulates that they must be the least disruptive measures in relation to the application of the Agreement. In the light of the fact that economic development and integration into the world economy are central objectives, the suspension of trade concessions or development finance cooperation must be carefully chosen. Thus, suspension of trade preferences should be product-specific and should avoid a full suspension or termination of the agreement.

Since the human rights clause in conjunction with the non-compliance clause of the Cotonou Agreement explicitly provides for suspension of the treaty as a measure of last resort in case a party fails to fulfil its human rights obligations and provides for a special procedure, these clauses may be regarded as *lex specialis* to Art. 60 of the VCLT on the suspension of treaties.

The preceding human rights clause contained in Art. 5 of Lomé IV (1989) was applied in several cases regarding serious human rights violations. For example, in the case of Sudan, Liberia, Somalia and Rwanda, the European institutions suspended foreign aid based on the Fourth Lomé Convention. Other cases concern human rights

---

301 See above, p. 120.
304 For an excellent overview, see ibid., p. 458 et seq.
305 Ibid., pp. 458–76.
violations in the context of violation of democratic structures.\textsuperscript{306} However, in many cases, there was no official reference to Art. 5 of the Lomé IV (1989) Treaty.\textsuperscript{307} More importantly, in cases such as Rwanda, Sudan, Liberia and Somalia, where civil wars were also going on, the distinction between a suspension from a treaty obligation due to human rights violations or because of pure pointlessness becomes blurred.\textsuperscript{308}

The non-compliance clause of the Cotonou Agreement was applied in the case of Zimbabwe in relation to serious violations of human rights and democratic principles.\textsuperscript{309}

With regard to the use of trade measures, it should be noted that, to date, there has been no case where the human rights clause of either the Lomé Convention or the Cotonou Agreement was used as a basis for imposing trade measures.\textsuperscript{310} Only financial aid was suspended. Trade measures in response to human rights violations might however be possible in the future given the explicit mention of the possibility of treaty suspension in the non-compliance clause of the Cotonou Agreement. This is all the more the case in the light of the fact that trade measures are also made use of under other EU trade regimes such as the GSP.\textsuperscript{311}

The failure of a party to cooperate on the elimination of the worst forms of child labour can also be the subject of dispute settlement. Art. 50 (2) obliges the parties to cooperate in this field and is fully subject to the dispute settlement mechanism pursuant to Art. 98. At the same time, as analysed above, state obligations under the Worst Forms of Child Labour Convention comprise international cooperation and are thus subject to the human rights non-compliance clause of Art. 96. While Art. 98 is silent on the use of trade measures in order to enforce the decision of the arbitrators, the imposition of trade measures is possible under Art. 96. Therefore, it is not clear which mechanism the parties had in mind for the resolutions of disputes on human rights obligations in relation to child labour.

\textsuperscript{306} Ibid., pp. 476–527.
\textsuperscript{308} Ibid., p. 740.
\textsuperscript{311} See below p. 300.
Considering that Art. 50 (3) explicitly states that labour standards should not be used for protectionist purposes, it is arguable that failure to cooperate on trade and labour issues should be exclusively solved under the dispute settlement where the use of trade measures is not explicitly provided for. Taking into account the historical application of the human rights clause, possibly only serious human rights violations such as the widespread use of forced child labour would be dealt with under the non-compliance clause. As will be recalled, so far only serious human rights violation, often in the context of civil wars, triggered the application of the human rights clauses and the related non-compliance clause under Art. 5 of the Lomé IV (1989) Treaty and the Cotonou Agreement.

It remains to be seen whether the future EPAs make obligations with respect to trade and labour cooperation subject to dispute resolution including trade measures as retaliation measures. An indication may be the solution of the CARIFORUM–EU EPA, which will be discussed below.

In any event, as regards a future social clause on child labour, it would be recommendable to reconcile these provisions and to establish a system based on dispute resolution preceded by dialogue and consultation. While the non-compliance clause now provides for a more formalised process than before, it is rather a political process based on consultations and countermeasures in accordance with public international law than a dispute settlement mechanism. Since a dispute settlement procedure provides for an objective assessment of the facts and a legal analysis, dispute settlement systems modelled on the US FTAs might be preferable for future social clauses on child labour. There could also be exceptions for immediate action in cases of extremely grave violations of children’s rights.

(3) Further cooperation and capacity building provisions

Falling short of the US FTAs as regards dispute resolution in the case of labour rights violations, it is however positive that the Cotonou Agreement provides for detailed cooperation and capacity building provisions under the human rights clause, the trade and labour provision and the provisions on social development. It is for example laudable that Art. 26 explicitly refers to the rights of children and in particular primary education as an area of cooperation. It is also notable that Art. 44 provides that the EU shall support the ACP states’ efforts to strengthen their capacity to handle all areas related to trade. The accompanying Compendium on Cooperation Strategies equally states that the
European Community shall allocate more resources to support education. While the NAALC and other US FTAs also provide for cooperative activities and refer to technical assistance, the approach of the Cotonou Agreement is more explicit on children’s rights and education. Most importantly, it refers more concretely to the allocation of resources. In this context, it should also be noted that the Cotonou Agreement differs from US FTAs (and other EU trade agreements) to the extent it dedicates its complete Part 4 to development finance cooperation. Art. 55 states that development finance cooperation aims at supporting and promoting the efforts of ACP states to achieve the objectives set out in the Agreement through the provision of adequate financial resources and appropriate technical assistance. According to Art. 79, technical cooperation shall *inter alia* encourage the participation of educational institutions in contracts financed from the Fund and develop action programmes for long-term institution building. According to Art. 83, an ACP–EC Development Finance Cooperation Committee should be set up to overview and implement development finance cooperation. It consists of representatives of the ACP states and of the European Community.

Whilst the detailed cooperation provisions including capacity building and the development finance cooperation are clearly noteworthy instruments, the question arises whether such provisions are feasible in a future global agreement.

### 2. CARIFORUM–EU Economic Partnership Agreement

The EPA between the CARIFORUM states and the European Community and its member states has been initialled as of 16 December 2007.\(^{312}\)

#### a) Objective of the CARIFORUM–EU EPA

In line with the Cotonou Agreement, the central objectives are the reduction and eradication of poverty through the establishment of a trade partnership for sustainable development as well as establishing a

---

transparent regulatory framework for trade and investment. In contrast to the Cotonou Agreement, it does not provide for non-reciprocal preferences but supports asymmetrical trade liberalisation.

b) Institutional structure
According to Art. 227 (1) of the Agreement, the Joint CARIFORUM–EC Council shall supervise the implementation of the Agreement. It is composed of members of the Council of the EU and the European Commission on the one hand, and, on the other hand, of representatives of the Governments of the CARIFORUM states. It has decision-making power.

The CARIFORUM–EC Trade and Development Committee composed of the representatives of the parties at senior levels assists the Joint CARIFORUM–EC Council in the performance of its duties. In particular, it supervises the proper application of the Agreement and makes recommendations in the area of trade and development. It has decision-making powers where the Council has them delegated to it.

The CARIFORUM–EC Parliamentary Committee consists of members of the European Parliament and the CARIFORUM states legislatures. It may request information with regard to the implementation of the Agreement and may make recommendations to the Council and the CARIFORUM–EC Trade and Development Committee. Thus, it does not have any decision-making power.

Finally, the CARIFORUM–EC Consultative Committee promotes dialogue and cooperation between representatives of civil society and social and economic partners. It may make recommendations to the Council and the CARIFORUM–EC Trade and Development Committee.

In sum, the institutional structure is quite similar to that of the Cotonou Agreement. It would be recommendable to have a secretariat.

313 Art. 1 (a) and (b) of the CARIFORUM–EU EPA.
314 Art. 1 (f) of the CARIFORUM–EU EPA.
315 Art. 228 (1) of the CARIFORUM–EU EPA.
316 Art. 229 (1) of the CARIFORUM–EU EPA.
317 Art. 230 (1) of the CARIFORUM–EU EPA.
318 Art. 230 (3) of the CARIFORUM–EU EPA.
319 Art. 230 (4) (d) of the CARIFORUM–EU EPA.
320 Art. 231 (2) of the CARIFORUM–EU EPA.
321 Art. 231 (5) and (7) of the CARIFORUM–EU EPA.
322 Art. 232 (1) of the CARIFORUM–EU EPA.
323 Art. 232 (5) of the CARIFORUM–EU EPA.
consisting of independent experts rather than representatives of the parties. It is however positive that members of the parliament and even civil society through the Consultative Committee may make recommendations to the Council and the CARIFORUM–EC Trade and Development Committee.

c) Social clauses
(1) Scope and content of the norms
Art. 2 (1) of the CARIFORUM–EU EPA explicitly refers to the human rights clause contained in Art. 9 of the Cotonou Agreement. As will be recalled, this clause establishes human rights obligations of the parties including the prohibition of child labour. According to Art. 9 (4) of the Cotonou Agreement, human rights are an important area of political dialogue. In addition, Art. 241 (2) of the CARIFORUM–EU EPA explicitly refers to the consultation procedure and the adoption of appropriate measures including trade-related measures under the non-compliance clause of Art. 96 of the Cotonou Agreement. Since Art. 96 of the Cotonou Agreement refers to Annex VII on Political Dialogue, Art. 96 should be read in conjunction with Annex VII also when applied under the CARIFORUM–EU EPA.

In comparison to the Cotonou Agreement, the CARIFORUM–EU EPA contains relatively strict rules as regards respect for labour standards and the behaviour of investors. Art. 72 of the CARIFORUM–EU EPA states that the parties shall cooperate and shall, through the adoption of domestic regulation, ensure that investors act in accordance with the core labour standards as defined by the ILO Declaration on Fundamental Principles and Rights at Work. In addition, they shall ensure that investors do not circumvent international labour agreements, which the parties have ratified. These obligations shall apply ‘within their respective territories’, i.e. not extraterritorially. Thus, an EU regulation that stipulates that investors in Barbados may not employ children is not encompassed by this provision. According to Art. 73 of the CARIFORUM–EU EPA, the parties must not encourage investment by lowering domestic labour standards.


325 Art. 72 (c) of the CARIFORUM–EU EPA.
These obligations are fully subject to the consultation and dispute settlement procedures contained in Part III of the CARIFORUM–EU EPA, which will be described below.

Art. 191–6 contained in Chapter 5 regulate ‘social aspects’ of the EPA. Reaffirming their commitment to the core labour standard as defined by the ILO Declaration on Fundamental Principles and Rights at Work in Art. 191, the parties have committed themselves in Art. 192 to ensure that their own labour legislation provides for and encourages high levels of protection. They shall also ‘strive to continue to improve those laws and policies’. In addition, Art. 193 explicitly states that the parties will not lower the level of protection or fail to apply labour legislation in order to encourage trade or foreign direct investment.

Art. 195 of the CARIFORUM–EU EPA provides for a consultation and monitoring process. The parties may consult each other and the Consultative Committee on social issues and seek advice from the ILO. According to Art. 195 (4), the parties may seek consultations with the other party on matters concerning the application and interpretation of Art. 191–4 and the consultations must not exceed three months. If the matter is not resolved, a Committee of Experts consisting of three experts may be convened to examine the case and deliver a report within three months.326

Finally, Art. 196 stipulates that the parties must cooperate by exchanging information, formulating labour legislation and policies with regard to a decent work agenda, education and awareness raising programmes and enforcement of labour laws, including promoting corporate social responsibility.

The obligations on consultation and cooperation are also much more far-reaching than those under the Cotonou Agreement.

Any dispute regarding the interpretation and application of the EPA is subject to consultations and dispute settlement procedures.327 While the provisions on labour and investment are fully subject to the dispute settlement mechanism, some rules do not apply to Chapter 5 on social aspects. This concerns for example the consultation process: whereas the normal consultation process may not exceed sixty days,328 the consultation process in social issues may not exceed nine months and may

326 Art. 195 (5) and (6) of the CARIFORUM–EU EPA.
327 Art. 203 (1) of the CARIFORUM–EU EPA.
328 Art. 204 (3) of the CARIFORUM–EU EPA.
include the establishment of a Committee of Experts. In both cases however, the parties may seek recourse to a mediator.

The parties may seek the establishment of an arbitration panel, which consists of three arbitrators. In the case of a dispute on social matters, the panel rightly must include at least two members with special expertise. The panel must submit an interim report no later than 120 days from its establishment, which the parties may comment on. The final report must be submitted no later than 180 days after the panel’s establishment. In the case of social matters, it must include a recommendation on how to ensure compliance with the relevant provisions.

If there is disagreement on the reasonable period to comply with the recommendation, the panel determines the length of the period, taking into account the normal period for the adoption of legislative measures.

If the parties disagree on the compatibility of the measure with the provisions of the EPA, they may request the establishment of a panel, which will decide the matter within ninety days. If the panel decides that the party complained against did not comply with the provisions of the EPA, that party shall offer compensation.

According to Art. 212 (2) of the CARIFORUM–EU EPA, if no agreement on compensation has been reached within thirty days after the panel ruling, the complaining party may adopt ‘appropriate measures’, taking into account the objectives of the EPA and the impact of the measures on the economy of the defending party. In the case of social matters, appropriate measures must not include the suspension of trade concessions. This is different to the US FTAs analysed above, which all provide for trade measures as a measure of last resort.

The complaining party may request a panel to review any measures taken to comply with the ruling after the adoption of appropriate measures, if it does not agree on the measure taken.

---

329 Art. 204 (6) in conjunction with Art. 195 (3), (4) and (5) of the CARIFORUM–EU EPA.
330 Art. 205 (1) of the CARIFORUM–EU EPA.
331 Art. 207 (4) of the CARIFORUM–EU EPA.
332 Art. 208 of the CARIFORUM–EU EPA.
333 Art. 209 (1) of the CARIFORUM–EU EPA.
334 Art. 209 (3) of the CARIFORUM–EU EPA.
335 Art. 211 (3) of the CARIFORUM–EU EPA.
336 Art. 212 (2) of the CARIFORUM–EU EPA.
337 Art. 213 (1) of the CARIFORUM–EU EPA.
338 Art. 213 (2) of the CARIFORUM–EU EPA.
339 Ibid.
340 Art. 214 of the CARIFORUM–EU EPA.
Having examined briefly the social clauses and their enforcement mechanisms, it should be noted that the general exception clause explicitly refers to child labour. Art. 224 (1) lit. a holds that members are allowed to adopt measures that are ‘necessary to protect . . . the public morals’. A footnote to the term ‘public morals’ states that such measures may include measures to combat child labour. Thus, the parties potentially could adopt labelling schemes or even import bans of products made with child labour. Hence, in contrast to the investment regulation of Art. 72, which is limited to territorial measures, trade measures on child labour with extraterritorial effects are allowed. Given that such measures have to be necessary, are subject to the prohibition of arbitrary or unjustifiable discrimination and should not be a disguised restriction on trade, this is to be welcomed. As will be seen later in this chapter, trade measures may function quite well as initiators of action to combat child labour.

(2) Assessment

As the Cotonou Agreement, the CARIFORUM–EU EPA provides for a human rights clause including a non-compliance clause and a chapter on social and labour matters subject to a dispute resolution procedure. The obligations under the chapter on social matters relate primarily to the enforcement of domestic labour laws and have the same shortcomings as those under the US–Jordan FTA in that they only oblige the parties ‘to strive to continue to improve’ labour laws in accordance with the ILO Declaration on Fundamental Principles and Rights at Work. However, they are much more far-reaching than those relating to trade and labour standards under the Cotonou Agreement. The obligation not to lower labour standards in order to attract investment or encourage trade is even stricter than the corresponding one contained in Art. 6 (2) of the US–Jordan FTA, which obliges the parties to ‘strive’ to refrain from relaxing labour laws in order to encourage investment. Neither the NAALC nor the US–Chile FTA explicitly subject this obligation to the dispute settlement procedure.

It is positive that the CARIFORUM–EU EPA provides for such a detailed dispute settlement mechanism including rules for compliance and retaliation. As under the NAALC, there is a graded system of penalties comprising compensation and the suspension of trade concessions. However, trade concessions are ruled out in the case of social and labour matters. In addition, in the case of labour matters, the consultation process is much longer, and the panel must comprise at least two
experts in the field of labour and social standards. While the latter rules may have a positive effect, ensuring that labour matters are adequately dealt with, it is deplorable that trade concessions are not available in the case of labour standards. As will be seen below, merely the threat of trade measures can have a stimulating effect.341

However, it should be noted that the provision that prohibits the parties from encouraging foreign direct investment by lowering domestic labour standards contained in Art. 73 of the EPA on investment is fully subject to a dispute settlement mechanism, i.e. the suspension of trade concessions is allowed. It is rightly held that the overlap between Art. 72 and Art. 193 does not exclude the availability of trade measures in case of a dispute on Art. 73. 342 Such a reading would be against the explicit wording of the text on dispute settlement and contrary to the rules of interpretation of Art. 31 of the VCLT.

In addition, the failure of the parties to implement their human rights obligations in relation to child labour is subject to the human rights clause and non-compliance clause of the Cotonou Agreement, under which the suspension of trade concessions may be an ‘appropriate measure’. However, as analysed above, this clause would probably only be applied in the case of widespread and worst forms of child labour.343

It follows that, whilst the CARIFORUM–EU EPA is more advanced than the Cotonou Agreement providing for stricter rules on labour standards that are subject to the dispute settlement mechanism, the relation between the different provisions and their enforcement mechanism has not been adequately solved. It is recommendable for a potential future social clause on child labour to provide only for one dispute settlement mechanism that includes both compensation and trade measures as retaliation measures such as the US FTAs.

(3) Cooperation and capacity building provisions

It is laudable that, in line with the Cotonou Agreement, the EPA relies heavily on financial and non-financial development cooperation. The financing cooperation shall be carried out in accordance with the rules provided for by the Cotonou Agreement involving the European Development Fund. It is noteworthy that cooperation priorities include enhancing the technological and research capabilities of the CARIFORUM

341 See the Bangladeshi example below p. 368 et seq.
states in order to support the development of ‘internationally recognized labour standards’. According to Art. 191, this includes the prohibition of child labour as defined by ILO Conventions No. 138 and 182.

3. The EU–Chile Association Agreement

a) Objective of the EU–Chile Association Agreement

The Agreement establishing an association between the European Community and its member states and the Republic of Chile (EU–Chile Association Agreement) entered into force on 1 March 2005. In divergence from the EPAs, it does not mention the eradication of poverty in its stated objectives but focuses on the promotion of sustainable economic and social development, Art. 1 (2) of the Agreement. It covers in particular the political, commercial, economic and financial, scientific, technological, social, cultural and cooperation fields, Art. 2 (3) of the Agreement. The trade provisions aim inter alia at the progressive and reciprocal liberalisation of trade in goods and services, Art. 55.

b) Institutional structure

The decision-making body is the Association Council, which is composed of members of the Council of the EU and the Foreign Affairs Minister of Chile, Art. 3, 4 and 5 of the Agreement. According to Art. 6, an Association Committee composed of government representatives shall assist the Association Council in carrying out its duties. Art. 7 of the Agreement sets forth that Special Committees may be set up when needed. According to Art. 9 (1) of the Agreement, the Association Parliamentary Committee consists of members of the Chilean National Congress and the European Parliament. It may make recommendations to the Association Council. According to Art. 10 (1), a Joint Consultative Committee composed of members of the European Economic and Social Committee and members of corresponding Chilean institutions shall assist the Association Council in promoting dialogue and cooperation between the various economic and social organisations of civil society in the European Union and those in Chile. In addition, in accordance with Art. 11, the parties shall promote regular meetings of civil society of both countries.

This institutional structure mirrors that of the Cotonou Agreement. It is slightly more innovative in providing for a forum for civil society.

Art. 8 (1) (v) of the CARIFORUM–EU EPA.
However, it also does not establish an independent body to carry out ongoing tasks. Nevertheless, it is positive that members of the parliaments are involved in the governance structure.

c) Social clauses

(1) Scope and content of the norms

Similar to the Cotonou Agreement, the EU–Chile Association Agreement contains both a human rights clause accompanied by a non-compliance provision as well as social cooperation clauses.

The EU–Chile Association Agreement in Art. 1 (1) states that respect for human rights as laid down in the UDHR underpins the policies of the parties and is an essential element of the Agreement.

As in the Cotonou Agreement, the main instrument for ensuring respect for human rights is political dialogue set forth in Art. 12 and 13. According to Art. 12 (1), the parties agree to reinforce their regular dialogue on bilateral and international matters. In accordance with Art. 12 (2), the main objective of this dialogue shall be *inter alia* respect for human rights. Art. 13 provides for meetings at different political levels such as the heads of states, the ministers or other senior officials.

Like the Cotonou Agreement, the EU–Chile Association Agreement contains a non-compliance clause contained in Art. 200. According to Art. 200 (1), the parties must adopt any general or specific measures required for them to fulfil their obligations. If one of the parties considers that the other party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Prior to this, the party must provide the Association Council within thirty days with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the parties, Art. 200 (2). In the case of a violation of the essential elements of the Agreement referred to in Art. 1 para. 1, i.e. human rights, any party may immediately take appropriate measures in accordance with international law, Art. 200 (3). In accordance with Art. 200 (3), the other party may ask for an urgent meeting for a thorough examination of the situation.

In addition, Part III relates to cooperation, including social cooperation. According to Art. 16 of the Agreement, the parties must establish close cooperation aimed *inter alia* at promoting social development and must give priority to respect for basic social rights. Art. 44 (1) lit. b of the Agreement states that the parties will give priority to the creation of employment and to the respect for fundamental social rights, notably by promoting the relevant ILO conventions on *inter alia* the abolition of
child labour. The relevant measures may be coordinated with the relevant organisations, such as the ILO, Art. 44 (3). For example, priority should be given to measures to promote specific programmes for youth, to modernise working conditions, to promote vocational training and to promote respect for human rights. According to Art. 48, the parties recognise the complementary role and potential contribution of civil society in the cooperation process, admitting civil society in consultations and provide financial resources.

According to Art. 182 of the EU–Chile Association Agreement, ‘any matter arising from the interpretation and application of this Part of the Agreement’, i.e. of Part IV on trade-related matters, shall be subject to the dispute resolution procedure.

(2) Assessment
It is positive that the EU–Chile Association Agreement refers to the UDHR as well as to the ILO conventions on child labour in its human rights and social cooperation clauses.

As analysed in Chapter 2, child labour is a contemporary form of slavery condemned by, for example, Art. 4 of the UDHR. Thus, the prohibition of child labour falls within the ambit of the human rights clause of Art. 1 (1) and may be the subject of political dialogue. In addition, Art. 200 (3) lit. b, i.e. the non-compliance clause, allows for immediate action in the case of a violation of essential elements of the Agreement, i.e. respect for human rights. Thus, if child labour happens in the territory of one party, the other party would be entitled to take appropriate measures immediately in accordance with international law, Art. 200 (3). In accordance with the analysis above, the reference to international law should be read as meaning that potential trade measures should be proportional and commensurate with the violation.

Yet, as the EU–Chile Association Agreement also contains a dispute settlement mechanism, the question is whether disputes regarding child labour should instead be resolved under this mechanism.

Art. 44 on social cooperation stipulates that the parties have to give priority to respect for fundamental social rights as protected in the ILO conventions on child labour and to give priority to measures for promoting human rights. This obligation, as well as the human rights obligation in Art. 1 (1), could in principle be the subject of dispute settlement. However, dispute resolution is regulated under Title VIII of Part IV on trade and trade-related measures whereas social cooperation is regulated under Title V of Part III on cooperation. As mentioned above,
Art. 182 merely refers to matters under Part IV of the Agreement. Thus, social cooperation obligations may not be the subject of dispute resolution. Whilst it is laudable to focus on cooperation, it would be preferable to provide for cooperation backed by dispute resolution, as long as recourse to dispute resolution remains a measure of last resort. The US–Chile FTA for example provides both for a detailed cooperation mechanism for labour law backed by a dispute settlement mechanism.

As stated above, as regards a future social clause on child labour, there should be a dispute settlement system preceded by extensive dialogue and consultations. Since a dispute settlement system consists of independent experts who decide on the issue, it provides for an objective assessment of the facts and a legal analysis. Therefore, it is preferable to mere consultations.

Whilst the provision for social cooperation and its participatory approach including civil society is to be welcomed, more detailed provisions with regard to the eradication of child labour and education would have been preferable. The Cotonou Agreement, for example, refers explicitly to cooperation on legislation, education and children’s rights.345 In contrast to the EU–Chile Association Agreement, the Cotonou Agreement and the CARIFORUM–EU EPA also provide for development finance cooperation. This difference might be attributable to the fact that the CARIFORUM–EU EPA and the Cotonou Agreement on their face have more the character of a development cooperation providing for non-reciprocal trade preferences while the EU–Chile Association Agreement has the character of an FTA providing for reciprocal trade liberalisation. The difference also demonstrates the limits of far-reaching support and finance provisions.

4. The EU–Jordan Association Agreement

a) Objective of the EU–Jordan Association Agreement

The Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, was signed on 18 November 1997 (EU–Jordan Association Agreement).346 Its aims are inter alia to establish the conditions for the progressive liberalisation of trade in goods, services and capital, to foster the development of balanced economic and social relations through dialogue and

345 Art. 25 (a), 26 (a) and 50 of the Cotonou Agreement.
cooperation, and to improve living and employment conditions, Art. 1 of the Agreement. In comparison to the Cotonou Agreement, the Agreement focuses less on development and more on free trade.

b) Institutional structure
According to Art. 89, an Association Council is established, consisting of members of the Council and the Commission of the EU and members of the Jordanian Government. It is the decision-making body. The decisions are binding on parties to the Agreement. The Association Council must take appropriate measures to facilitate cooperation and contacts between the European Parliament and the Jordanian Parliament.

An Association Committee also consisting of members of the Council and the Commission of the EU and members of the Jordanian Government is responsible for the implementation of the Agreement and may take decisions for the management of the Agreement, Art. 93 and 94 of the Agreement.

Similar to the other EU economic agreements, these institutions are merely political bodies, not executive bodies consisting of independent experts.

c) Social clauses
(1) Scope and content of the norms
Like the Cotonou Agreement and the EU–Chile Association Agreement, the EU–Jordan Association Agreement provides for a human rights clause accompanied by a non-compliance clause and provisions on social cooperation.

According to Art. 2, relations between the parties shall be based on respect for human rights as set out in the UDHR and constitute an essential element of the Agreement. Art. 3 provides for political dialogue between the parties, which according to Art. 4 shall cover human rights. In accordance with Art. 5, dialogue shall take place at different political levels such as the ministerial level or other diplomatic levels and shall include parliamentary dialogue.

Art. 101 is the non-compliance provision. According to Art. 101 (1), the parties must take all measures to fulfil their obligations under the Agreement in order to attain the objectives. In case of non-fulfilment, either party may take appropriate measures, Art. 101 (2). Prior to this, the complaining party shall supply the Association Council with all relevant information necessary to thoroughly examine the case in order to seek an acceptable solution to the parties. The measures taken must
be the least interfering with the Agreement and are subject to consultations if the other party so requests.

Title VI provides for cooperation in social and cultural matters. According to Art. 80, a regular dialogue between the parties must be established on all social issues of mutual interest. According to Art. 81 in conjunction with Art. 5 of the Agreement, this political dialogue shall facilitate the pursuit of joint initiatives and must take place at regular intervals and shall *inter alia* be conducted in the framework of the Association Council or at senior official level. In addition, Art. 84 stipulates that a working party shall be set up by the Association Council to evaluate continually the implementation of social cooperation.

Art. 82 provides for social cooperation actions. Art. 82 (1) states that economic development should go hand in hand with any economic development, and that priority should be given to basic social rights. In particular, priority should *inter alia* be given to development and consolidation of Jordanian family planning and mother and child protection programmes. Art. 83 states that cooperation shall be coordinated by appropriate international organisations.

Like the EU–Chile Association Agreement, the EU–Jordan Association Agreement also establishes a dispute settlement mechanism contained in Art. 97. According to Art. 97 (1), the parties may refer to the Association Council any dispute relating to the application or interpretation of the Agreement to the Association Council. The Association Council may settle the dispute by means of a decision, Art. 97 (2). The parties are bound to take measures involved in carrying out the decision, Art. 97 (3). If the Association Council does not settle the dispute, three arbitrators are appointed by the Association Council and each party. The decision of the arbitrators must be implemented by the parties. As in the EU–Chile Association Agreement and the Cotonou Agreement, there are no rules for compliance or retaliation.

(2) Assessment

Neither ILO nor UN conventions are cited in the different provisions, only the UDHR is mentioned and ‘basic social rights’. Whilst the protection of children from economic exploitation is arguably part of basic social rights, it would have been preferable to explicitly mention the protection from child labour as contained in the ILO conventions, as the US–Jordan FTA, according to which the parties must strive to protect the rights contained in the ILO Declaration on Fundamental Principles and Rights at Work.
Since according to Art. 2, relations between parties shall be based on human rights and human rights constitute an essential element of the Agreement, non-compliance with human rights is a non-fulfilment of obligations of the Agreement.\(^{347}\)

Thus, in line with the interpretation of the human rights clause of the Lomé IV Convention, the Cotonou Agreement and the EU–Chile Association Agreement, the non-compliance clause would be applicable in the case of child labour.

Since the EU–Jordan Association Agreement also provides for a dispute settlement mechanism, the question is whether disputes regarding child labour may also be resolved under this mechanism.

Art. 82 (1) states that priority should be given to basic social rights. It could be argued that child labour would be a contravention of this obligation. In contrast to the EU–Chile Association Agreement, dispute resolution applies to any dispute arising from the interpretation and application of the whole Agreement. Thus, disputes regarding social cooperation could also be solved under the dispute settlement mechanism. In accordance with the practice under the Cotonou Agreement and the solution under the CARIFORUM–EU EPA and the EU–Chile Agreement, it can be assumed that serious human rights violations in relation to child labour will be solved under the human rights clause while dispute settlement will be used in cases of less importance.

As stated above, in a future social clause on child labour, a mechanism involving dialogue, consultations and dispute resolution modelled on both mechanisms is recommendable.

As the EU–Chile Association Agreement, the EU–Jordan Association Agreement falls short of the detailed cooperation and capacity building provisions of the Cotonou Agreement. This might be due to the fact that the EU–Jordan Association Agreement focuses more on free trade than development cooperation.

5. Conclusion

To date, there has not been evidence of significant progress under the human rights and labour clauses of the EU economic agreements.\(^{348}\) However, the human rights clause of the Cotonou Agreement and the Lomé Conventions were applied in several cases. Before finally


\(^{348}\) Greven, Social Standards, p. 44.
concluding on the effectiveness of the social clauses in regional and bilateral trade agreements, several lessons regarding the design of the social clauses in the EU economic agreements should be drawn.

First of all, it should be noted that there are different categories of EU economic agreements. While the Cotonou Agreement and the CARIFORUM–EU EPA focus more on establishing a framework for development (aiming however at the same time at creating areas of free trade in the future), EU Association Agreements rather are trade agreements focusing on trade liberalisation. This is reflected in the different implementation provisions.

It is positive that the Cotonou Agreement, CARIFORUM–EU EPA, and the EU–Chile Association Agreement refer to the ILO conventions on child labour.

All of the EU economic agreements examined above contain social clauses in the main body of the text but no specific institutions for their implementation exist. While this could enhance coherence in decision-making with regard to trade and labour issues, it would also be desirable to involve labour experts explicitly in the decision-making process.

The main bodies generally are political bodies while independent executive bodies are lacking. Still, it is very innovative that the Cotonou Agreement, the CARIFORUM–EU EPA and the EU–Chile Association Agreement provide for bodies that consist of members of the parties’ parliaments. This democratic element could ensure that human rights and labour issues are dealt with in an objective way.

It is to be deplored that none of the agreements examined above provides for national institutions implementing labour standards similar to the NAOs. Accordingly, to date no ‘labour internationalism’ like under the NAALC has emerged. Still, it is to be welcomed that almost all agreements make reference to civil society. The most far-reaching provisions are contained in the CARIFORUM–EU EPA and the EU–Chile Association Agreement providing for a forum for civil society. However, workers’ representatives are not explicitly mentioned.

All of the EU agreements analysed above provide for a human rights clause as well as trade and labour or social cooperation clauses.

The prohibition of child labour comes within the ambit of the human rights clauses, which are implemented through political dialogue and

349 Since this work focuses on the assessment of social clauses, the economic implications for developing countries of the provisions on development and trade liberalisation will not be evaluated.
non-compliance clauses providing for countermeasures including the suspension of the treaty. Labour issues are also covered by trade and labour or social cooperation clauses that in some cases are subject to the main dispute settlement system. In the light of the existing state practice, it is likely that the non-compliance clause will be applied only in serious cases.

In a future social clause, child labour should be subject to a dispute settlement mechanism that is preceded by extensive dialogue and consultations. While more and more formalised, the existing non-compliance clause is more of a political process that does not ensure an objective assessment of the facts by independent experts.

It is to be welcomed that the EU economic agreements provide for detailed cooperation provisions. The Cotonou Agreement contains the most far-reaching provisions explicitly mentioning children’s rights, primary education, the allocation of resources to ACP countries and development finance cooperation. Whilst the financial provisions are clearly desirable, it is doubtful whether such far-reaching cooperation provisions would be feasible in a future multilateral social clause.

Finally, it should be pointed out that none of the agreements contains a reporting system similar to the one proposed by EU and Latin American trade unions under a social protocol to be included into the EU–MERCOSUR Agreement. Such a monitoring and reporting system including independent bodies similar to the MERCOSUR Committee involving workers’ and employers’ organisations would also be desirable under a multilateral social clause.

IV. Conclusion

To date, the social clauses analysed above have not achieved major improvements for child labourers. In the case of the NAALC, the ‘labour internationalism’ created was the main achievement. Apart from the US–Cambodia TA, which was extraordinarily successful, the remaining free trade agreements have been of rather limited impact. This might be due to their often relatively short existence but also to the reluctance of governments to apply the various enforcement mechanisms. Thus, the first lesson to be drawn is that social clauses in trade agreements are not a panacea for eliminating child labour.

350 Cf. Greven, Social Standards, p. 44.
351 If several implementation mechanisms exist, it should be made explicit which rights may be subject to which mechanism.
However, it is too early to decide definitely whether social clauses are an efficacious means of bringing about substantial changes for child and adult workers. Some of the US FTAs and EU economic agreements analysed above, such as the US–Chile FTA, the EU–Chile Association Agreement and the CARIFORUM–EU EPA, have been in force for a period shorter than four years or, as in the case of the CARIFORUM–EU EPA, have not even entered into force. The first complaint with respect to social clauses in US FTAs has only recently been filed, namely the complaint with regard to the US–Jordan FTA from 2006. Moreover, future social clauses do not necessarily have to be designed in the same way as the ones examined above. Taking the recommendations given above into account, a more effective social clause could be designed.

The strategy of pursuing labour rights provisions in regional and bilateral trade agreements is indeed considered to have the potential to change the quality of regional governance. However, it should be pointed out that regional and bilateral trade agreements are often themselves heavily criticised for their neo-liberal trade agenda providing market access for industrialised countries and putting developing countries at a disadvantage. Therefore, labour rights provisions might be regarded as trade barriers and disguised protectionism. Thus, there should be coherence between a fair trade liberalisation agenda and a labour rights agenda that takes into account the interests of developing countries. In addition, the discrepancy between the protection of investors’ and intellectual property rights and workers’ rights is clearly to be disapproved of. While they should be protected under different procedures, the levels of protection should be brought more into line.

Most importantly, given the numerous existing and forthcoming regional and bilateral trade agreements, the question is not any more whether but how to devise social clauses. Considering that the linkage of trade and labour is already a matter of fact in such agreements, the first question is whether a multilateral social clause would be more

352 Greven, Social Standards, p. 47.
354 The US has already concluded to date about nine bilateral and regional FTAs and is negotiating with about forty countries. The EU to date has concluded about nineteen economic agreements and is negotiating with seventy-six ACP states on EPAs, see www.bilaterals.org/rubrique.php3?id_rubrique=52.
appropriate. The second question is what lessons can be drawn from regional and bilateral agreements.

With respect to the first question, the answer is that a multilateral clause might be more appropriate. A multilateral clause that establishes a global framework would place all countries on the same footing. For example, it could help to reduce ‘beggar-thy-neighbour’ competition between countries when replacing children with adult workers in the export industry as described in Chapter 1.\(^{355}\) The ‘lower cost’ factor contributing to child labour and ‘race to the bottom’ arguments could be addressed. As stated above, a future global social clause could also accommodate the lessons drawn from regional social clauses. For example, it could be designed in a more objective and transparent way taking into account the potentially different development needs of developing countries and their child labourers.

Before summarising the main lessons from the US and EU regional and bilateral trade or economic agreements, the different approaches of the US and EU agreements should be highlighted. Whilst US FTAs generally provide for the obligation to enforce domestic labour standards implemented by cooperation, consultation and dispute resolution mechanisms including trade measures, EU economic agreements provide for both a human rights clause accompanied by a non-compliance clause and social or trade and labour cooperation provisions. While serious cases such as widespread and forced child labour will be arguably dealt with under the human rights clause, less grave cases will be dealt with under the regular dispute settlement.

A potential future multilateral clause on child labour should provide for a dispute settlement mechanism that ensures an objective assessment of the facts and contains adequate enforcement provisions. This is preferable to the political implementation system of the non-compliance clause. While it is true that the dialogue and cooperation provisions of the EU agreements are more far-reaching, there is no reason why these cannot be linked to a dispute resolution process. The US–Chile FTA for example provides for a detailed cooperation mechanism as well as a dispute resolution procedure.

The recommendations for a multilateral clause on child labour are as follows. It is recommendable to have a separate agreement with special bodies consisting of staff with labour rights expertise and at least one

\(^{355}\) Since products made by adults are generally more expensive, countries using adult workers might be at a slight competitive disadvantage, see above p. 30.
executive body consisting of independent experts. Otherwise there is the risk that trade interests prevail over labour issues. While a Parliamentary Assembly would be desirable, at the current stage, it is only realistic at the global level if it has merely an advisory role and only meets after long time intervals. Civil society and workers’ representatives should have a role in the decision-making, cooperation and consultation process. It is rightly argued that to improve labour rights, outside pressure on the government and strong local activists are needed. 356

Regarding the level of protection, the fundamental ILO Conventions No. 138 and 182 in their full scope should be referred to. It is recommendable that an obligation to refrain from lowering standards in order to attract investors should be included.

In the light of the fact that the prohibition of child labour is protected in international law as an immediate state obligation, a party should not be exempted from the obligation to enforce the prohibition in the case of scarce resources. The problem of resource constraints may be addressed under the proportionality requirement for enforcement measures.

Cooperative activities should be similar to those contained in the NAALC, the US–Chile FTA, the Cotonou Agreement and the proposals of the social protocol proposed by the trade unions for the EU–MERCOSUR Trade Agreement. Thus, there should be detailed provisions on for example technical cooperation, capacity building, joint research projects, seminars, training of workers, allocation of resources for children’s rights and overall primary education, and development finance cooperation. However, the development finance cooperation of the Cotonou Agreement might be too far-reaching to be applied at the global level. The financial resources should primarily be provided by industrialised countries. At the global level, the ILO reporting mechanism and IPEC should play a role.

The public communication procedure of the NAALC should be incorporated into a multilateral social clause, contributing primarily to awareness raising with some concrete results. It should however be improved, providing for a strict timetable, concrete action plans and strict guidelines for ministerial agreements and follow-up action.

It should be considered whether at the global level, private parties or an independent agency should have the right to initiate the dispute settlement procedure providing for trade measures. While this would

lead to a better use of dispute resolution, such a right might be too intrusive given the current state of international law.

It appears reasonable that those labour standards that can be the subject of dispute settlement should be trade-related. Since trade measures can have a strong impact on a country’s economy, they should be limited to violations of labour standards related to trade. As to child labour, standards related to child labour occurring in companies producing for export could be included in a social clause. The limitation to trade-related standards might minimise the risk of protectionism because it is a comprehensible restriction and can be used as a barrier against possible misuse. On the other hand, it could be seen as disguised protectionism on the assumption that not labour rights but the taking away of the comparative advantage of developing countries is the only motive behind a social clause. A further question is the exact definition of the term trade-related, whether for example trade-related requires a special relationship to the product or not. In this respect, it should also be noted that, although standards should be trade-related, it is not recommendable to require evidence that the violation of the respective labour standards has a detrimental effect on trade. As will be seen below, such a causal link is difficult to establish.\(^{357}\)

The dispute settlement procedure should be distinct from the procedure for commercial disputes. It is important that labour experts belong to the roster for panellists. The timetable should provide enough time for the parties to find a non-adversarial solution. A graded penal system from the imposition of concrete action plans to monetary enforcement assessments and the withdrawal of trade benefits is appropriate, in particular if the monetary assessment takes into account the reasons for the failure to enforce labour standards and has to be paid into a fund established for implementation measures regarding labour standards. A question to be discussed in detail is the amount to be paid in order to have a deterrent effect, and how it is guaranteed that the money is spent for the eradication of child labour including the support of former child labourers. In addition, one should consider whether an international obligation for developed countries to support countries with resource constraints should be introduced.

\(^{357}\) See the Omnibus Trade and Competitiveness Act and the Caribbean Basin Initiative in the next section.
Finally, the question is how a system providing for economic incentives and ILO–IPEC programmes similar to the US–Cambodia TA could be incorporated into a multilateral social clause.

C. SOCIAL CLAUSES IN GENERALIZED SYSTEMS OF PREFERENCES

I. Introduction

Among the various schemes that condition trade on a foreign country’s labour law and practice, GSPs are the most frequently used. Other examples are US trade laws such as the Omnibus Trade and Competitiveness Act, the recently amended Section 307 of the Tariff Act of 1930, or the Caribbean Basin Initiative. Since the latter US trade laws are based on a similar rationale as social clauses in bilateral agreements, i.e. imposing trade measures for a failure to implement workers’ rights, they will not be examined here. It is also questionable whether their approach of requiring a direct link between the violations of workers’ rights and changes in the domestic labour market is an appropriate approach for tackling child labour.

Under GSPs, developed countries grant reduced or zero tariff rates to selected products originating in certain developing countries. According to a resolution taken at the United Nations Conference of Trade and Development II (UNCTAD) in New Delhi in 1968, the aim is ‘to increase

---


their export earnings, to promote their industrialization and to accelerate their rates of economic growth. There are currently thirteen national GSPs. The GSPs of the US and the EU include a set of labour rights conditionalities, requiring developing countries to respect certain labour rights in order to be eligible or, as in the case of the EU, to get further preferences. The following section will analyse these social clauses and their past application in order to find out whether they are an adequate means of eliminating child labour and could serve as a model for multilateral social clauses.

When evaluating the effectiveness of these schemes, the criteria will be the architecture and content of the rules, the performance of the bodies applying these rules and the actual changes in law and practice following the application of GSP labour clauses. As is the case with the ILO and UN implementation mechanisms, the main evaluation criterion will be the performance of the implementing bodies, since it is particularly complex to identify the origin of change in law and practice. Where changes are attributable to the GSP labour clauses, cases will be cited.

II. The US GSP

1. Introduction

The US GSP was first introduced as part of the Trade Act of 1974. It was re-authorised by the Trade and Tariff Act of 1984, introducing requirements that beneficiary countries observe internationally recognised labour rights. The rationale for introducing a labour rights clause was to improve conditions for workers in developing countries and to slow the exodus of jobs from the US. In 2000, the African Growth and Opportunity Act (AGOA) was introduced, offering sub-Saharan countries duty-free and quota-free access for a wider range of products. The AGOA explicitly states that the beneficiary country must have implemented its commitments to eliminate the worst forms of child labour (ILO Convention No. 182). The Trade Act of 2002 extended the programme until

---

the calendar year 2006. In 2006, the US President signed legislation that continued the GSP until 31 December 2008.  

2. The US GSP provisions

a) Granting and withdrawing of tariff preferences

Under the US GSP, all products that are eligible are granted zero tariff rates. An eligible import must be from a designated beneficiary country, must be eligible for GSP treatment and must meet the GSP rules of origin. A product that is classified as ‘import-sensitive’ by the President is not granted duty-free treatment. For example, most textiles, apparel articles and agricultural products are not eligible as they are either designated ‘import-sensitive’ or exceed certain in-quota quantities. This is problematic because the garment sector and agriculture are major export industries in developing countries, and also two major sectors in which child labour occurs. However, under the AGOA, certain agricultural products and clothing are included. There are currently 131 designated developing countries, territories and associations. Countries must graduate from the programme if the President determines that the country has become a ‘high income country’. Such a graduation mechanism is questionable, since, as one famous legal scholar put it, it puts developing countries at the mercy of domestically defined thresholds by importing countries.

---

365 Ibid.
366 19 United StatesC. sec. 2463 (b) (1) (G) of Title V of the Trade Act of 1974.
367 19 United StatesC. sec. 2463 (b) (1) (A) and sec. 2463 (b) (3) of Title V of the Trade Act of 1974.
369 See above p. 24 and below p. 349.
370 See www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html.
371 19 United StatesC. sec. 2462 (e) of Title V of the Trade Act of 1974.
(1) **Mandatory criteria**

In addition, there are mandatory and discretionary criteria for country eligibility under the GSP law. According to 19 United StatesC. sec. 2462 (b) (2) (G), a country is ineligible if ‘such country has not taken or is not taking steps to afford to workers in that country internationally recognized worker rights (including any designated zone in that country)’. The Trade and Development Act of 2000 introduced 19 United StatesC. sec. 2462 (b) (2) (H), which declares that a country is ineligible if ‘such country has not implemented its commitments to eliminate the worst forms of child labour’. 19 United StatesC. sec. 2467 (6) defines the term ‘worst forms of child labour’ in accordance with Art. 3 of the ILO Convention No. 182, without explicitly referring to the provision. The protection of internationally recognised worker rights and the implementation of a country’s commitments to eliminate the worst forms of child labour are formulated as mandatory criteria.

The wording ‘has not taken or is not taking steps’ is very vague, neither defining legal or administrative measures, nor the level of implementation required. This vagueness could be a source of abuse. However, it is laudable that, in the case of child labour, the text explicitly refers to non-implementation of a country’s commitments. Although there might be disagreements on the meaning of ‘implementation’, this is a much clearer criterion than ‘taking steps’.

It is notable that the provision is applicable in ‘any designated zone’, i.e. also in Export Processing Zones (EPZ). The ILO defines an EPZ as ‘Industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being re-exported.’

Section 2467 (4) of the statute defines ‘internationally recognized worker rights’ as including the right of association, the right to organise and bargain collectively, the prohibition on the use of any form of forced or compulsory labour, a minimum age for employment of children and acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health. The Trade Act of 2002 included the prohibition on the worst forms of child labour.

Although overlapping with the core labour standards as defined by the ILO, this regulation fails to explicitly refer to the fundamental ILO conventions, in particular Convention No. 138. This would be commendable.

---

373 ICFTU, Perman, *Behind the Brand Names*, p. 5.
to ensure that the provision is applied in a non-discriminatory and non-protectionist way. Instead, it remains unclear which minimum age is referred to. This gives the US Government the possibility of choosing the age to apply in any given situation. Such subjectivity of standards is not adequate for human rights implementation mechanisms that should be based upon objective criteria to ensure a fair and consistent procedure, avoiding double standards. However, it is laudable that the statute has been amended to include the worst forms of child labour.

(2) The national interest clause
19 United StatesC. sec. 2462 (b) (2) regulates that the President may designate a country that, for example, has not implemented its commitments to eliminate the worst forms of child labour as a beneficiary country if doing so is in the national interest of the US. Thus, although the law considers the labour rights situation in other countries, economic interests of the US take precedence.

(3) Discretionary criteria
There are also discretionary criteria regarding country eligibility. According to 19 United StatesC. sec. 2462 (c) (7) of the Trade Act of 1974, when determining a country’s eligibility, the President will take into account ‘whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights’.

Since 2002, this provision has also included the elimination of the worst forms of child labour. However, this standard also fails to explicitly refer to ILO Conventions No. 138 and No. 182.

In addition, the formulation ‘shall take into account’ grants the President much discretion when determining country eligibility. However, the President is prevented from using this discretion given that it is mandatory for beneficiary countries to take steps to implement both a minimum age for employment and its commitment regarding the worst forms of child labour.

(4) The level of development
The House Conference Committee report emphasised that a country’s adherence to internationally recognised workers’ rights should be

---

evaluated commensurate with its level of development. This is in line with Art. 2 of the ICESCR, which maintains that economic, social and cultural rights have to be implemented progressively, depending on the country’s available resources. However, as mentioned previously, the obligation to protect children from economic exploitation, as prescribed in Art. 10 (3) of the ICESCR, has to be implemented immediately. In addition, this right is also protected by Art. 3 lit. d of the ILO Convention No. 182 and Art. 32 of the CRC, which equally require immediate implementation. Hence, in the case of child labour a country’s economic development should in theory not be a criterion. One might argue that these provisions are not applicable since, in the case of the application of GSP law, it is the US that attempts to enforce the protection of children from economic exploitation in another state through the granting of trade preferences. However, since the obligation to protect children from economic exploitation is an obligation *erga omnes*, it also applies vis-à-vis the US. Hence, it might be argued that the beneficiary country, if it has ratified the ICESCR or the CRC, also has the obligation to implement immediately the protection of children from economic exploitation vis-à-vis the US. Therefore, economic considerations should not play a role in the determination of a beneficiary country’s adherence to its commitments regarding child labour.

(5) **Withdrawal of duty-free treatment**

According to 19 United StatesC sec. 2462 (d) (1) in conjunction with sec. 2461, the President may withdraw a country’s duty-free treatment if the country has advanced in its economic or trade development. When making this decision, he shall also consider factors such as reasonable market access and workers’ rights in accordance with sec. 2462 (c).

19 United StatesC sec. 2462 (d) (2) grants the President the power to withdraw any beneficiary country’s duty-free treatment if he or she determines that as a result of changed circumstances in the country it would be barred from designation as a beneficiary developing country.

---

377 See above p. 65.
378 See above p. 65.
379 See above, p. 115 et seq.
380 One should bear in mind that the US GSP is a trade incentive regime, and that it is a different question whether third states may take economic countermeasures against another state.
according to subsection (b) (2); this subsection upholds mandatory criteria including the requirement to eliminate the worst forms of child labour and to establish a minimum age for employment.

b) The reporting and review process

(1) Reporting

The US GSP law requires the President to submit an annual report on the protection of internationally recognised workers’ rights in each beneficiary country.\(^{381}\) This is done by including a passage on this matter in the State Department’s annual Country Report on Human Rights Practices.\(^{382}\) The Trade and Development Act of 2000 introduced 19 United StatesC. sec. 2464 that provides that the Secretary of Labor’s findings with respect to the beneficiary country’s implementation of its international commitments to eliminate the worst forms of child labour have to be included in the annual reports. Although it would be better to have a separate report providing in-depth studies of each country’s labour law and practice, the existing reporting clause is an important precondition for implementing GSP law.

While it is positive that a reporting mechanism exists that facilitates the decisions on the granting of trade preferences, it would be recommendable to require cooperation with the ILO in the drafting of reports.

(2) The petition and review process

The GSP legislation provides for an annual petition and review process for alleged labour rights violations in beneficiary countries. Sec. 2007.0 (b) of GSP 15 CFR Part 2007 regulates that any person may file a request for a review of the GSP status of any beneficiary country with respect to any of the designation criteria listed in sec. 502 (b) or 502 (c), i.e. 19 United StatesC. sec. 2642 (b) and (c) containing mandatory and discretionary criteria referring to labour rights. In contrast to the Omnibus Trade and Competitiveness Act and the Caribbean Basin Initiative, the GSP provisions do not require a causal link between violations of workers’ rights in the beneficiary country and job losses in the US labour market.\(^{383}\)

\(^{381}\) 19 United StatesC. sec. 2465 (c).


\(^{383}\) For the Omnibus Trade and Competitiveness Act, and the Caribbean Basin Initiative see above p. 284 and fn. 358.
It is noteworthy that persons filing the request for review do not need to have an economic interest in the matter. If the subject matter of the request has already been reviewed pursuant to a previous request, the new request must include substantial new information that warrants further consideration of the issue, sec. 2007.0 (b) of GSP 15 CFR Part 2007. According to sec. 2007.0 (f), the Trade Policy Staff Committee (TPSC) may also request a review on its own motion.

According to sec. 2007.2 (a) (2) of GSP 15 CFR Part 2007, a request will not be accepted for review if it does not provide sufficient information relevant to the discretionary and mandatory criteria regarding labour rights contained in 19 United StatesC. sec. 2462 (b) and (c), or if it is clear from available information that the request does not fall within these criteria. Requests that conform to the requirements of these provisions or for which the petitioners have demonstrated a good faith effort to obtain information in order to meet the requirements, and for which further consideration is deemed warranted, shall be accepted for review.

The GSP Subcommittee conducts the first level of interagency consideration. The GSP Subcommittee consists of representatives from the Departments of Agriculture, Commerce, the Interior, Labor and State and the Treasury. It is to be welcomed that the Subcommittee consists not only of trade experts.

The TPSC makes further investigations, including public hearings in order to provide the opportunity for public submissions. It reports to the United States Trade Representative (USTR) who makes recommendations to the President on any modifications to the GSP status, sec. 2007.2 (g) of GSP 15 CFR Part 2007.

According to sec. 2007.3 (a) of GSP 15 CFR Part 2007, reviews of pending requests shall be conducted at least once each year. The deadline for the acceptance of petitions is 1 June, for the announcement of petitions accepted for review 15 July, and for public hearings and submission of written briefs and rebuttal materials September/October, sec. 2007.3 (a) (1), (2), (3) of GSP 15 CFR Part 2007. The results are announced...
on 1 April the following year and implemented on 1 July, sec. 2007.3 (a) (5) of GSP 15 CFR Part 2007.

According to section 2007.3 of GSP 15 CFR Part 2007, requests that indicate the existence of unusual circumstances that warrant an immediate review may be considered separately.

This process has a number of limitations. Firstly, an obvious shortcoming is that while the bodies that initially conduct the petition review include representatives from the Department of Labor, the USTR makes the final decision. This potentially leads (and has led, see the following sections) to a biased final decision in favour of trade concerns.

Secondly, although workers’ interests in foreign countries are concerned, only US administrative bodies take part in the process. Thirdly, the conditions for accepting or rejecting petitions are rather vague, making it difficult for beneficiary countries to challenge the USTR’s decision.

Another criticism has been the rigidity of the annual review cycle. Since violations of workers’ rights can happen any time, one should be able to file petitions at any time during the year. A striking example of this is the 1989 crisis in Sudan when the then new government issued a decree to abolish labour unions and forbid strikes. Two years passed before a petition was filed and Sudan lost its GSP status.

(3) Other reviews of article eligibilities

Workers’ rights must also be considered in the determination by the President as to which articles from beneficiary countries are ‘sufficiently competitive to warrant a reduced competitive need limit’. Such competitive need limitations provide a ceiling on GSP benefits for each product and beneficiary country. According to sec. 2007.8 (b) (1) of GSP 15 CFR Part 2007, the President may grant competitive need limits waivers. In deciding whether to grant a waiver, the President considers whether or not a beneficiary country has taken or is taking steps to afford workers in that country internationally recognised worker rights.

This clause offers an additional incentive for countries to implement labour rights. This is to be welcomed. It should however be criticised...

---

390 Ibid.
391 Sec. 2007.8 (b) (2) (x) of GSP 15 CFR Part 2007.
393 Sec. 2007.8 (b) (2) (x) of GSP 15 CFR Part 2007.
that sec. 2007.8 (b) (1) of GSP 15 CFR Part 2007 does not refer to the elimination of the worst forms of child labour.

3. Application of the US GSP social clause

One major concern regarding the US GSP social clause has been its poor administration.

a) Lack of international standards

One major criticism of the General Accounting Office has been the lack of standards in the labour clause of the GSP law.\textsuperscript{394} As mentioned above, the GSP law does not refer to the relevant ILO conventions, which allows for potential abuse.

b) Acceptance of petitions

Overall, the petition system has been used frequently. From 1985 to 1993, eighty labour rights petitions were filed; forty-six of these petitions were rejected.\textsuperscript{395} The high number of rejections indicates a certain reluctance of the administration to enforce the labour rights provision. According to Schneuwly a hundred labour rights petitions were submitted by 2001 of which approximately half were rejected.\textsuperscript{396}

c) Political and economic bias

Another major criticism of the US GSP implementation is that it has been politically biased.\textsuperscript{397} For example, from 1987 to 1990, petitions against El Salvador, where death squads assassinated and tortured trade unionists,\textsuperscript{398} were rejected, while petitions against Nicaragua under Sandinista rule immediately led to the removal of its GSP status.\textsuperscript{399} In 1993, a petition against Colombia – still among the world’s worst violators of labour rights – was rejected for review since at the time

\textsuperscript{395} Ibid., p. 108.
\textsuperscript{398} Ibid., 1186 and 1213.
\textsuperscript{399} Tsogas, ‘Labour Standards’, 358.
Colombia’s President was the candidate favoured by the US to head the Organization of American States. In order to make the review process more objective, it has rightly been proposed that guidelines should be published that set forth requirements for a petition to be rejected.

Furthermore, economic interests of the US have played a major role. A petition against Malaysia has been deferred for two years – US firms such as Motorola and Harris benefiting from the country’s low labour standards. In contrast, countries whose GSP status has been removed most often had minimal trade with the US (e.g. Romania, Myanmar, Central African Republic). Likewise, in countries removed from GSP, US foreign direct investment was significantly lower than in countries where removal did not take place. As a general rule, US foreign direct investment was up to 50 per cent higher in countries for which petitions were rejected than in those countries for which petitions were accepted.

d) Removal of GSP status
So far, twelve countries have lost their GSP status following the annual petition review on labour rights, i.e. Romania, Paraguay, Myanmar, Central African Republic, Liberia, Sudan, Mauritania, Maldives, Nicaragua, Syrian Arab Republic, Chile, Belarus. The total number of removed countries is very small in comparison to the currently 131 GSP beneficiary countries, many of which have bad labour rights records, e.g. India and Bangladesh.

e) Other criticisms
Other criticisms and proposals for modification include the following:

Some labour rights advocates want to introduce trade measures that target specific industries with high incidences of labour rights violations.
violations.\textsuperscript{407} It has also been observed that the wording ‘taking steps’ has often been used to the detriment of labour rights.\textsuperscript{408} Labour rights advocates therefore want the statute to require full compliance with all five ‘internationally recognized worker rights’. Finally, it has been criticised that cases are taking too long a time.\textsuperscript{409} For example in the case of Bangladesh, as of January 2004, its GSP status had not been removed although the Government had been breaking its promise to improve the labour rights situation in its Export Processing Zone continuously since a petition was filed on this matter in 1991.\textsuperscript{410}

Finally, implementation of GSP law has often been considered to be hypocritical since the US has not even ratified ILO Convention No. 138.\textsuperscript{411} Despite the criticisms raised regarding both the law itself and its implementation, no reform has taken place.

4. Changes in law and practice

The following examples illustrate the actual impact of the GSP petition review of labour standards on beneficiary countries.

Following two petitions filed in 1990 and 1991, the Dominican Republic criminalised the use of illegal labour by debt bondage in response to the threat of losing its GSP status for sugar exports.\textsuperscript{412} In Paraguay and the Central African Republic, GSP trade preferences were removed and later reinstated for improvement of labour practices.\textsuperscript{413} The Guatemalan Government revised its labour code in order to keep its GSP status.\textsuperscript{414} Following a petition filed in 1990, a minor success was achieved in El Salvador when the country introduced a new labour code in 1994.\textsuperscript{415} However, the labour code fell short of

\textsuperscript{407} US General Accounting Office, \textit{International Trade}, p. 120.
\textsuperscript{408} Harvey, ‘US GSP Labour Rights Conditionality’, 5.
\textsuperscript{409} US General Accounting Office, \textit{International Trade}, p. 120.
\textsuperscript{412} Harvey, ‘US GSP Labour Rights Conditionality’, 6.
\textsuperscript{413} US General Accounting Office, \textit{International Trade}, p. 112.
\textsuperscript{414} Tsogas, ‘Labour Standards’, 359.
\textsuperscript{415} Davis, ‘The Effects of Worker Rights Protections in United States Trade Laws’, 1200 et seq., 1213.
recommendations made by the ILO. In 2000, the Thai Government finally introduced a labour law instituting core labour standards in state enterprises – the corresponding petition having been filed in 1992.

The US Government’s refusal to grant competitive need limit waivers to Indonesia due to the bad labour rights situation induced the Indonesian Government to introduce a new labour law including a higher minimum age for child labour, i.e. fifteen years, in 1997.

In 2006, the TPSC decided to close the case on the protection of workers’ rights in Uganda, deciding that the country had made considerable progress when it passed legislation facilitating the organisation of unions. Swaziland eliminated a limitation on the minimum number of people required to start a union.

In the eight cases that dealt with child labour, the rate of success in improving child labour laws has been estimated at 38 per cent. Hopefully, the same will hold true in the pending cases on child labour. In 2006, a request for review of the GSP status of the Republic of Niger was accepted with regard to inter alia the widespread occurrence of the worst forms of child labour. In 2007, worker country practice petitions regarding practice in the Philippines, Bangladesh and the Ukraine were accepted.

In 2008, the GSP Subcommittee undertook to examine whether nine countries supplying hand-loomed or hand-hooked carpets under duty-free treatment in accordance with the US GSP and the Miscellaneous Trade and Technical Corrections Act were taking sufficient steps to eliminate the worst forms of child labour. These countries were India,
Thailand, the Philippines, Indonesia, Pakistan, Egypt, Turkey, South Africa and Nepal.

The cases mentioned above demonstrate that the removal of GSP status or the mere threat of it may lead to improvements of the labour rights situation. This result proves the effectiveness of the GSP labour rights conditionality. However, it has to be taken into account that in some cases an excessive amount of time elapsed between the filing of the petition and the change in law occurring.

The introduction of the AGOA in 2000, offering trade preferences for sub-Saharan countries, has also prompted a labour law reform in several countries. Many countries in the region have since ratified ILO Convention No. 182 on the elimination of the worst forms of child labour, and are currently changing their laws regarding child trafficking. 425 In 2003, the USTR finally granted trade preferences under the AGOA to the Côte d’Ivoire in recognition of the progress made in addressing forced and child labour, and by drafting legislation in accordance with ILO standards. 426

It has also been appreciated by the US Government that the GSP has helped to raise awareness of labour rights in beneficiary countries. 427

5. Value of trade preferences to developing countries

It seems to be obvious that the potential of GSP law to improve labour rights in beneficiary countries depends on the value of the trade preferences to beneficiary countries. According to a recent study, a share of 0.5 per cent of GSP exports in a country’s gross national income might suffice for the country to react to threats of GSP status removal. 428 This section therefore gives a short overview of the general value of GSP trade preferences to developing countries.

After the Uruguay Round, it was believed that the value of trade preferences to developing countries would decrease due to general tariff reductions. 429 However, since tariff reductions did not occur in industries of interest to developing countries, GSPs are still important. For example, while the average tax on industrial products is 3.8 per cent, the average tax imposed by developed countries on textiles and clothing

---

426 Greven, Social Standards, p. 16.
imports from developing countries is 12 per cent. Tariff peaks may even reach up to 30 or 40 per cent on some goods. Additionally, the tariffication process for agricultural products made it possible for developed countries to grant preferences. Finally, with the Doha Round being in an impasse at the time of writing, GSPs will continue to play an important role. This at least holds true for the US, where annual imports under the GSP grew from US $16.4 million in 2000 to US $28.6 million in 2007.

Nevertheless, the impact of GSPs on developing countries is limited since, as already mentioned, products deemed to be critical to developing countries such as agricultural products, textiles and apparel products often are not eligible for GSP status. Since exports in textiles or clothing represent over 50 per cent of all exports in Bangladesh, Cambodia, Pakistan, El Salvador, Mauritius, Sri Lanka and the Dominican Republic, these countries do not greatly benefit from the US GSP. However in contrast, beneficiary countries of the AGOA were granted trade preferences for textile and clothing products. Nevertheless, an UNCTAD study found that only 4 per cent of all exports from least developed countries (LDCs) are granted trade preferences under the US GSP, excluding petroleum oil from Angola. The 2006 report on the implementation of the AGOA found that there was even a decline by 16 per cent in non-oil AGOA imports due to increased global competition in the apparel sector resulting from the end of the Multifibre Arrangement (MFA).

The UNCTAD study also found that rules of origin and related administrative procedures were one of the main reasons for the under-utilisation of existing trade preferences. It recommends that in order to be more effective, GSPs should extend to all products and apply rules of origin and related administrative procedures that

431 Ibid.
432 Ibid.
434 19 United StatesC. sec. 2463 (b) (1) (A) and sec. 2463 (b) (3) of Title V of the Trade Act of 1974; UNCTAD (Trade Preferences for LDCs), p. xi.
435 Oxfam, Stitched Up, p. 7.
437 UNCTAD, Trade Preferences for LDCs, p. xi.
439 UNCTAD, Trade Preferences for LDCs, p. xi; see also Inama, ‘Trade Preferences’, 971.
reflect the supply capacity and industrial development of LDCs.\textsuperscript{440} Consequently, considerable trade effects could be generated.

Another related issue is the increased country graduation of more advanced developing countries.\textsuperscript{441} It is argued that the application of graduation on the basis of criteria that are more transparent and objective in their requirements would help to reduce adverse impacts on the effectiveness of the GSP schemes.\textsuperscript{442}

In sum, under the current WTO rules, there is still room for GSP schemes to generate significant trade effects.

6. Lessons drawn from the US GSP

Several lessons may be drawn from the US GSP.

The first main lesson is that unilaterally imposed trade preference schemes bear the risk of being discriminatory or even protectionist. The US GSP law provisions, as well as their implementation, have often proved to be a source of abuse. This is a particularly sensitive issue considering that the US themselves have not ratified all of the relevant ILO conventions, e.g. the ILO Minimum Age Convention.

There are two main reasons for this biased application: firstly, the wording of the provisions is very vague and can therefore be interpreted in a discriminatory way, for example neither a specific minimum age for children is defined, nor are the relevant ILO conventions referred to. However, in 2000 and 2002 the GSP law was amended to refer to the worst forms of child labour as defined in ILO Convention No. 182.

Secondly, the provisions give the implementation bodies too much discretion, which especially in the 1980s led to a politically and economically biased enforcement of the GSP petition review mechanism. However, the workers’ rights clause has seldom been used in a protectionist way.\textsuperscript{443}

Having said that, in almost all cases where GSP status was removed, national labour rights legislation improved, introducing for example minimum age legislation. In some cases, there were also positive changes for children in the situation on the ground. This is why, according to some scholars, the GSP workers’ rights clause has been an important instrument in international labour affairs that has yielded

\textsuperscript{440} UNCTAD, \textit{Trade Preferences for LDCs}, p. xi.
\textsuperscript{441} Inama, ‘Trade Preferences’, 974.
\textsuperscript{442} Ibid.
concrete positive results for workers in many instances.\textsuperscript{444} Especially the AGOA has brought about progress in the abolition of child labour.

At the same time, due to some reluctance on the part of the administrative bodies to enforce the GSP mechanism, given the number of labour law violators around the world, very few petitions have been approved. This might also be due to the fact that foreign trade policy very much affects foreign relations. Governments have also argued that it is more effective to use labour standards rather than to impose punitive measures and lose leverage.\textsuperscript{445} Nevertheless, the enforcement mechanism should provide for clearer rules and be more transparent in order to liberate decisions from policy considerations.

In conclusion, the second main lesson is that, generally, labour rights conditionality may lead to improved labour standards. However, the question arises whether such a mechanism should be implemented multilaterally since unilateral action always affects bilateral policy relations and tends to be biased. At the very least, unilaterally imposed economic measures should be subject to review, preferably by a multilateral judicial or quasi-judicial review mechanism. In addition, labour rights representatives should be involved in the decision-making process when implementing trade measures. Unilaterally imposed trade measures, if not applied objectively, may distort trade relations and undermine the rule-based international trade system of the WTO. Another question is whether, instead of country review mechanisms, product review mechanisms should be used in order to avoid political interests taking precedence in decision-making. Although not focusing on labour rights performance in the production process, the social clause included in the review process of competitive need limits of beneficiary countries with regard to specific products is a step in the right direction.

\textbf{III. The EU GSP}

\textbf{1. Introduction}

The European Union introduced its GSP in 1971.\textsuperscript{446} The current system replaces the expired system based on Council Regulation (EC)


The current system is based on Council Regulation (EC) No. 980/2005 and follows the same approach as its preceding system. It provides tariff preferences for certain developing countries and consists of general arrangements; a special incentive arrangement for sustainable development and good governance, also known as ‘GSP plus’; and special arrangements for least developed countries, also referred to as the Everything But Arms (EBA) initiative. Its two priorities are to foster development through increased trade and to establish the link between trade liberalisation and respect for internationally recognised social and environmental standards. Special incentive arrangements for the protection of labour rights were first introduced in 1998 by Council Regulation (EC) No. 3281/94.

Since the current system only entered into force in 2006, cases under the previous systems will also be referred to in the analysis of the special incentive regime for sustainable development and good governance.

2. The EU GSP provisions

a) Granting of preferences under the special incentive arrangement

The general arrangements regulate that products originating in beneficiary countries listed as non-sensitive, except for agricultural components, are entirely suspended from tariff duties.

Common Customs Tariff ad valorem duties on products listed as sensitive products are granted a tariff reduction. Ad valorem duties for sensitive products are granted a reduction of 3.5 percentage points. This reduction is 20 per cent for textiles and clothing.

According to Art. 7 (4) of Council Regulation (EC) No. 980/2005, specific duties on sensitive products shall be reduced by 30 per cent.

---


453 Ibid.

454 Ibid.
Art. 8 (1) of Council Regulation (EC) No. 980/2005 provides for a suspension of Common Customs Tariff *ad valorem* duties on all products originating in countries that qualify for the special incentive arrangement for sustainable development and good governance. Art. 8 (2) of Council Regulation (EC) No. 980/2005 provides for a suspension of specific duties, except for products for which *ad valorem* duties also apply. In some cases such as white chocolate these duties are limited to 16 per cent of the customs value.\(^{455}\) In contrast to the US GSP law, the EU thus uses a so-called ‘more carrot’ or positive conditionality approach\(^{456}\) providing incentives instead of punitive measures.\(^{457}\)

According to Article 9 (1) lit. a to e of Council Regulation (EC) No. 980/2005, the special incentive arrangement may be granted to countries which have ratified and effectively implemented sixteen human rights conventions including the CRC, and ILO Conventions No. 138 and 182 on child labour, and at least seven conventions from a choice of conventions on the environment and governance principles; which commit themselves to ratify and effectively implement by December 2008 the remaining conventions and have undertaken to maintain the ratification of conventions and their implementing legislation and measures; which accept regular monitoring and review of their implementation record in accordance with the implementation provisions of the conventions; and which are considered to be a vulnerable country. A vulnerable country is one that has not been classified as a high income country by the World Bank for three consecutive years, and whose economy is poorly diversified. A poorly diversified economy is one whose five largest sections of its GSP-covered imports represent more than 75 per cent in value of its total GSP-covered imports, and whose GSP-covered imports represent less than 1 per cent in value of total GSP covered imports.\(^{458}\)

According to Art. 14 (1) of Council Regulation (EC) No. 980/2005, tariff preferences granted under Art. 7 and 8 can be removed if the beneficiary country holds more than 15 per cent of the EU market share for over

---

\(^{455}\) Art. 8 (2) of Council Regulation (EC) No. 980/2005.


\(^{457}\) However, the EU scheme at the same time uses negative conditionality, see below p. 304 et seq. It has also to be kept in mind that the granting of zero duty rates to eligible countries under the US regime represents a positive conditionality approach.

three consecutive years of any good imported from all beneficiary countries. The ceiling for textiles is 12.5 per cent of the market share. According to Oxfam, this rule means that a developing country may be graduating out of GSP just as it begins to get its foot on the ladder.459 The new graduation rules will mostly have an impact on India and China due to their large market shares in textiles and clothing.460

Under Council Regulation (EC) No. 2501/2001 the special incentives required that a beneficiary country incorporated the substance of the standards laid out *inter alia* in ILO Conventions No. 138 and No. 182 on child labour, and effectively applied that legislation. The current approach is fairly similar. The main difference is that the current system has a more comprehensive approach focusing on a broad definition of sustainability that encompasses social, environmental and good governance aspects. While this comprehensive approach is to be welcomed, it might also limit the number of beneficiary countries by preventing them from choosing between different schemes according to their needs. Another major limitation is the condition of vulnerability. The effect of these changes will be analysed below.

The expired and current EU GSP laws, in contrast to the US GSP law, explicitly refer to the core labour standards including the prohibition of child labour contained in the ILO Declaration on Fundamental Principles and Rights at Work. The law also sets forth that the country shall effectively implement this legislation. This requirement is much more concrete and gives the administrative body less discretion than the US wording ‘taking steps’.

Moreover, the application procedure is much more detailed and complex than the US application procedure for GSP benefits. According to Art. 10 (2) of Council Regulation (EC) No. 980/2005, the requesting country must provide comprehensive information regarding ratification of the relevant conventions, the relevant national legislation and implementation measures, and has to fully comply with the monitoring and review mechanism provided for in the relevant conventions. Having received the request, the European Commission examines the request taking into account the findings of relevant international organisations.

---


460 Ibid.
and agencies.\textsuperscript{461} It may also verify the information received with the requesting country.\textsuperscript{462} The Commission has to conduct all relations with a requesting country concerning the request in close cooperation with the Generalized Preferences Committee.\textsuperscript{463} The Generalized Preferences Committee is composed of representatives of member states.\textsuperscript{464} Hence, member states have the possibility of influencing the decisions of the Commission, which might lead to politically biased decisions.

In the preceding GSP, during the examination of the request, the Commission could carry out assessments in the country concerned.\textsuperscript{465} The period of examination was one year.\textsuperscript{466} Explicitly providing for \textit{in situ} visits, this procedure ensured, for example, that the protection of labour rights actually took place. However, these provisions made the application procedure very cumbersome and lengthy, which had the effect, as will be seen below, that only very few countries were granted special incentive arrangements.

According to Art. 9 (4) of Council Regulation (EC) No. 980/2005, the Commission must keep under review the status of the ratification and effective implementation of the conventions referred to under the special incentive arrangement. Before the end of the period of the application of this Regulation, it must report to the European Council. Thus, the result of the special incentive arrangement will be reviewed. This provision hopefully contributes to an objective application of the special incentive arrangement.

In sum, both EU GSPs provide for more objective criteria in the granting procedure than the US GSP law, which neither takes into account decisions of relevant international organisations, nor explicitly provides for verification with the requesting country.

\textbf{b) Temporary withdrawal}

\textbf{(1) Scope and content of the norms}

The preferential arrangements may be temporarily withdrawn for some or all products if the monitoring bodies of the human and labour rights conventions listed in Annex III to Council Regulation (EC) No. 980/2005

\textsuperscript{462} Art. 11 (1) of Council Regulation (EC) No. 980/2005.
\textsuperscript{463} Art. 11 (5) and Art. 28 (1) and (2) of Council Regulation (EC) No. 980/2005.
find the occurrence of serious and systematic human or labour rights violations. For example, this provision could have been applied in the case of Myanmar in which the ILO Governing Body recommended reviewing trade relations with the country.

Hence, the EU approach is not limited to ‘carrots’, but also uses ‘sticks’. It needs to be pointed out, however, that in contrast to the US GSP legislation, Art. 16 (1) lit. a of Council Regulation (EC) No. 980/2005 only applies in cases of serious and systematic violations. At first sight, the requirement of serious and systematic violations represents a drawback. However, it corresponds to the term ‘consistent pattern of gross and reliably attested violations of human rights’ used under the Human Rights Council’s complaint procedure. Also, it has to be kept in mind that under the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, it is still undecided whether a state other than the injured state may respond with countermeasures to a third state’s serious breaches of an obligation arising under a peremptory norm of general international law. It might thus prove useful to allow for the withdrawal of general preferential arrangements only in serious cases.

The decision on whether serious and systematic violations of human rights obligations are taking place must be based on the conclusions of the relevant UN monitoring bodies. This is an advantage over the US system, ensuring transparency and coherence of international law.

In addition, the special incentive arrangement may temporarily be withdrawn for some or all products originating in countries that no longer incorporate the conventions that they ratified in fulfilment of the requirements of the special incentive arrangements in their national laws, or if the relevant legislation is not effectively implemented. Thus, if a country ceases to fulfil the conditions under which it has been granted the special incentive arrangement, these may be withdrawn. Regarding the gravity of human rights violations, single cases of child

468 For the UN extra-conventional procedures, see above p. 145 et seq.
labour will arguably not lead to a withdrawal of preferences. Only in cases of widespread child labour can legislation be regarded as not having been effectively implemented.

In contrast to the US GSP, besides removing the beneficiary status of a country, it is also possible to withdraw the special incentive arrangement with respect to certain products. Such an approach is preferable since it targets the industry where the non-compliance, such as the use of child labour, occurs and has a less negative impact on the beneficiary country as a whole.

Upon receiving information that justifies a temporary withdrawal, the Commission or a member state informs the Generalized Preferences Committee and requests consultations that must take place within one month.\footnote{471 Art. 18 of Council Regulation (EC) No. 980/2005.} After one month, the Commission decides whether to conduct an investigation.\footnote{472 Art. 18 (2) of Council Regulation (EC) No. 980/2005.} Interested parties may present their views within four months.\footnote{473 Art. 19 (1) of Council Regulation (EC) No. 980/2005.} The Commission must provide the beneficiary country concerned with every opportunity to cooperate and it may verify the information received.\footnote{474 Art. 19 (2), (3) of Council Regulation (EC) No. 980/2005.} Any decision or conclusion of the supervisory bodies of the ILO, UN or other competent international organisations shall be taken into account and serve as the basis on which the matter will be decided in the case of serious and systematic human rights violations.\footnote{475 Art. 19 (3) of Council Regulation (EC) No. 980/2005.} The investigation must be completed within one year.\footnote{476 Art. 19 (6) of Council Regulation (EC) No. 980/2005.}

If the Commission concludes that the findings justify the withdrawal of preferential arrangements in the case of serious and systematic violations of human rights obligations, it must decide to monitor and evaluate the situation in the beneficiary country for a period of six months.\footnote{477 Art. 20 (3) of Council Regulation (EC) No. 980/2005.} Unless the country concerned, before the end of the period, makes a commitment to take the necessary measures to conform to, for example, the ILO conventions on child labour within a reasonable period of time, the Commission submits a proposal to the Council of the EU for temporary withdrawal. The Council decides on the proposal within one month by a qualified majority.\footnote{478 Art. 20 (3) and (4) of Council Regulation (EC) No. 980/2005.}
In cases of the withdrawal of special incentive arrangements, the Commission submits a proposal to the Council on the temporary withdrawal if it considers that to be necessary. The Council then decides within one month by a qualified majority. The decision to withdraw the tariff preferences only enters into force six months after it was taken. This procedure is thus easier than in cases of serious human rights violations. This may be due to the fact that, in cases of serious human rights violations, all preferences can be withdrawn.

(2) Assessment
In contrast to the US GSP petition review, the EU investigation procedure is much more flexible, participatory and provides for objective criteria by referring to international law. Firstly, it is a multi-layered system, providing for a withdrawal procedure for the general arrangements in case of serious human rights violations, as well as for a withdrawal procedure for the special incentive arrangement. Secondly, the approach is more flexible allowing for the withdrawal of benefits only with respect to certain products. Thirdly, the investigation may be initiated at any time upon receiving information, i.e. neither does a request have to be made by a private party, nor are there certain criteria for admissibility. Instead, the Commission or any member state is obliged (‘shall’) to inform the Committee and request consultations, provided there are grounds for an investigation. In theory, it is thus easier to initiate the withdrawal procedure under the EU GSP than under the US GSP. Fourthly, decisions of the ILO and UN supervisory bodies must be taken into account and be the basis of the withdrawal decision in cases of serious and systematic human rights violations. The correct application of international labour law is thus better ensured than in the US GSP petition review. Fifthly, the procedure obliges the Commission to cooperate with the beneficiary country concerned and is therefore more participatory. Sixthly, the beneficiary country, in the case of withdrawal of general arrangements in serious cases of human rights violations, has the chance to comply with the relevant conventions following the decision of the Commission. Moreover, it is not the European Commissioner for Trade alone who decides on the matter, but the Commission.

collectively, including the European Commissioner for Employment and Social Affairs.\textsuperscript{482}

However, the withdrawal system as well as the country election are conducted by the EU bureaucracy and not open to judicial review. Furthermore, the withdrawal procedure gives the Commission much discretion in deciding whether to proceed with the investigation and whether to refer its findings to the Council. There are no special criteria according to which the Commission has to make their decision apart from cooperating with the GSP Committee.\textsuperscript{483} Furthermore, the final decision to withdraw preferences is made by a political body, i.e. the Council where a group of countries can block action.\textsuperscript{484}

3. Application of the special incentive arrangement

\textit{a) Granting of preferences}

The special incentive arrangements for the protection of labour rights contained in the preceding GSP were granted to the Republic of Moldova in 2000\textsuperscript{485} and the Democratic Socialist Republic of Sri Lanka in 2003.\textsuperscript{486} Requests were submitted by the Republic of Georgia,\textsuperscript{487} by Ukraine,\textsuperscript{488} by the Republic of Uzbekistan\textsuperscript{489} and by the Russian Federation.\textsuperscript{490}

\textsuperscript{482} According to the rules of procedure of its weekly ‘college’ meetings, the European Commission decides by oral, written, empowerment or delegation procedure, by which all members have a say (Commission Decision of 15 November 2005 amending its Rules of Procedure, OJ 2005 L 347/83, 2005).

\textsuperscript{483} Art. 18 (1) and (2) in conjunction with Art. 28 (5) of Council Regulation (EC) 980/2005 and Art. 3 and 7 of Council Decision 1999/468/EC, OJ 1999 L 184/23.

\textsuperscript{484} Tsogas, ‘Labour Standards’, 365.


\textsuperscript{487} European Commission, Notice regarding the request submitted by the Republic of Georgia in order to benefit from the special incentive arrangements concerning labour rights, OJ 2001 C 127/13.

\textsuperscript{488} European Commission, Notice regarding the request submitted by Ukraine in order to benefit from the special incentive arrangements concerning labour rights, OJ 2001 C 266/2.

\textsuperscript{489} European Commission, Notice regarding the request submitted by the Republic of Uzbekistan in order to benefit from the special incentive arrangements concerning labour rights, OJ 2002 C 189/21.

\textsuperscript{490} European Commission Decision of 13 November 2002 on postponing the decision on the request of the Russian Federation for the special incentive arrangements for the protection of labour rights, OJ 2002 L 312, 27.
Given the total number of GSP beneficiary countries of 176 in 2008\textsuperscript{491} and the wide acceptance of the core ILO labour standards, the use of this special incentive regime was very limited. The reason might have been the lengthy and cumbersome administrative procedure for a requesting country to comply with the special incentive rules. It is therefore to be welcomed that the current procedure is simpler.

As of 21 December 2005, the special incentive arrangement for sustainable development and good governance had been accorded to fifteen countries.\textsuperscript{492} Thus, despite the more comprehensive approach, more countries are using the special incentive arrangement than before. However, sometimes the decision to grant additional preferences may be rather doubtful in the light of continuing human rights violations.\textsuperscript{493}

\textbf{b) Use of the withdrawal procedure}

To date, the temporary withdrawal provisions have also been of rather limited use. Tariff preferences have been withdrawn in two cases while submissions to initiate an investigation have been made in four cases.

In the case of Myanmar, after a complaint lodged by the European Trade Union Confederation (ETUC) and the ICFTU alleging practices of forced labour in Myanmar in 1995 under Art. 9 of Council Regulation (EC) No. 3281/94, the Commission decided to carry out an investigation.\textsuperscript{494} The European Parliament, without formally taking part in the process, welcomed the investigation undertaken by the Commission.\textsuperscript{495} In the subsequent investigation, the Commission found that the alleged


\textsuperscript{492} European Commission, Decision of 21 December 2005 on the list of the beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided for by Article 26 (e) of Council Regulation (EC) No. 980/2005 applying a scheme of generalized tariff preferences, OJ 2005 L 337/50.


\textsuperscript{494} European Commission, Notice of an investigation of forced labour practices being carried out in Myanmar in view of a temporary withdrawal of benefits under the European Union’s Generalized Scheme of Preferences, Bull. 1/2–1996, point 1.4.58.

\textsuperscript{495} European Parliament, Resolution on human rights violations in Burma (Myanmar), OJ 1996 C 166/201.
practices of forced labour were ‘routine and widespread’.

It therefore proposed to the Council to completely withdraw Myanmar’s access to preferential arrangements under the GSP. The Council then immediately withdrew Myanmar’s access to the tariff preferences granted under Regulation (EC) 3281/94 and 1256/96. Having been decided without delay and in strict accordance with the GSP regulations, the case of Myanmar is a positive example for the performance of the EU institutions in applying the withdrawal provisions. However, this might be due to the fact that a strong consensus among countries worldwide condemning the practice of forced labour in Myanmar had existed for a long time. For example, as examined in Chapter 3, the ILO has criticised and publicly condemned the human rights violations in Myanmar for many years. However, the long-term result of the Myanmar care is limited. Forced labour still exists on a large scale.

The Pakistan case had a different outcome since for many countries substantial political and economic interests were at stake. In 1995, ETUC’s committee on textiles, clothing and leather, and ICFTU submitted a complaint against Pakistan for the use of forced child labour under Council Regulation (EC) No 3281/1994. However, in this case, while recognising that forced child labour occurred in Pakistan, the Commission did not deem it necessary to move to the second stage of the procedure and carry out an investigation. Rather, it underlined that withdrawal was a measure of last resort and that careful reflection was necessary. It pointed out that Pakistan had introduced legislation to outlaw child labour and that the Government intended to keep the Commission informed of its implementation efforts. At the request of the Pakistani Government, the Commission also started to fund a development project in cooperation with IPEC and referred to the

497 Ibid.
498 For the Myanmar case under the ILO see above p. 183.
499 European Parliament, Resolution on the application of social clauses within the framework of the multiannual programme for generalized tariff preferences inter alia with regard to Pakistan and Myanmar, OJ 1996 C 17/201.
500 Written Question No. 2368/97 by Ulf Holm to the Commission, OJ 1998 C 21/148.
501 Ibid.
502 Ibid.
special incentive regime for the protection of labour rights under preparation.\textsuperscript{503} The focus of the Commission was thus more on encouraging countries to pursue social development and backing it up with complementary schemes rather than punishing them through trade measures.\textsuperscript{504} However, this decision might also have been influenced by the fact that some member states with important trade relations with Pakistan were not willing to pursue the investigation, fearing retaliation and the cancellation of contracts.\textsuperscript{505}

The IPEC project nonetheless has proven to be successful, having withdrawn 6,000 children from the football industry by the year 2000.\textsuperscript{506} The IPEC programme might not have been initiated if there had not been a complaint under the GSP scheme.

The different treatment of the Myanmar and Pakistan cases might be due to the fact that at that time the practice of forced labour in Myanmar was deemed to be ‘routine and widespread’ whereas forced child labour in Pakistan was only found ‘to occur’.\textsuperscript{507}

Following the submission of a complaint by ICFTU, ETUC and the World Federation of Labour on alleged systematic and serious violations of the freedom of association in Belarus, lodged in early 2003, the Commission initiated an investigation pursuant to Article 27 (2) of Council Regulation (EC) 2501/2001 after consultations with the Generalized Preferences Committee.\textsuperscript{508} In December 2006, the Commission recommended the withdrawal of trade privileges from Belarus over serious and systematic violations of core labour rights.\textsuperscript{509} Considering the recommendation of the Commission and the assessment of the situation in Belarus by the ILO, the Council decided to withdraw preferential

\footnotesize 503 Ibid.
504 Ibid.
arrangements for Belarus. Pursuant to Art. 20 (5) of Council Regulation 980/2005, the decision entered into force in June 2007. While this case was pending over a rather long period of three years, the final decision was straightforward.

On 31 March 2008, following a Supreme Court Ruling that declared certain provisions of the ILO convention concerning freedom of association and protection of the right to organise inconsistent with the constitution, the Commission rightly decided to initiate an investigation as to whether El Salvador complied with its obligation under the special incentive arrangement with regard to these labour rights.

In early 2008, the Council withdraw GSP plus preferences with regard to Moldova because new ‘autonomous trade preferences’ would make the existing trade preferences superfluous.

4. Value of trade preferences to developing countries

As in the case of the US GSP, the EU GSP has to be assessed on the basis of the value of its trade preferences to beneficiary countries.

As illustrated above, GSP is still of importance for developing countries because of tariff peaks, the tariffication process in agriculture, and other factors.

In 2002, EU imports under its GSP had a value of €53.2 billion out of the total €360 billion from all imports from developing countries. This was more than imports under the US GSP (€16 billion), but still only equals 14.7 per cent of all imports from developing countries. In 2007, GSP imports totalled €57 billion.


511 European Commission, Decision providing for the initiation of an investigation pursuant to Art. 18 (2) of Council Regulation (EC) 980/2005 with respect to the protection of the freedom of association and the right to organize in El Salvador, OJ 2008 L 108/29.


513 See above p. 297 et seq.


515 European Commission, EU Factsheet.
Agricultural imports accounted for about 10 per cent of GSP imports including EBA imports. Products that are important for developing countries such as cocoa are however often classified as sensitive products and are therefore not subject to tariff suspension. Yet, sensitive products may be subject to tariff suspension under the special incentive arrangement for sustainable development and good governance.

Textile products accounted for 18 per cent of the total GSP imports. Even though it grants preferential treatment to textiles differently from the US, the utilisation rate of the EU GSP is low nevertheless because of its strict rules of origin requirements. In 2002, the utilisation rate was only 52.5 per cent.

The EU itself has realised the need for improvement of the rules. Already in 2004, the Commission expressed its willingness to renew the current rules of origin in order to facilitate access for beneficiary countries to trade preferences. Providing for so-called ‘regional cumulation’, it remains to be seen whether the rules under the current and future GSP will lead to better results.

In the future, the increasing use of special incentive regimes and a change of rules of origin may increase the importance of the EU GSP for developing countries and can thus be used as either incentives or punitive measures for the (non-) protection of labour standards.

5. Lessons drawn from the EU GSP

The EU uses a two-fold approach, combining negative with positive labour rights conditionality. It is an advantage that additional incentives are used because they bear a smaller risk of distorting existing trade

---

516 European Commission, Generalized System of Preferences.
517 Art. 7 (1) in conjunction with Chapter 18, Annex II of Council Regulation (EC) 980/2005.
519 European Commission, Generalized System of Preferences.
521 UNCTAD, Trade Preferences for LDCs, p. xi.
523 Ibid., p. 10.
524 Ibid.
525 tralac.
relations. Unlike in the case of economic countermeasures, potential leverage is not lost if labour rights violations occur.

Although the EU GSP social clause is much more detailed and objective than the US GSP, it is still difficult to say whether it is an adequate means of substantially improving labour standards in developing countries. Unlike the US GSP, it has been of rather limited use. However, this might be attributable to its shorter time of implementation and the different role of trade unions in Europe. In general, the EU GSP can be considered to be a worthwhile approach offering meaningful incentives and punitive trade measures. Moreover, it has to be pointed out that at least two cases dealt with under the GSP both led to changes and one even to improvements in the situation of children.

Several lessons may be drawn. First of all, it is notable that applicant countries have to comply with international human rights law including laws prohibiting child labour.

The determination process of countries having access to additional preferences under the special incentive arrangement is also preferable to the US procedure, referring for example to decisions of the relevant international organisations and providing for the cooperation of the beneficiary country.

However, maybe due to its more complex procedures, under the former EU GSP only two countries, and under the current GSP only fifteen countries (one of which is no longer a beneficiary GSP plus country) have been granted further preferences under the special incentive arrangement. This is a very small number, compared to the 131 US GSP beneficiary countries that have to implement labour standards to be eligible. The great number of US beneficiary countries might be due to the vague wording of the requirement of ‘taking steps to afford to workers internationally recognized worker rights’ and the precedence of the national interest of the US when determining beneficiary countries.

On the surface, the EU withdrawal provisions appear to offer a more objective and transparent procedure than the US petition review. It is to be welcomed that they provide for cooperation with the country concerned and the use of findings by ILO bodies. However, they also suffer from shortcomings. Their wording gives the EU institutions too much discretion, which may lead – as occurred in the Pakistan case – to

527 19 United StatesC. sec. 2462 (b) (G).
politically biased decisions. Yet, it is to be welcomed that it is possible to only withdraw benefits with respect to certain products.

The different treatment of the Pakistan and Myanmar cases demonstrates that the EU procedure is not free from the political influence of its member states and that, as in the US, initiation of an investigation is more likely to happen if trade interests are minor. However, in the case of Pakistan, the EU chose to support a successful IPEC programme. This is proof of the fact that complaints mechanisms under social clauses, even if rarely used, can prompt positive action. However, in general, it has to be noted that, however well devised unilaterally imposed social clauses are, they bear the risk of being applied in a politically biased way. The question therefore is whether and how to introduce a multilaterally imposed incentive scheme. As in the case of the US GSP, the withdrawal procedure also should be subject to judicial review, giving the beneficiary country the right to appeal the administrative decision.

In July 2008, the Council adopted Council Regulation (EC) No. 732/2008 applying a scheme of tariff preferences for the period from January 2009 to 31 December 2011. The new GSP is an extension of the current system, only introducing minor changes.

IV. Conclusion

Both GSP schemes are in principle useful initiatives that have contributed to better labour standards in some beneficiary countries, and in some cases have even led to a reduction of child labour. It has been argued that nearly every labour reform in Central America in the past fifteen years was the direct result of a threat to withdraw trade benefits under a preference programme, and that the new labour rights provision in the draft of the Central American Free Trade Agreement (CAFTA) would unnecessarily weaken the existing GSP leverage. GSPs demonstrate that labour conditionality can work. However, due to external and internal factors, they alone are insufficient – and inadequate – to solve the problem of child labour.

External factors are the general reduction of tariffs and, as a result, a reduced preference margin and the increasing number of bilateral and


529 LAC quoted in Greven, Social Standards, p. 32.
regional trade agreements. Together with the current rules of origin and administrative procedures, these conditions reduce the impact of GSP law on developing countries. Thus, the leverage on labour rights performance of these countries is limited. However, in the case of a better application of rules of origin and easier access to GSPs in general, as the EU has promised, both GSPs might be effective tools for reducing child labour.

Shortcomings inherent in both GSPs and the lessons to be drawn are as follows. The US GSP law does not refer to international standards and has often been implemented in a discriminatory and biased way. The former EU GSP law – referring to UN and ILO conventions and being more detailed and participatory – was not very effective because of its limited use. However, the EU GSP special incentive arrangement for sustainable development and good governance is easier to implement and has been accorded to more countries. Yet, the high number of human rights, environmental and governance conventions, which applicants have to ratify and implement in order to be eligible, may be an obstacle for some countries. In any event, future GSPs should be based on international conventions and jurisprudence.

Under the former EU GSP, there were complaints about a biased implementation, especially with regard to the different treatment given to Myanmar and Pakistan. Although less significant than under the US GSP, the current EU GSP also accords the Commission a lot of discretion in the granting and withdrawal procedure, increasing thereby the risk of politically biased and discriminatory decisions.

In addition, it is to be deplored that in both schemes the final decision, in most cases, is made by trade representatives. This might lead to trade interests taking precedence over labour rights concerns. As illustrated above, this has indeed been the case with the US GSP. Thus, there should be a clear provision that trade and labour representatives are involved in the final decision making. Moreover, neither GSP provides for an objective appeal mechanism.

As US Government officials have said, in theory, the positive conditionality approach of granting additional tariff preferences in the case of

\[^{530}\text{European Commission, COM(2004) 461 final, p. 7.}\]
\[^{531}\text{In the case of the EU, according to Art. 203 of the EC-Treaty, decisions by the European Council are made by the relevant ministers of each member state. Since the GSP concerns foreign trade relations, it is probable that trade ministers will decide on the cases.}\]
the protection of labour standards is preferable to the negative conditionality of the US since leverage is not lost. It has to be noted however that positive incentives may have the same effect as punitive trade measures. The conditions of competition between beneficiary and non-beneficiary countries are altered and one country may feel discriminated against. The establishment of a panel by the request of India to investigate the compatibility of the EU GSP law with WTO law demonstrates that positive conditionality can raise the same concerns as negative conditionality.\(^{532}\)

As is the case with the EU system, the US GSP system should allow for the possibility of withdrawing benefits only with respect to certain products. Such a scheme is more flexible and bears less risk of being discriminatory. It should be noted however that the US GSP provides for a review process of specific articles with regard to their competitive need limit in which the beneficiary country’s labour rights performance must be considered.

Moreover, some legal authors placed GSPs in their historical and political context and discovered some neo-colonial strands in the debate over ‘conditionality’ of tariff preferences.\(^{533}\) The current systems are equally determined by political processes within the EU and US, as were the former laws written by colonial powers before the 1960s and 1970s.\(^{534}\) The legal authors rightly question the adequacy of unilateral systems that are only under the supervision of the WTO adjudicating bodies.\(^{535}\)

Thus, apart from proposals for unilateral reform, the question arises whether the existing unilateral schemes should be complemented by, or incorporated into a multilateral social clause implemented by multilateral forums such as the WTO and ILO.\(^{536}\) Such a mechanism could provide for a judicial review process to ensure an objective application of granting and withdrawing provisions. With a view to the external and internal shortcomings of GSP schemes, such a multilateral

\(^{532}\) WTO panel and Appellate Body European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, report of the panel, 1 December 2003 and the Appellate Body, 7 April 2004.

\(^{533}\) Shaffer, Apea, ‘GSP Programmes’, p. 492.

\(^{534}\) Ibid., p. 493.

\(^{535}\) Ibid., p. 501.

\(^{536}\) As a result of this analysis of the US GSP, Schneuwly, ‘Handelssanktionen’, 141 also recommends a joint ILO–WTO implementation system for improving labour standards.
mechanism indeed would be preferable to the existing GSP schemes in their current form.

D. UNILATERAL AND OTHER NATIONAL TRADE MEASURES ON CHILD LABOUR

I. Introduction

The following section will analyse some existing unilateral and other nationally implemented trade measures regarding the elimination of child labour. The first measure to be examined is a US law prohibiting the importation of goods made with child labour. Another example of a ban on goods is the US Burmese Freedom and Democracy Act prohibiting goods coming from Myanmar following an ILO Governing Body recommendation. This law is however different to the extent it prohibits all goods coming from a specific country. Rather than being product-related, it can be classified as a general sanction or more specifically a country-specific countermeasure. The ban has already been presented above and will not be described again in this section. The second measure to be analysed is the Massachusetts Act on Burma, which is a selective government purchasing law prohibiting the purchase of goods of companies doing business with Myanmar. The third measure presented pursues a market-based approach providing for a government label for companies complying inter alia with international child labour standards. Finally, the Kimberley Process Certification Scheme will be presented, prohibiting trade with non-certified diamonds.

The measures will be analysed with a view to their effectiveness in bringing about change to child labourers. The analysis will mainly be done by examining the structure of the law. Specific cases and examples for change will be considered where possible.

II. Section 307 of the US Tariff Act of 1930

1. Section 307 of the Tariff Act of 1930

amendment may be attributable to the ratification of ILO Convention No. 182 in 1999 by the US. It reads:

All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labour or/and forced labour or/and indentured labour under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision. The provisions of this section relating to goods, wares, articles, and merchandise mined, produced, or manufactured by forced labour or/and indentured labour, shall take effect on January, 1932; but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in the United States as to meet the consumptive demands of the United States.

‘Forced labour’ as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its non-performance and for which the worker does not himself offer voluntarily. For purposes of this section, the term ‘forced labour or/and indentured labour’ includes forced or indentured child labour.

Such a prohibition is at first glance to be welcomed. However, it has to be pointed out that goods made with forced child labour are not prohibited from entering the US if the goods concerned are not produced in the US but demanded by consumers. Thus, as in the US GSP, there is an exception for the national economic interest, which prevails over human rights concerns. This is an indication that unilateral measures tend to be biased in favour of national interests and, therefore, not panaceas for trade-related action on child labour.

The enforcement regulations are contained in 19 CFR sec. 12.42. According to 19 sec. 12.42 (a), if any Customs officer has reason to believe that any merchandise is being produced in any foreign locality with the use of forced child labour or indentured child labour under penal sanctions, he shall communicate this to the Commissioner of Customs. Pursuant to 19 CFR sec. 12.42 (b), any person outside the Customs Service who believes that merchandise produced by forced child labour is likely to be imported into the US is entitled to communicate his belief to the Commissioner of Customs. Upon such a communication, the Commissioner will cause an investigation, 19 CFR sec. 12.42 (d). If the allegations

are true, the merchandise must be denied entry into the US and treated as an importation prohibited under Section 307, Tariff Act of 1930, unless the importer establishes by satisfactory evidence that the merchandise was not produced with forced child labour, 19 CFR sec. 12.42 (f) and (g).

2. Application of Section 307 of the Tariff Act of 1930

The Act was *inter alia* applied to the importation of goods coming from Mexico\(^\text{541}\) and China.\(^\text{542}\) In 2000, the Customs Service took action regarding the detention of bidi cigarettes from India, which were found to be produced by indentured child labour.\(^\text{543}\)

In May 2002, the International Labour Rights Fund (ILRF, the successor of its legal department is now the International Rights Advocates), a US-based NGO, filed a petition with the US Customs Service to initiate an investigation and enforcement action under Section 307 of the Tariff Act of 1930 with regard to child labour.\(^\text{544}\) It alleged that, in the Côte d’Ivoire, children under the age of fifteen were working on cocoa farms under abusive conditions, and that children were held in debt bondage. Several reports of the US State Department in 2001 and 2004 confirmed that there were 15,000 children working on cocoa, coffee and cotton farms in the Côte d’Ivoire.\(^\text{545}\) The US is a major importer of these cocoa beans, marketed by firms such as M&M, Mars, Nestlé, Archer Daniels

---


\(^\text{542}\) In a China–US Memorandum on Prohibiting Import and Export Trade in Prison Labour Products, the US barred certain leather imports from China following a determination by the US Customs Service that goods produced at the Qinghai Hide and Garment Factory were produced with convict labour, 58 Fed. Reg 32,746 (1993) quoted in Cleveland, ‘Human Rights Sanctions’, 139, fn. 23. In April 1996, the Customs Service applied Section 307 to ban the importation of certain iron pipe fitting from the Tianjin Malleable Iron Factory in China holding that the goods were made with prison labour, see Cleveland, ‘Human Rights Sanctions’, 139, fn. 23.


Midland and Cargill.\textsuperscript{546} Since the Bush administration remained inactive despite several letters, the ILRF sued the US Customs Service in October 2004 asking for an investigation, requiring cocoa importers to show that their imports were not the product of forced child labour and calling for a prohibition of the importation of the merchandise that is shown to be produced with forced child labour.\textsuperscript{547}

In 2005, the US Court of International Trade dismissed the action arguing that the plaintiffs lacked standing.\textsuperscript{548} The Court argued that since 19 United StatesC sec. 1307 excepted from the prohibition goods for which domestic production was insufficient to meet domestic demand, the plaintiffs could not claim that the government’s failure to comply with regulations under the statute had caused them informational injury.

This case demonstrates, as indicated above, that Section 307 of the Tariff Act of 1930, because of its exception in cases of domestic demand, is not a panacea for all cases of child labour. Future trade measures should not contain economic exceptions.

3. Conclusion

The US ban on goods made with forced and indentured child labour is principally a meaningful approach to combat child labour. However, the exception for goods for which domestic production is insufficient to meet domestic demand is a major shortcoming. As the case on child labour in the Côte d’Ivoire has shown, this shortcoming hinders the effective application of Section 307 of the Tariff Act of 1930.

However, the Act has been applied in several cases and may prove an effective remedy in some of these cases. Yet in the Côte d’Ivoire, child labour still exists on a large scale.\textsuperscript{549} Thus, to date, there have been few changes on the ground that are attributable to the application of the Act.


\textsuperscript{549} According to some estimates, there are still 248,000 children aged nine to twelve working in hazardous conditions on West African cocoa farms, cf. C. Bomhardt, ‘The Bitter Sweet Truth, Chocolate and Child Slavery’, \textit{Hands on Magazine}, 16 (2) (2006).
In addition, it has to be kept in mind that the law might also hurt child labourers by making them jobless. Hence, such trade measures should be accompanied by regulations providing for educational measures helping the former child labourers.

### III. The Massachusetts Act on Burma (Myanmar)

In 1996, the Massachusetts Act on Burma (Myanmar), an Act regulating State Contracts with companies doing business with or in Burma (Myanmar), was codified under the Massachusetts General Law, Chapter 7, Section 22G – M.\(^{550}\)

The Act provides, in essence, that public authorities of the Commonwealth of Massachusetts are not allowed to procure goods or services from any persons doing business with Burma. In case of contravention, any contract will be void, Section 22L of Chapter 7, Massachusetts General Law.

In particular, any state agency or authority may not purchase goods or services from any person listed on the restricted purchase list, Section 22H of Chapter 7, Massachusetts General Law. This is achieved by applying an automatic price penalty of 10 per cent on bids from companies that are considered to be doing business with Myanmar.\(^{551}\) The restricted purchase list contains persons doing business with Burma, Section 22J. ‘Doing business with Burma’ means having a principal place of business in Burma or any operations, leases, franchises, majority owned subsidiaries; providing financial services to the government; promoting the importation or sale of gems, timber, oil, gas; or providing any goods or services to the government of Burma, Section 22G (a)–(b). ‘Government of Burma’ includes any public or quasi-public entity operating within Burma, Section 22G. ‘State agency’ includes all awarding authorities of the commonwealth while ‘State authority’ ranges from the Bay State Skills Corporation to the University of Massachusetts Building Authority. The law had thus a very broad scope.

It was enacted in 1996 to respond to Myanmar’s military Government refusing to recognise the results of democratic elections held in 1990 and in an ongoing pattern of human rights violations such as extra-judicial executions, ill-treatment during forced labour including child labour.

---


labour and 'portering' and forced relocations.\textsuperscript{552} At about the same time, the ILO Labour Conference adopted a recommendation by the ILO Governing Body that recommended its ILO constituencies to review their relations with Myanmar.\textsuperscript{553}

The law had some impact on business operations. Along with a boycott campaign, the Massachusetts Burma Law prompted Pepsi in 1997 to withdraw from Burma and to terminate all of its business relationships there.\textsuperscript{554} Campaigners underlined the importance of selective purchasing laws in hitting companies that are not consumer-oriented, like construction firms.\textsuperscript{555}

In 2000, the Supreme Court declared the law unconstitutional, finding that the federal government sanctions pre-empted the Massachusetts Burma Law and highlighting the need of the federal government 'to speak with one voice' in foreign relations.\textsuperscript{556}

In conclusion, while its WTO law compatibility still has to be examined,\textsuperscript{557} the Massachusetts Burma Law is an example of what government procurement laws aiming at socially responsible procurement may look like. In its short existence, it had already had some success. Socially responsible government purchasing laws may therefore represent a viable option for trade measures on child labour. However, as the other measures presented here, this law does not provides for rehabilitation measures for former child labourers. This aspect should be taken into account in future laws.

\textbf{IV. The Belgian Social Label Law}

1. Introduction

The Belgian Social Label Law entered into force in September 2002.\textsuperscript{558} The law provides for the granting of an official public social label to

\textsuperscript{552} Fitzgerald, 'Massachusetts, Burma, and the World Trade Organization', 4.

\textsuperscript{553} See above p. 186.

\textsuperscript{554} Fitzgerald, 'Massachusetts, Burma, and the World Trade Organization', 19.

\textsuperscript{555} Simon Billeness quoted in Fitzgerald, 'Massachusetts, Burma, and the World Trade Organization', 19.


\textsuperscript{557} Since the EC had asked for the suspension of the panel following its original request for establishment of a panel, the panel agreed to suspend the panel proceedings, \url{www.wto.org/english/tratop_e/dispu_e/cases_e/ds88_e.htm}.

\textsuperscript{558} Loi du 27 février 2002 visant à promouvoir la production socialement responsable, Moniteur belge du 26 mars 2002; the law entered into force on 1 September 2002 and was modified on 8 April 2003, \url{www.ejustice.just fgov.be/loi/loi.htm}. 
products produced in conformity with the ILO core labour conventions.\footnote{559} A label is a means of communication stating the social conditions relating to the production of a product or rendering of a service.\footnote{560} As the title suggests, the aim of the law is to promote socially responsible production. It can be considered as an attempt to reconcile defendants of a social clause who want to condition market access on labour law compliance in commercial treaties with opponents of such a clause, i.e. companies or several developing countries that reject any binding mechanism for socially responsible production. As such it can be described as a response to the many-fold private initiatives such as social labelling and codes of conduct.\footnote{561} So far, Belgium has been the only country that has introduced such a law.

2. The social labelling system

According to Art. 2 (1) of the Belgian Law a label is affixed to products and certifies that all stages of the production chain are in compliance with the conformity criteria contained in Art. 3, section 2 (5) of the Belgian Law, that is the fundamental ILO conventions including the Minimum Age Convention and the Worst Forms of Child Labour Convention.

Art. 3, section 3 of the Belgian law in conjunction with the ‘cahier des charges’\footnote{562} provides for the application procedure for enterprises that want to affix a label on their products. The applicant has to apply to the Minister of Economic Affairs and a Committee consisting of sixteen members from NGOs, government representatives, consumer organisations, trade unions and employers’ federation representatives, Art. 7, section 3 of the Belgian Law and para. 1.1 of the cahier des charges.

If the Committee declares the request acceptable, the company has to choose a social auditing organisation from the list provided by the Committee (e.g. auditing organisations accredited by Social Accountability International),\footnote{563} para. 1. 4 of the cahier des charges. It then has to

\footnote{559}{Art. 2 and 3 of the Belgium Social Label Law.}
\footnote{561}{A. Peeters, 'The Belgian Social Label, A Pilot Project for Involving Governments in CSR', European Review of Labour and Research, 10 (3) (2004), 393–400, 394.}
\footnote{562}{Arreté ministériel du 7 avril 2003 approuvant le cahier des charges pour une production socialement responsable, Moniteur belge du 28 avril 2003.}
\footnote{563}{Ethibel, Manuel pour la Demande du Label Social Belge, www.social-label.be/social-label/ContentSite/Handleiding%20FR.pdf, para. 1.4.}
submit to the auditing organisation a detailed description of the product chosen and of its supply chain, a list of its suppliers and subcontractors, the national law of the country where production takes place, its internal control mechanism to ensure that the fundamental ILO conventions are complied with, a declaration that all workers involved in the production are informed about the request and a declaration signed by its sub-contractors and suppliers that they comply with the fundamental ILO conventions and that they will inform their employees about the request for the social label, para. 1.5 of the cahier des charges.

If the request is admitted, the auditor carries out a social audit of the supply chain and delivers a report stating cases of non-compliance with the relevant ILO conventions and possible corrective measures, paras. 1.6 and 1.7 of the cahier des charges. In response, the applicant has to provide an action plan implementing corrective measures, para. 1.8 of the cahier des charges. The auditor subsequently drafts a final report containing its view on the action plan and the corrective measures taken by the company and renders it to the Committee, para. 1.9 of the cahier des charges. The Committee in turn delivers its opinion on the report to the Minister who finally decides whether to grant the label or not, paras. 1.10 and 1.12 of the cahier des charges. In case of gross violations of the fundamental ILO conventions, the Committee may decide to carry out the social audit again, para. 1.11 of the cahier des charges.

Controls concerning the implementation of the action plan and the extension or prolongation of the request follow the same procedure (para. 1.13 of the cahier des charges).

The company commits itself *inter alia* only to apply the label under the conditions determined by this law and to inform all its suppliers of the criteria to fulfil and of the complaints procedure, para. 2.1 of the cahier des charges.

The auditor has to ensure that it is financially and otherwise independent of the company concerned, para. 2.3 of the cahier des charges. During the social audits, the auditor *inter alia* has to make sure that the factories examined are part of the supply chain, that the people conducting the interviews with the workers speak their language and are familiar with local culture, and that the workers are informed about the labelling programme and its complaints mechanism described below, para. 3.3 of the cahier des charges. The social audit has to reveal whether the measures taken to comply with the fundamental ILO conventions are permanent, para. 3.3 of the cahier des charges. The costs of the social
audits have to be borne by the applicant. However, companies from developing countries may be granted financial aid to be able to implement measures to comply with the core ILO conventions, Art. 5 of the Belgian Law.

The social audits have to be carried out once a year, para. 3.4 of the cahier des charges. After a maximum period of three years, a social audit concerning the prolongation of the label has to be carried out, para. 3.4 of the cahier des charges.

According to Art. 10 of the Belgian Law, the Minister may prohibit the use of the label by the company concerned if it is discovered that the label is affixed to products produced in contravention of the fundamental ILO conventions contained in Art. 3, section 2 of the Belgian Law. He may also withdraw the label if the company hinders control of its supply chain (Art. 10 of the Belgian Law).

According to Art. 11, § 1 of the Belgian Law, there may be a punishment of up to five years in prison or a fine of €12,400 if someone uses or tries to use the label in contravention of the orders of the law. Thus, if the label has been granted to a company and child labour is discovered in its supply chain, this may not lead to a punitive sanction. Such a provision would be too far-reaching and constitute a barrier for the successful implementation of the law.

Companies, organisations or any other person interested in the subject may submit complaints concerning the granting, rejection or withdrawing of the label, Art. 3, section 6 and Art. 9 of the Belgian Social Label Law. The Minister of Economic Affairs decides with the help of the Committee, Art. 3, § 6. According to Art. 9, an appellate council for appeals on the decisions of the Minister is established.

Finally, according to Art. 3, section 7 of the Belgian Social Label Law, the Minister of Economic Affairs accepts other labels if they provide for equivalent control and auditing systems.

To date, five different types of product have received the label.

---


565 The term ‘sanction’ as used here refers to penal sanctions in contrast to economic countermeasures in international law.

3. Evaluation

The Belgian Law follows the approach of the private social labelling programmes described in the next section: it rewards enterprises that use a socially responsible production. As the social labelling schemes examined below will show, labelling schemes can be effective approaches when combating child labour but vary a lot as regards their success depending on the effectiveness of their implementation and monitoring system. The law attempts to solve this problem by referring to a legally prescribed auditing system including sanctions. Thus, it endeavours to reconcile a voluntary market-based approach with mandatory criteria.

In contrast to many codes of conduct and social labelling schemes, the implementation scheme of the Belgian Law explicitly refers to the ILO Conventions No. 138 and 182. It provides for a detailed control system that makes sure that the whole supply chain is involved. By providing a list of auditing organisations, the control system secures that the auditing remains independent and objective. In particular, it is commendable that the applicant company has to ensure that the workers in the supply factories have to be informed about the application procedure for the label. Moreover, it is positive that the Committee advising the Minister on the application consists of members representing all the different stakeholders and thus guarantees objective and independent decisions. While the applicant company has to bear the costs of the auditing, it can at least apply for financial aid for compliance costs if it is from a developing country.

However, it is not clear how exactly the corrective measures concerning the implementation of the fundamental ILO conventions have to be implemented. First of all, the mechanism does not verify whether the corrective measures are taken. Secondly, nothing is said on how for example child labour has to be reduced: completely and immediately by dismissing all children or in a transitional period accompanied by rehabilitation and educational measures? In order to avoid what happened in the case of the Child Labour Deterrence Act of 1995 in Bangladesh, it would be recommendable to allow for a transitional

---

567 In this case, Bangladeshi employers fearing a boycott of their carpets by American importers dismissed all child labourers at once who then began to work in even more exploitative work or as prostitutes, see S. Alam, Harkin Bill and Child Workers in Bangladesh Garments, www.banglarights.net/HTML/garmentsworkers.htm.
period. Finally, the periods between the audits might be too long. There is the risk that in the meantime, factory owners employ children.

To date, since there have not been any complaints, it is hard to assess the effectiveness of the complaints mechanism. However, the existence of a complaints mechanism including an appeal mechanism is a major advantage over private labels. Yet, as is the case with other complaints mechanisms, its effectiveness depends on whether the members of the appellate council to be established by the Minister of Economic Affairs will be impartial and independent and represent the different stakeholders.

A possible advantage of the law could be the harmonisation of the existing codes of conduct and labels if companies choose to apply for the legal label instead of creating their own label system. The great number of private codes and labels has led to confusion among consumers. The acceptance of private labels by the Minister of Economic Affairs will contribute to harmonisation.

The shortcoming of the law is inherent in its market-based approach: its effectiveness in ensuring socially responsible production depends on the willingness of the consumer to buy labelled products. Only if companies notice that consumers prefer labelled products will they participate in the labelling programme. However, consumer behaviour varies a lot. Moreover, even if it proves to be an efficacious means, unless a majority of consumers buys labelled products and thus a majority of companies applies for the legal label, initiatives such as the Belgian Law alone are not sufficient to ensure a socially responsible production. Trade unions especially stress that the law can only have an auxiliary role, and that respect for decent work has to be ensured by a general structure applicable to all in the name of the public good. 568

Finally, since not all transnational corporations may be able to afford to apply for the label, the law can have trade distorting effects. It could also be considered to be protectionist if Belgian companies have a bigger chance to be awarded the label than foreign companies. It has been stated that a major reason for companies to apply for the Belgian label is to gain the upper hand in Belgian public procurement tenders over competitors from developing countries. 569 Therefore, it has to be examined whether it is a trade barrier and violates WTO law.

The Association of South East Asian Nations (ASEAN) developing countries asserted that it was a technical barrier to trade and therefore contravened WTO rules.\footnote{Ibid., 396.}

V. The Kimberley Process Certification Scheme

1. The Scheme

The Kimberley Process Certification Scheme was developed in response to the devastating effects of the wars in West Africa involving and financed by so-called ‘conflict diamonds’.\footnote{K. Nadakavukaren Schefer, ‘Conflict Diamonds, Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process’ in T. Cottier, J. Pauwelyn, E. Bürgi (eds.), Human Rights and International Trade (Oxford University Press, 2006), pp. 391–450, p. 411.} In Sierra Leone for example, rebel attacks on the civilian population included mutilation, rape, forcible conscription of children and murder.\footnote{Ibid., p. 406.} Diamonds were used as a source of finance for the rebels’ wars.\footnote{Ibid., p. 411.}

The Kimberley process was a reaction of the international community involving an unusual amount of different stakeholders.\footnote{Ibid.} It started in 2000 in South Africa and was followed by eight more meetings,\footnote{Ibid., p. 412.} leading to the Kimberley Process Certification Scheme.\footnote{Kimberley Process Certification Scheme, www.kimberleyprocess.com/documents/basic_core_documents_en.html.

At the centre of the Scheme is the obligation of each participant to ensure that a Kimberley Process Certificate accompanies each shipment of rough diamonds, its process for issuance of such a certificate means the shipment meets minimum standards established by the Scheme and the certificate itself contains minimum items of information, Section II of the Scheme. Minimum requirements include the statement that ‘The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds’; information on the country of origin – parcels have to be of unmixed origin; the date of issuance and expiry of the certificate, the issuing authority and the identification of the exporter and importer; the carat weight and the value in US dollars; the number of parcels in shipment; and the validation of the certificate by the exporting
The implication of these requirements is that diamonds without such a certificate were traded by rebel armies. According to the application procedures, national authorities of participants should ensure that imports and exports of rough diamonds are accompanied by duly validated certificates; confirm that the details of the shipment correspond to the certificate; and ensure that no shipment is imported from or exported to a non-participant. Internal controls of imports and exports of rough diamonds including criminal penalties and data collecting systems should be established. Other requirements include cooperation and transparency. Finally, participants have a right to complain if another participant fails to implement the Scheme effectively.

2. Evaluation

Although it can be considered as a success that the Scheme came into force, many stakeholders criticised several points. The main criticism raised by NGOs is the lack of independent monitoring of the implementation of the participants’ schemes.

The Scheme entered into force in January 2003. As of September 2007, it consisted of forty-eight participants. Although the Scheme is relatively recent, it has already proven successful, having reduced the share of blood diamonds of world trade to less than 1 per cent. However, there are also some gaps in the system, making it possible that blood diamonds are traded with the wrong certificates.

The Scheme differs from the US import bans mentioned above. Since the human rights violations are not directly linked to the production of diamonds, sanctions (in this work named countermeasures) targeting trade with diamonds have been classified as a ‘semi-tailored’ sanction.

---

577 Annex I of the Scheme.
578 Nadakavukaren Schefer, ‘Conflict Diamonds’, p. 413.
579 Section III of the Scheme.
580 Section IV of the Scheme.
581 Section V of the Scheme.
582 Section V (e) of the Scheme.
584 Ibid.
587 This is the case for diamonds from the Côte d’Ivoire, ibid.
On the one hand, the Scheme is product-related, prohibiting trade of non-certified diamonds but does not have a direct product nexus. On the other hand, it targets products that are not used for the conflict but nevertheless banned because they do not stem from a participant country. In that sense, it is a country-specific measure. It remains to be seen whether such a scheme is WTO-consistent.

Overall, the Scheme can be considered to be a success for two reasons. Firstly, it contributed to the reduction of blood diamonds. Secondly, it has been set up in a multi-stakeholder process. This should be taken as a lesson for future trade measures.

VI. Conclusion

The trade measures presented here are proof of the fact that trade measures can work. They all led to some positive changes, for example a reduced trade in conflict diamonds or to certified products produced in conformity with the fundamental ILO conventions. The Massachusetts Burma Law appears to be able to have some impact on business relations with Myanmar. Its effects on forced child labourers however remain unclear. The exact impact of the measures would thus still have to be assessed.

However, in general, the measures can be considered as meaningful approaches. Yet, they alone are insufficient to solve the problem of child labour. They all suffer from some shortcomings. The US law is economically biased and not effectively enforced. The Belgian Law depends on consumer willingness to buy labelled products. Moreover, the Belgian Law only reaches products in the Belgian market. However, since the Belgian Law emerged during discussion on the creation of a European social label, it should be regarded as a pilot project for a European-wide initiative.589 The Kimberley Process Certification Scheme also suffers from some gaps in its implementation system. All measures lack follow-up measures for former child labourers.

Since the WTO law compatibility of these measures is also questionable, a multilateral social clause regulating such cases might be preferable. If it had for example been established that such measures were consistent with WTO law, the US Government might have enforced its law more effectively.

Moreover, a multilateral social clause drawing on the social clauses in regional and bilateral trade agreements might remedy the shortcomings

589 Peeters, 'The Belgian Social Label', 400.
of unilateral measures for several reasons. Firstly, cooperative activities and dispute settlement would take place before such a strong measure as an import ban is imposed. Secondly, the clause could provide for general criteria for national labelling schemes. Thirdly, international bodies would supervise the imposition of trade measures directed at the elimination of child labour. This would guarantee a non-discriminatory and unbiased application of trade measures in contrast to unilateral measures. A multilateral clause could also impose an obligation to introduce educational measures for former child labourers as well as the obligation for developed countries and international organisations to provide technical and financial aid.

E. CORPORATE SOCIAL RESPONSIBILITY

I. Introduction

Having examined obligations of states and government measures to improve labour rights, this section will focus on the responsibility of transnational and national corporations for improving workers’ rights and eliminating child labour.\(^{590}\) It will examine whether private sector initiatives and non-binding standards are effective in bringing about change for child labourers.

Transnational corporations (TNCs)\(^{591}\) have become powerful entities that have a great impact on the one hand on the global economic development and on the other hand on the human rights and lives of individuals through their core business practices and operations. The past twenty years of trade liberalisation have created jobs for millions of...

\(^{590}\) The Belgian Social Label Law also addresses corporate social responsibility providing for a social label. Since it has already been examined together with other existing unilateral trade-related measures on child labour, it will not be mentioned in this section.

\(^{591}\) According to para. 20 of the UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights adopted by the Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, fifty-fifth session, 26 August 2003, E/CN.4/Sub.2/2003/12/Rev.2, the term ‘transnational corporation’ refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively. This definition shall apply here.
workers in global supply chains of TNCs. However, companies often based their business model on outsourcing production through global supply chains that demand low-cost and ‘flexible’ labour. As a result, labour rights abuses in supplier factories are often perpetrated, including children’s rights. The apparel industry especially has received much criticism for substandard working conditions in Asian supplier factories, e.g. Nike, adidas or Puma.

1. Extraterritorial legislation

Yet it is difficult to hold corporations liable for human rights violations abroad. The regulation of TNCs by the host state where production takes place is difficult because companies are often more powerful than the states in which they operate. TNCs can avoid being held liable by host states by threatening to disengage from a state. Moreover, as they usually operate through complicated supply chains, they refuse to be held legally responsible for wrongs committed by their suppliers.

Most multinational companies only recently acknowledged their responsibility for labour rights violations occurring in supplier factories.

593 Ibid., p. 17.
594 Since 1996, Nike, adidas and Puma have been criticised for using child labour in the football industry in Pakistan, Clean Clothes Campaign, Sialkot, Pakistan, p. 1.
596 IRENE, Macdonald, Molenaar, Pennartz ‘Controlling Corporate Wrongs’, 4.
598 For example Monsanto, Emergent Genetics, Hindustan Lever, Syngenta, Advanta and Proagro recognised only in 2003 that it is part of their role to help to eliminate child labour in supplier factories, India Committee of the Netherlands et al., Multinationals Pledge to End Child Labour in Indian Seed Production, 24 October 2003, www.indianet.nl/pb031024e.html.
As regards regulation of TNCs by home states, even if extraterritorial applicable legislation exists, states are reluctant to hold them liable for extraterritorial labour rights violations because of possible competitive disadvantages. For example, in the US the Alien Tort Claims Act (ATCA) exists, which gives US courts jurisdiction over a civil action by foreign nationals relating to torts committed in violation of ‘the law of nations or a treaty of the US’. Such a law is almost unique in the world. However, US courts have been reluctant to enforce US labour laws extraterritorially to protect foreign workers. In the case John Doe I v. UNOCAL in which UNOCAL, a US oil company, is alleged to have used slave labour when constructing a pipeline in Burma, the Bush administration asked the court to dismiss the case, stating that the ATCA does not grant victims the right to sue for abuses committed abroad. In March 2005, the plaintiffs and UNOCAL agreed to settle the case out of court. This might however be interpreted as a concession by UNOCAL that the plaintiffs had a right to action.

In the landmark decision Sosa v. Alvarez-Machain, the Supreme Court restricted the scope of application of the ATCA to a limited set of cases. It found that the ATCA gave federal courts jurisdiction to hear

599 In other common law jurisdictions such as the UK or Australia, proposals for legislation dealing with overseas corporate behaviour have been made, but none of these have reached the statute book. The notion of extraterritorial legislation is rather alien in civil law jurisdictions, D. Kinley, J. Tadaki, ‘From Talk to Walk, The Emergence of Human Rights Responsibilities for Corporations at International Law’, Virginia Journal of International Law, 44 (4) (2004), 931–1024, 940.
‘claims in a very limited category defined by the law of nations and recognized as common law’. 609

In 2005, the former ILRF, Global Exchange and others filed suit against Nestlé, Archer Daniels Midland and Cargill companies in the federal district court of California. 610 The plaintiffs were inter alia Malian children who were trafficked from Mali to the Côte d’Ivoire and forced to work twelve to fourteen hours a day on cocoa plantations that supplied cocoa beans to the defendants. 611 Specifically, the plaintiffs assert claims under inter alia the ATCA for forced labour and torture they suffered as a result of the wrongful conduct either caused and/or aided or abetted by the corporate entities. 612 Given that Nestlé, Cargill and Archer Daniels Midland all have branches both in the Côte d’Ivoire and the US, i.e. sufficient US contact, and that forced labour and torture are the subject matter, the plaintiffs stand a good chance to be granted their damages under the ATCA. However, Nestlé et al. argue that the plaintiffs were wrong stating inter alia that there is an international law consensus against corporate liability. 613 It remains to be seen how the US Courts will solve this case.

In general however, the ATCA only offers redress for victims of slavery or child labour in a limited number of cases. The same holds true for other national legislation that is extraterritorially applicable. Overall, there are many loopholes in national legal systems, which companies can exploit. 614

2. The concept of corporate social responsibility

The concept of corporate social responsibility tries to bridge the regulation gaps by requiring that enterprises themselves have to ensure that they comply with social and environmental standards throughout the

612 Ibid., 1.
614 Under British law for example, companies try to use forum non conveniens to escape responsibility in the home state, IRENE, Macdonald, Molenaar, Pennartz ‘Controlling Corporate Wrongs’, 8.

However, the expectation is that corporate social responsibility will evolve into legal accountability.\footnote{UNCTAD, \textit{World Investment Report 1999}, p. 347.} This is why civil society increasingly uses the term ‘corporate accountability’.\footnote{See for example the German network CorA using the term ‘corporate accountability’ as its name, www.cora-netz.de.} Initiatives that address labour practices in enterprises comprise codes of conduct, social labelling, investor reporting and other multi-stakeholder initiatives.\footnote{J. Diller, ‘A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives’, \textit{International Labour Review}, 138 (2) (1999), 101–29, 101.} These initiatives overlap sometimes.

One has to distinguish between public sector initiatives, i.e. governmental and intergovernmental instruments, and private sector codes aiming at corporate social responsibility. Whereas intergovernmental instruments such as the OECD Guidelines date from as early as the 1970s, private initiatives on child labour standards were increasingly developed by companies in the 1990s to respond to pressure from intense public criticism of labour conditions existing in the foreign plants of subcontractors or suppliers of transnational corporations.\footnote{UNCTAD, \textit{World Investment Report 1999}, p. 363; well-known examples are the adoption of corporate codes of conduct by Levi Strauss & Co., Reebok and Nike.}

Besides NGOs and trade unions, private initiatives may also involve public bodies, in which case they are called multi-stakeholder initiatives or public–private partnerships.

II. Codes of conduct

A study conducted by the International Organization of Employers (IOE) revealed that among 258 codes of conduct addressing labour practices, about 67 per cent are corporate codes of conduct, around 11 per cent are business association codes, approximately 7 per cent are framework agreements, about 2 per cent are multi-stakeholder codes, around 7 per cent stem from NGOs, approximately 3 per cent stem from worker
organisations and 0.39 per cent are public sector codes. The following section will analyse these different types of codes.

1. Public sector codes

a) The OECD Guidelines

In 1976, the OECD prepared Guidelines for Multinational Enterprises, which were revised in 2000. To date, the thirty OECD member countries as well as eleven other countries have signed the Guidelines. They are recommendations jointly addressed by governments to multinational enterprises. They are voluntary and not legally enforceable. They aim at reinforcing private efforts to define and implement responsible business conduct, including the effective abolition of child labour. The provision concerning child labour recommends that enterprises contribute, within the framework of applicable law, to the effective abolition of child labour. Thus, there is no explicit reference to the ILO conventions on child labour. Instead, the applicable law, i.e. in most cases the national law of the country concerned, has to be applied. However, the ILO Declaration on Fundamental Principles and Rights at Work referring to ILO Conventions No. 138 and 182 is contained in the Preface of the Guidelines. In addition, the commentary to the Guidelines recommends that multinational enterprises should apply the ILO conventions when addressing child labour. It can therefore be assumed that these conventions will be referred to when applying the Guidelines.

Governments adhering to the Guidelines are asked to establish National Contact Points to settle disputes and promote the Guidelines. The Business and Industry Advisory Committee to the OECD, the Trade Unions Advisory Committee to the OECD, OECD member

---

621 Study conducted by the IOE quoted in ILO, Urminsky Self-regulation in the Workplace, p. 13.
625 OECD Guidelines Part 1, IV. Employment and Industrial Relations, para. 1. b.
626 Ibid.
627 Ibid., Preface, para. 8.
628 Ibid., Part 3, Commentaries, para. 22.
countries and interested parties, i.e. NGOs, may bring claims concerning violations of the Guidelines by companies.\footnote{Friedrich-Ebert-Stiftung, B. Hamm, \textit{Die OECD-Leitsätze für multinationale Unternehmen – Ihr Einsatz durch zivilgesellschaftliche Organisationen in Deutschland} (Bonn: Friedrich Ebert Stiftung, 2005), p. 12.} If a claim is brought, the National Contact Point examines the admissibility of the complaint. The main issue is whether there exists an ‘investment nexus’ between the company located in the OECD member country and the supplier where the violation had occurred.\footnote{Ibid.} If the complaint is accepted, the company has to make a statement and endeavour to resolve the issue.\footnote{Germanwatch, C. Heydenreich, \textit{Die OECD-Leitsätze: Ein sinnvolles Instrument zur Regulierung von Unternehmen?}, 18 July 2003, www.germanwatch.org/tw/kwdnr03.htm.} If the dispute is not settled, an official statement has to be made that the company has violated the Guidelines.\footnote{Ibid.} This may have an impact and affect company behaviour.\footnote{J. Evans, ‘OECD Guidelines – One Tool for Corporate Social Accountability’, \textit{Labour Education}, 130 (1) (2003), 25–30, 27.}

Despite its weak implementation mechanism, the Guidelines are taken seriously by workers’ and employers’ organisations and even NGOs consider them as having a great potential to address social and environmental responsibility of TNCs.\footnote{ILO, \textit{Information Note on Corporate Social Responsibility}, GB.288/WP/SDG/3, p. 11; Friedrich-Ebert-Stiftung, Hamm, \textit{Die OECD-Leitsätze für multinationale Unternehmen}, p. 11.} It has been stressed that the Guidelines are one of the few instruments that provide for an applicable complaints mechanism.\footnote{Friedrich-Ebert-Stiftung, Humm \textit{Die OECD-Leitsätze für Multinationale Unternehmen}, p. 23.} In 2003, there had been about forty cases worldwide, including complaints against adidas, BP and TotalFinaElf, in most cases initiated by workers’ organisations.\footnote{Germanwatch \textit{et al}., \textit{OECD-Leitsätze für multinationale Unternehmen aktiv umsetzen}, p. 8.} In the case against the German sportswear company adidas, while the German National Contact Point recognised the nexus between the German company and its Indonesian supplier where labour law violations had occurred, there was no agreement on the facts of the case and adidas refused to take corrective action.\footnote{Deutsches Institut für Entwicklungspolitik, \textit{Analysen und Stellungnahmen}, 2 (2005) 4; Germanwatch \textit{et al}., \textit{OECD-Leitsätze für multinationale Unternehmen aktiv umsetzen}, p. 8.} Because the OECD mechanism does not offer any possibility of validating the truth, the parties agreed to disagree.\footnote{Ibid.}

\footnotesize
\begin{itemize}
  \item \footnote{Friedrich-Ebert-Stiftung, B. Hamm, \textit{Die OECD-Leitsätze für multinationale Unternehmen – Ihr Einsatz durch zivilgesellschaftliche Organisationen in Deutschland} (Bonn: Friedrich Ebert Stiftung, 2005), p. 12.}
  \item \footnote{Ibid.}
  \item \footnote{Ibid.}
  \item \footnote{J. Evans, ‘OECD Guidelines – One Tool for Corporate Social Accountability’, \textit{Labour Education}, 130 (1) (2003), 25–30, 27.}
  \item \footnote{ILO, \textit{Information Note on Corporate Social Responsibility}, GB.288/WP/SDG/3, p. 11; Friedrich-Ebert-Stiftung, Hamm, \textit{Die OECD-Leitsätze für Multinationale Unternehmen}, p. 11.}
  \item \footnote{Friedrich-Ebert-Stiftung, Humm \textit{Die OECD-Leitsätze für Multinationale Unternehmen}, p. 23.}
  \item \footnote{Germanwatch, Heydenreich \textit{Die OECD-Leitsätze: Ein sinnvolles Instrument zur Regulierung von Unternehmen?}}
  \item \footnote{Deutsches Institut für Entwicklungspolitik, \textit{Analysen und Stellungnahmen}, 2 (2005) 4; Germanwatch \textit{et al}., \textit{OECD-Leitsätze für multinationale Unternehmen aktiv umsetzen}, p. 8.}
  \item \footnote{Ibid.}
\end{itemize}
In October 2004, the NGOs Germanwatch, Coalition Against Bayer Danger and Global March Against Child Labour submitted a complaint to the German National Contact Point alleging that subcontractors of the German company Proagro/Bayer are employing 1,650 children in the production of cottonseed in Andra Pradesh, India. Bayer has reacted and set up an action plan providing for micro-credits for farmers, creative learning centres for child labourers and awareness raising measures. However, it remains to be seen whether the action plan proves efficient and the case can be settled. While coming late, it is laudable that action on the elimination of child labour has been initiated following the complaint.

Recognising that some cases brought under the Guidelines caused action for the elimination of child labour, it should also be noted that the complaints system still requires improvement. Since developing countries are often reluctant to accept cases in order to avoid conflicts with investors, complaints are often only successful in the home country of multinational companies. In addition, often National Contact Points take too long to resolve cases. Few cases have led to conclusions by National Contact Points. A major problem is that the Guidelines are often unknown. In Germany, it has rightly been recommended by civil society that the German National Contact Point should make more investigations in situ and adopt conclusions in all cases. Ideally, there would be a monitoring and enforcement procedure in order to assess whether there had been changes on the ground.

In conclusion, the Guidelines had the potential to be effective through the method of ‘naming and shaming’ but need to be applied more effectively.


\[642\] Germanwatch, Heydenreich Die OECD-Leitsätze: Ein sinnvolles Instrument zur Regulierung von Unternehmen?


\[644\] Ibid.

\[645\] Ibid.

\[646\] Germanwatch et al., OECD-Leitsätze für multinationale Unternehmen aktiv umsetzen, p. 9.
b) The ILO Tripartite Declaration

In 1977, the ILO adopted the Tripartite Declaration of Principles concerning Multinational Enterprises. It was revised in 2000 and again in 2006, embodying now the ILO Declaration on Fundamental Principles and Rights at Work and explicitly referring to the elimination of the worst forms of child labour contained in ILO Convention No. 182. The principles contained in the Declaration are meant to guide governments, employers’ and workers’ organisations and multinational and national enterprises in taking measures to adopt social policies. According to the Declaration, governments as well as TNCs should refer inter alia to ILO Conventions No. 138 and 182 for guidance in their social policy. Governments should apply to the greatest extent possible the principles embodied in these conventions. The definition of multinational enterprises is very broad, encompassing any ‘enterprises, whether they are of public, mixed or private ownership, that own or control production, distribution, services or other facilities outside the country in which they are based’. According to para. 36, multinational and national enterprises should respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour and should take immediate and effective measures within their own competence to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency, referring to ILO Conventions No. 138 and 182.

The Declaration does not contain binding obligations. Paragraph 7 of the Declaration makes clear that the principles contained in the Declaration are to be observed on a voluntary basis. The Declaration also provides for consultations to take place between employers and workers on matters of mutual concern, for examination of grievances of workers including child labour and for the establishment of a voluntary conciliation machinery for the settlement of industrial disputes consisting of

---

649 Ibid. para. 5.
650 Ibid., para. 9.
651 Ibid.
652 Ibid., para. 6.
653 Ibid., para. 36.
equal representation of employers and workers.\(^{654}\) This is noteworthy since the Declaration together with the OECD Guidelines are the only international instruments providing for complaints mechanisms aiming at holding companies liable for violations of workers’ rights. However, lacking a binding enforcement mechanism, the Declaration and the OECD Guidelines have to rely on their moral force.

There is a special procedure for the examination of disputes concerning the application of the Declaration by means of interpretation of its provisions.\(^{655}\)

The impact of the ILO Tripartite Declaration is assessed through a reporting procedure according to which the Subcommittee on Multinational Enterprises of the ILO Governing Body periodically conducts surveys based on reports submitted by governments and national employers’ and workers’ organisations of ILO member countries.\(^{656}\) For example in the last survey on the period between 2000 and 2003, the majority of respondents stated that TNCs respected the minimum age for employment.\(^{657}\) Other questions and answers refer to consultations between TNCs and government or workers’ organisations, incentives offered to TNCs adversely affecting fundamental rights at work or the establishment of so-called export processing zones (EPZs).\(^{658}\) Due to the low response rate, the Subcommittee has proposed the refinement of the current global survey approach.\(^{659}\) While the reporting procedure may be the basis for action aimed at the elimination of child labour, it is a weak and slow implementation mechanism.

In sum, while the Declaration may contribute to the elimination of child labour in the long term, other initiatives are also needed.

c) The UN Global Compact

Another international initiative similar to an international code of conduct is the UN Global Compact, incepted in 1999 and now
encompassing ten core principles on social and environmental issues, *inter alia* the effective abolition of child labour. The corporations participating in the Global Compact are asked to implement these principles. They will publish their progress made on the Global Compact website and civil society organisations such as Amnesty International may respond to these publications. The initiative has received much criticism from civil society organisations since business partners with a bad human rights record will benefit from the good reputation of the UN without being subject to a compulsory monitoring mechanism. As of June 2008, there were 4,300 businesses participating worldwide. Civil society and labour is also involved.

Although this initiative might strengthen the dialogue between multinational enterprises and human rights advocates, it is doubtful whether it will have much impact on the elimination of child labour. However, a study released by McKinsey & Company at the Global Compact Leaders Summit in 2004 stated that approximately 50 per cent of Global Compact companies had adopted or accelerated the implementation of existing policies with regard to the Global Compact. However, only 67 of 311 surveyed companies changed their purchasing policies with

---


662 Ibid.; civil society and other stakeholders can participate through a number of engagement mechanisms such as Policy Dialogues, Learning, Local Networks and Partnership Projects, UN Global Compact, *Frequently Asked Questions*, www.unglobalcompact.org/AboutTheGC/faq.html, question 3.


664 UN Global Compact Participants list of the Global Compact, www.unglobalcompact.org/ParticipantsAndStakeholders/index.html.

regard to suppliers using child and forced labour. It was also stressed that transparency should be increased and a compliance mechanism agreed upon. On the positive side, in Germany, there is an increasing number of companies taking part in the Global Compact that participate in private public partnerships, for example on child labour.

In response to a call by Kofi Annan for a new strategic concept and governance structure to support its next phase of organisational development, a new governance concept was implemented in 2005. Its main elements are: a better reporting procedure (communication on progress) according to which companies that do not report on their progress may be labelled as non-communicating or inactive; a more transparent complaints mechanism; and a new governance framework comprising inter alia Local Networks and the Global Compact Office.

As of September 2008, 877 companies have been labelled as non-communicating. There is now a complaints mechanism according to which complaints of systematic or egregious abuse of the Global Compact’s aims and principles by a company may be submitted to the Global Compact Office. The Global Compact Office may share with the parties information on the OECD Guidelines specific instance procedure and the interpretation procedure of the ILO Tripartite Declaration as well as with relevant local networks and other UN entities that are part of the Global Compact Network. If the company concerned refuses to engage in dialogue on the matter, it may eventually be labelled as ‘non-communicating’ or even be removed from the list of participants. In Germany, a cooperation of the Global Compact local network with the National Contact Point for handling complaints under the OECD Guidelines for dealing with complaints under the Global Compact is currently being discussed.

---

669 Ibid., p. 11.
670 Ibid., p. 12.
672 UN Global Compact, Note on Integrity Measures, www.unglobalcompact.org/AboutTheGC/integrity.html, p. 3.
673 Ibid.
674 Ibid.
It can be concluded that, while the UN Global Compact has received much attention from companies and improved dialogue and activities on corporate social responsibility including child labour issues, it remains a very weak instrument, which contains the risk of blue-washing. Yet, its implementation mechanism has recently been strengthened and may improve the impact of the UN Global Compact in the future. There are so far however few practical results with regard to child labour.

d) The UN Norms

In August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution containing the ‘Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights’ (UN Norms). It proclaims the human rights obligations of TNCs and other business enterprises within their ‘sphere of influence’ including the rights of children to be protected from economic exploitation as forbidden by the relevant international treaties.

However, it begins with maintaining that states have the primary responsibility to promote, secure the fulfilment of, respect and ensure respect of human rights including ensuring that TNCs and other business enterprises respect human rights. It is important to note that the term ‘other business enterprises’ includes any business entity that has any relation with a TNC, for example contractors and suppliers. Thus, domestic companies exploiting children also fall under these provisions.

TNCs are expected to implement internal rules in compliance with these Norms and to periodically report on measures to implement them. It is noteworthy that enterprises must implement the Norms throughout the supply chain, i.e. incorporating the Norms into contracts and arrangements with contractors and suppliers. In addition, existing and future international implementation mechanisms of

---

677 Ibid., para. 6.
678 Ibid., para. 1.
679 Ibid., para. 21.
680 Ibid., para. 15.
681 Ibid.
the UN or other players will be applied. The monitoring must be transparent, conducted by independent stakeholders and provide for a complaints mechanism. It has been proposed that existing treaty monitoring mechanisms could be used to report on, for example, violations of children’s rights or a Special Rapporteur could be established. Alternatively individual complaints mechanisms could be applied in the case of violations of children’s rights by multinational enterprises. Other parties implementing the Norms could be the ILO, NGOs when monitoring business, trade unions when negotiating with business or the WTO applying international labour standards limiting trade. States should also establish and reinforce the necessary legal and administrative framework for ensuring that the Norms are implemented, para. 17. According to para. 18 of the Norms, business enterprises have to provide prompt and adequate recompense to those persons that have been adversely affected by violations of these Norms through inter alia reparation or compensation.

Hence, besides serving as a model for company codes of conduct or as a governmental or international standard for company policy, the proposed Norms could have been used for the development of procedures for monitoring compliance, verifying and reporting of human rights obligations of corporations, and for individual complaints systems providing for compensation in human rights violations. The latter provision constitutes a remarkable advantage over the existing codes of conduct or international standards. Civil society already has begun to use the Norms as a framework for documenting and challenging corporate human rights abuses and for related efforts to build corporate accountability. As such, the resolution can be called revolutionary since it aims at imposing direct legal obligations on private parties.

However, so far, the Norms have neither been adopted by the Commission on Human Rights nor the Human Rights Council and are strongly

682 Ibid., para. 16.
683 Ibid.
685 Ibid., 919.
opposed by the international business community.\textsuperscript{687} Instead, the Commission requested a report be put together by the OHCHR on existing standards for TNCs.\textsuperscript{688} The report recommended maintaining the Norms among existing initiatives and standards on business and human rights such as the OECD Guidelines, the ILO Tripartite Declaration and the principles of the UN Global Compact.\textsuperscript{689} Consequently, the Commission on Human Rights requested the Secretary-General to appoint a Special Representative on the issue of human rights and TNCs \textit{inter alia} to identify and clarify standards of corporate responsibility and accountability for TNCs with regard to human rights.\textsuperscript{690} In its interim report, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises has made clear that the UN Norms do not reflect the existing state of international law: the current array of international human rights law does not attach direct legal obligations to corporations.\textsuperscript{691} Subsequently, the Special Representative explored existing approaches on responsibility and accountability such as extraterritorial application of home countries’ jurisdiction or human rights policies and management practices of the world’s largest 500 firms by revenue.\textsuperscript{692} In his final report, he identified three core elements of a common conceptual and policy framework: the state duty to protect against human rights abuses by third parties including business; the corporate responsibility to respect human rights; and the need for more access to remedies.\textsuperscript{693}

\textsuperscript{687} H. Feldt, ‘In der Sackgasse? Zum Stand der Debatte über die UN-Normen für transnationale Unternehmen im Hinblick auf die Menschenrechte’ in DGB Bildungswerk, Global Policy Forum Europe et al. (eds.), \textit{Verbindliche Regeln für Multis – Corporate Accountability, Zwischenbilanz und Zukunftsperspektiven} (Düsseldorf: DGB Bildungswerk, 2006), pp. 6–9, p. 8.

\textsuperscript{688} Ibid.

\textsuperscript{689} Ibid.


In June 2008, the Human Rights Council welcomed this final report and extended the mandate of the Special Representative of the Secretary-General for another three years to elaborate further on this framework.\footnote{UN Human Rights Council, Mandate of the Special Representative of the Secretary-General on the Issue on Human Rights and Transnational Corporations and Other Business Enterprises, 18 June 2008, Resolution 8/7.}

In conclusion, while the Norms as such so far have not been accepted by the international community, they have been an important starting point for developing a framework for TNCs and human rights.

e) Miscellaneous codes

Other international approaches comprise the European initiative for a Code of Conduct for European enterprises operating in developing countries\footnote{ILO, Information Note on Corporate Social Responsibility, GB.288/WP/SDG/3, p. 11.} or initiatives of the World Bank’s International Finance Corporation to develop a framework for measuring sustainability of private sector investments, which includes an assessment of the welfare of the labour force.\footnote{Ibid., p. 12.} These approaches are also of a non-binding character.

Besides these international codes of conduct, there are also unilateral country-specific codes such as the US Model Business Principles that were developed in 1995 after consultation with business, labour and other NGOs.\footnote{UNCTAD, World Investment Report 1999, p. 366.} These model codes are intended to serve as a basis for enterprises to develop their own codes.\footnote{Diller, ‘A Social Conscience in the Global Marketplace?’, 103.}

The presented instruments on corporate social responsibility can be used as models for company or national codes of conduct or assist private initiatives in developing standards and are therefore important tools for promoting the concept of corporate social responsibility. Most of them also have implementation systems among which that of the OECD Guidelines is the most successful. To date, it provides for the only functioning complaints procedure for human rights violations of TNCs. However, all these instruments are neither binding nor enforceable and have so far led to few concrete results for child workers. Yet, they may be an important contribution on the way to establish legal accountability of TNCs. This holds especially true for the proposed UN Norms.
2. Private sector codes

Private sector codes include corporate codes of conduct, business association codes, multi-stakeholder or model codes and international framework agreements.

A study conducted by the IOE revealed that among 258 codes of conduct addressing labour practices, the most highly represented sector was the textiles, clothing and footwear sector with sixty-two codes. Among the codes examined, only 47 per cent referred to the issue of child labour. Eighty-nine per cent of the codes referring to child labour were found in the textiles, clothing and footwear industry, 88 per cent in the commerce sector, 42 per cent in the food and drink industry and 40 per cent in forestry and construction. This suggests that codes of conduct referring to child labour are more likely to be found in labour-intensive industries.

a) Corporate codes of conduct

Corporate codes of conduct are policy statements that define ethical standards for companies. Corporations voluntarily develop such codes to inform consumers about the principles that they follow in the production of the goods and services they manufacture or sell. They primarily adopt such codes to project a positive image and to protect their brand name. They constitute a market-based approach by which companies make sure that consumers do not boycott their products because of appalling labour conditions in their supply factories. They are unilaterally adopted and relate either to their own operations or to their suppliers. The second wave of corporate codes of conduct stemming from the 1990s focused especially on labour standards, especially the use of sweatshops and child labour by leading US brands such as

---

699 Study conducted by the IOE quoted in ILO, Urminsky, *Self-regulation in the Workplace*, p. 15.
700 Ibid., p. 25.
701 Ibid.
703 Ibid.
704 Ibid., p. 8.
Gap, Kathie Lee Gifford, Nike, Disney and others. According to a World Bank study from 2003, there were 1,000 company codes in existence.

(1) Case study relating to the US apparel industry
The study comprised forty-eight companies, including Nike, Liz Clairborne and Russell Corporation, Sara Lee Corporation, Levi Strauss & Co., Wal-Mart Stores and Dillard Department Stores, to name but a few.

Most of them indicated that they had adopted a policy prohibiting child labour. These policies consisted of *inter alia* providing letters stating their policies on child labour addressed to their suppliers/contractors or compliance certificates, which usually required suppliers to certify that they observed the company’s standards and clauses in formal documents such as purchase orders that made the prohibition of child labour a contractual obligation.

The codes of conduct either stated a minimum age for all workers, referred to the national laws of the host country or to international standards, i.e. ILO Convention No. 138. Some companies did not define child labour at all.

In most of the cases, the study revealed a lack of transparency with respect to the implementation of the codes. For example, many companies responded that they did not know whether workers were aware of their child labour policies and few cooperated with international organisations, labour unions or NGOs. Field visits in the Dominican Republic, El Salvador, Guatemala, Honduras, India and the Philippines revealed that codes were hardly posted in factories and that few workers knew about or even understood them.

Most companies lacked an effective monitoring mechanism. However, field visits conducted by the study revealed that active monitoring

---

709 Ibid., p. iv.
710 Ibid.
711 Ibid., p. v.
712 Ibid., p. viii.
713 Ibid., p. v.
for child labour was less common than in the case of quality standards.714 Few US corporations tended to have structured monitoring.715 Also, pre-contact inspections had increasingly been used to avoid doing business with foreign suppliers/producers who used child labour.716 However, companies usually rejected contractors for other reasons.

As regards enforcement of their codes of conduct, most companies stated that, in the case of a violation, they would first investigate the matter, then demand corrective action or even terminate the business relationship.717

Field visits to foreign suppliers and contractors in India, Guatemala, and the Philippines revealed that most child labour occurred in small subcontractors or in homework.718 There was a consensus between government officials that only children aged fifteen to seventeen were working in the garment industry. However, children often use false proof of age documents.719

The study concluded that codes of conduct could be a positive factor in combating child labour.720 Child labour can be considerably reduced. However, there are major shortcomings in the current system of codes of conduct. The proliferation of many different codes of conduct confuses producers and suppliers and creates a ‘fatigue’ of codes.721 There is a lack of implementation of codes and a lack of transparency. Thus, the real impact of codes is still hard to assess.

(2) Findings on corporate codes
More recent studies and research results confirm the findings of the case study. With regard to the design of codes of conduct, a study revealed that the majority of codes provide for self-defined prohibitions of child labour; few refer to ILO Convention No. 138 in defining a minimum age and even fewer to Convention No. 182.722 Few codes specifically mention monitoring.723 According to a study in the UK, none of the company

714 Ibid., p. ix.
715 Ibid.
716 Ibid., p. v.
717 Ibid., p. vii.
718 Ibid., p. vii.
719 Ibid., p. vii.
720 Ibid., p. x.
721 Ibid.
722 Study conducted by the IOE quoted in ILO, Urminsky Self-regulation in the Workplace, p. 25.
codes examined made a clear commitment to systematic monitoring and independent verification. Other research reports that codes from major retail brands in leisure wear are more known for their breaches than for compliance with them. This confirms that enforcement of corporate codes is still poor.

Other problems relate to the structure and operation of the supply chain. Often retailers only hold up their codes of conduct without ensuring that suppliers are able to implement them. Instead they increase the pressure to cut costs or threaten to move their production. Suppliers from developing countries especially are under much pressure to meet delivery schedules set by the buyers and thus unable to implement better labour standards.

However, as regards practical results, many TNCs report that child labour could be considerably reduced. For example, studies conducted by the ‘Instituto Observatório Social’ (a multi-stakeholder group where German, Dutch and Brazilian trade unions take part) revealed that the German companies Bayer and Thyssenkrupp located in Brazil neither employed children nor concluded contracts with suppliers employing children at the time of the study. In Bangladesh, the US company Levi Strauss conducted an innovative programme aimed at the elimination of child labour. An agreement was reached with government officials withdrawing children from the factories and sending them to school while continuing to pay the contractor. Levi Strauss also paid for their tuition fees including books and uniforms.

However, it is difficult to completely abolish child labour. More recent reports reveal that child labour re-emerges in global supply chains. For

---

724 Ibid., p. 22.
726 Oxfam, Trading Away Our Rights, p. 7.
731 Ibid.
732 Ibid.
example, there have been accusations that child labour is still present in
global supply chains of TNCs in Brazil such as BASF or Faber Castell. Other allegations refer to child labour in Bangladeshi suppliers of the
British supermarket chain Tesco. Even the German company Otto, which is known for its relatively good social performance, was accused of having sourced from suppliers using child labour. Finally, the Business Social Compliance Initiative (BSCI), an industry-driven initiative to improve working conditions in global supply chains of European TNCs, reports that still nearly 10 per cent of suppliers use child labour.

In conclusion, company codes of conduct are still controversial and
often not effective. In this sense, the concept of corporate social responsi-
bility bears the risk of not going beyond but going around what is legally
required.

b) Business Associations codes
Business Associations, which represent groupings of employers, have
developed their own codes of conduct. According to some estimates,
only 23.3 per cent of thirty codes examined refer to the prohibition of
child labour. Similar to company codes, few refer to monitoring. They are therefore perceived to be even weaker than company codes of
conduct.

(1) WRAP and WFSGI
Examples are the Worldwide Responsible Apparel Production Principles
(WRAP), which were endorsed by the American Apparel Manufacturers
Association in 1998 or the code of the World Federation of the
Sporting Goods Industry (WFSGI). Whereas they contain a prohibition

---

www.csr-asia.com/upload/crsiaweeklyvol2week42.pdf.
735 Stern, Kinderarbeit für den Heine-Versand, 6 (2007).
According to oral statements of BSCI staff, the numbers however include young
employees who could not prove their age.
inventory of codes from 1999 and 2000.
739 Ibid., p. 18.
740 Ibid., p. 24.
of child labour, their monitoring system can mainly be seen as a public relations exercise. In the majority of cases, the company to be visited arranges the visit by the inspectors and also pays them. While the WFSGI code is complex on paper, the WFSGI so far has done little to enforce it.

(2) The International Cocoa Initiative
An on-going initiative is the International Cocoa Initiative to implement industry-wide labour standards and to eliminate the worst forms of child labour on cocoa farms in West Africa. According to estimates of the US State Department, there were 15,000 children working on cocoa, coffee and cotton farms in the Côte d’Ivoire. The Côte d’Ivoire is the largest exporter of the world’s cocoa beans, accounting for more than 40 per cent of the world’s supply. The US imports the majority of these cocoa beans, marketed by firms such as M&M, Mars, Nestlé, Archer Daniels Midland and Cargill. Pursuant to media reports on the existence of child slavery on cocoa farms in the Côte d’Ivoire, in 2001 the Chocolate Manufacturers’ Association representing the major chocolate industry introduced the Harkin–Engel Protocol, which provided for an industry-funded foundation to implement specific programmes directed at alleviating child labour. Upon the announcement of an agricultural bill proposing a federal system to certify and label chocolate products as ‘slave free’, the industry also committed itself to develop and implement a public certification scheme by July 2005. However,

741 Ibid., p. 27; Oxfam GB, Clean Clothes Campaign, Global Unions, Play Fair at the Olympics, p. 51.
742 Ibid., p. 51.
743 See www.cocoainitiative.org/.
in 2005, this intention had not been fulfilled and the deadline was extended to July 2008.\(^\text{749}\) Sadly enough, in June 2008 again, the intent of the Protocol to monitor and improve child labour was not satisfied.\(^\text{750}\) As mentioned above, the corporations were sued under the ATCA as a result of their failure to act. It should however be mentioned that some corporations achieved some progress outside the process of the Protocol,\(^\text{751}\) and that some certification and verification efforts were undertaken.\(^\text{752}\) Whereas generally rehabilitation efforts of children are missing, industry recently started to provide some funding for such efforts.\(^\text{753}\)

Whilst the initiative is in principle to be welcomed, the failure of companies to act accordingly demonstrates the limits of voluntary action. The fact that part of the initiative was prompted by the announcement of binding certification standards also raises the question to what extent such voluntary initiatives only aim at blue-washing instead of tackling the issue in a straightforward way.

c) Multi-stakeholder and model codes

In response to the above-mentioned criticism of unilaterally imposed company codes of conduct, various multi-stakeholder and/or model codes have emerged.\(^\text{754}\) Multi-stakeholder codes are characterised by negotiations between several stakeholders, including companies or their industry representatives, NGOs and/or trade unions.\(^\text{755}\) In contrast to company codes, the intention is to deepen labour standards by referring to ILO conventions and addressing monitoring and effectiveness questions.\(^\text{756}\) Multi-stakeholder codes are also referred to as model codes because companies participating in monitoring schemes accompanying


\(^{750}\) Ibid.

\(^{751}\) For example, Kraft Foods entered into partnership with Rainforest Alliance to certify cocoa produced in Côte d’Ivoire, ibid.

\(^{752}\) Ibid., pp. 4–5 and pp. 10–11.

\(^{753}\) Ibid., pp. 3 and 13.


these codes are expected to adopt them as their own code. Conversely, model codes do not necessarily involve several stakeholders.

Noteworthy examples of multi-stakeholder initiatives are the Social Accountability International and the Ethical Trading Initiative while the code developed by the Clean Clothes Campaign is more of a model code. The ISO 26000 guidance currently being developed is a multi-stakeholder initiative.

(1) **SA8000**
SA8000 is a workplace certification standard based on ILO and UN conventions, including the Minimum Age Convention No. 138. This standard was developed in 1997 by Social Accountability International (SAI), a human rights organisation, in cooperation with workers and trade unions, companies, and other NGOs. It disposes of an independent verification system of compliance with the SA8000 standard conducted by SAI accredited auditing bodies. This includes workplace audits, a complaints and appeals system and a constant review of the training process. The SA8000 Corporate Involvement Programme helps companies to implement the standard in the supply chain and to report publicly on the implementation progress. Companies such as Gap, Chiquita Brands International and Co-op Italia take part in this scheme.

While the provision of independent monitoring and a complaints system for workers represent progress in comparison to corporate codes, the auditing approach has recently come under heavy criticism. For example it has been found that a thorough investigation of a factory cannot be done in two or three days and that workers are trained to give wrong answers. Most importantly, commercial auditing can

---

761 Clean Clothes Campaign, *Looking for a Quick Fix*, p. 26;
transfer power away from workers. However, it has also been found that social auditing helped to reduce child labour.

It has been concluded that auditing must be combined with other tools. SAI has responded to this criticism by providing for training for auditors, factory management and workers.

(2) The Ethical Trading Initiative

The Ethical Trading Initiative (ETI) is a partnership of companies, NGOs and trade unions establishing a forum for exchanging information regarding implementation and monitoring of codes of conduct, and as a means of conducting pilot studies relating to the implementation of codes. The ETI provides for the ETI Base Code based on international standards including the prohibition of child labour. As an example of ETI activities, at a recent meeting, members explored potential solutions to some of the common purchasing practices, which undermine working conditions in the supply chain. In addition, at another roundtable of companies, ETI staff, trade unions and NGOs discussed the impact of retailers’ purchasing practices on workers’ conditions including the incidence of cheap child labour, and how buyers can improve their sourcing practices to make sure that everyone in the supply chain is responsible for improving labour conditions in suppliers’ factories. For the time being, suppliers often are not able to implement codes of conduct since they have to produce goods quickly at low costs.

A recent study assessed the impact of the ETI Base Code and found that child labour has been reduced. To bring about long-term change,
there must however be regular assessments of suppliers, training of workers and no more downward pressure on prices and lead times.\footnote{773}

(3) The code of the Clean Clothes Campaign
The Clean Clothes Campaign (CCC), which is a network of NGOs, trade unions and researchers aiming at improving working conditions in the garment industry, has developed a model code based on the fundamental ILO conventions, including those dealing with child labour.\footnote{774}

It explicitly states that it does not substitute collective bargaining. Monitoring is conducted by accredited organisations and local-level worker organisations, which also may bring complaints. According to the CCC, the responsibility for implementing the code should not be with the supplier who risks the cancellation of his contract in case of a violation of the code.\footnote{775} Likewise, neither suppliers nor producers should bear the costs of implementing a code of conduct.\footnote{776} Additionally, workers’ education on their labour rights should be improved.\footnote{777} Although the CCC considers codes of conduct a useful approach to advance the cause of child labourers, it stresses that they are just a start of a process that has to be accompanied by solidarity actions supporting workers in getting their rights.\footnote{778}

While these examples demonstrate that multi-stakeholder codes have a better implementation system of international child labour standards than unilaterally imposed corporate codes of conduct ensuring independent monitoring and complaints mechanisms, they also suffer from inherent shortcomings. As corporate codes of conduct, they rely too much on the auditing approach and insufficiently take into account the position of suppliers and workers. However, most importantly, some of them led to practical results such as the reduction of child labour.

d) International framework agreements
In order to avoid corporate codes of conduct becoming a substitute for the self-organisation of workers, trade unions have started to participate in the codes debate and eventually become engaged in concluding

\footnote{773}{Ibid.}
\footnote{774}{Ascoly, Zeldenhurst, ‘Working with Codes’, p. 175.}
\footnote{775}{Ibid., p. 176.}
\footnote{776}{Ibid., p. 178.}
\footnote{777}{Ibid., p. 177.}
\footnote{778}{Ibid., p. 179.}
framework agreements. Framework agreements are negotiated between TNCs and global union federations. Although a code of conduct accompanied by monitoring and certification schemes usually forms part of the agreement, their main objective is to establish an ongoing dialogue between the employers’ and workers’ representatives. Thus, workers themselves are integrated in the drafting and monitoring process of the codes. Framework agreements refer more to ILO conventions than other types of codes and usually provide for external monitoring systems. As of June 2007, there were approximately fifty-nine international framework agreements – a very small number compared to approximately 60,000 TNCs worldwide. Supplier factories are normally not covered by those agreements. Thus, although to some extent preferable to other initiatives such as codes of conduct, they still lack much influence.

Examples include framework agreements between the IUF and the French food company Danone or the IUF and Chiquita, the US-based banana TNC.

A popular initiative involving trade unions but falling short of a framework agreement is the FIFA Code, which was developed in 1996 by the international trade union organisations and the Fédération Internationale de Football Association (FIFA), after evidence of widespread use of child labour in the manufacture of leather soccer balls bearing the FIFA label in Pakistan had been revealed. The text provided for a code for the production of footballs carrying the FIFA authorised label, in a continuing effort to eliminate the use of child labour and other

781 Ibid.
782 Ibid.
783 ILO, Urminsky, Self-regulation in the Workplace, p. 37.
786 Ibid., 88.
787 International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations.
exploitative practices. However, the World Federation of the Sporting Goods Industry was strongly opposed to the FIFA Code. As a result, in 1997, major sportswear brands such as Nike, adidas and Reebok announced an agreement on a voluntary programme aimed at ending the use of child labour in their supply chain. The ILO, UNICEF and the Sialkot Chamber for Commerce took part in this so-called Atlanta Agreement. The programme was also to give children the opportunity to leave the industry and to go to school. The project was partly successful, eliminating child labour in so-called stitching centres by 1999. However, the on-going IPEC projects in the soccer ball industry in Pakistan also show that the problem of child labour still exists.

This example shows how difficult it is to achieve long-term results in eliminating child labour on a voluntary basis. Thus, concerted efforts by all parties involved seem to be necessary.

3. Evaluation

As this overview has demonstrated, the real impact of codes of conduct is still hard to assess. Public sector codes are based on ILO conventions but are not binding and still lack effective monitoring and complaints mechanisms. Complaints under the OECD Guidelines however did lead to some action against child labour.

Private sector codes have often evolved from unilaterally imposed corporate codes of conduct to protect a company’s reputation to multi-stakeholder codes referring to the core ILO conventions and providing for independent monitoring mechanisms. However, while social auditing has led to a reduction of child labour, the auditing approach alone will not lead to long-term changes. There is some evidence that child labour is re-emerging in global supply chains. Long-term changes cannot occur if codes of conduct put responsibility for child labour only on suppliers. Instead, concerted action including the whole supply chain is needed including a change of purchasing practices by global buyers. Most importantly, the majority of codes of conduct so
far lack remediation programmes such as rehabilitation and education programmes.\textsuperscript{796} In conclusion, codes of conduct alone are insufficient to achieve the abolition of child labour. They should be complemented by a legal framework holding companies liable for their violations of (child) labour rights. The UN Norms can be considered a first step towards the creation of a framework of legal accountability of TNCs.

III. Social labelling

1. Introduction

Social labelling operates as a verification system for enterprise social performance using a visible means of communication: a physical label stating the social conditions relating to the production of a product or rendering of a service.\textsuperscript{797} The label usually consists of a logo or a trade mark accompanied by explanatory text.\textsuperscript{798} The prohibition of child labour is the social condition mostly targeted.\textsuperscript{799} Usually granted to products, some labels are assigned to enterprises.\textsuperscript{800} Social labelling programmes are sometimes difficult to distinguish from codes of conduct since all social labels follow some code of conduct. In the case of child labour, social labelling programmes often provide for rehabilitation measures for former child labourers. Labelling programmes are usually financed by licence fees imposed on exporters or levies paid by importers that may be passed onto consumers.\textsuperscript{801} Labelling programmes usually involve many stakeholders such as NGOs, trade unions, employers’ associations and enterprises.\textsuperscript{802} As will be seen below, some initiatives include government participation.

2. Examples

Noteworthy labelling initiatives are Care & Fair, RugMark and STEP focusing on the carpet industry in South East Asia, especially India. These initiatives evolved when the image of the Indian carpet industry,

\textsuperscript{796} See however the study of the World Bank, \textit{Company Codes of Conduct}, p. 7 that holds that there are codes that provide for remediation efforts to combat child labour.

\textsuperscript{797} ILO, Urminsky, \textit{Self-regulation in the Workplace}, p. 38.

\textsuperscript{798} Ibid.

\textsuperscript{799} Ibid., p. 40.

\textsuperscript{800} Ibid., p. 38. In this sense, the SA8000 certification is also a social labelling system.

\textsuperscript{801} Ibid., p. 40.

\textsuperscript{802} Ibid., p. 38.
and its exports, suffered as a result of worldwide media reports on the exploitation of children in the Indian carpet industry. Social labelling programmes were initiated to tackle the problem of child labour and to improve the image of the Indian carpet industry.

a) Care & Fair

Care & Fair is a company certification programme that expects its members to respect its code of conduct. This includes the prohibition of the use of illegal child labour, bonded labour and the provision for education facilities for child workers. The objectives of Care & Fair are inter alia to eradicate poverty and to create permanent training and school facilities for children. Care & Fair was founded by German carpet importers and retailers and relies on the moral commitment of its members. Its members have to pay an annual fee and 1 per cent of the FOB value of carpets imported. The label applies to the entire stock of the wholesaler and retailer members and not to the individual carpets. The label thus does not guarantee the entirely child-labour-free status of each carpet sold since the company is certified and not the product. If importers find out that suppliers use child labour, they are entitled to terminate the contract. The organisation believes that this threat of economic measures is more useful than any monitoring system. Care & Fair is involved in eighteen schools and other health and educational projects. It claims that 5,000 children from weavers’ families benefited from its efforts up to 1999. However, in many targeted schools, infrastructure is still very poor.

---

803 Ibid., p. 31.
804 Ibid.
805 Ibid., p. 32.
807 Free-On-Board.
809 Hilowitz, ‘Social Labelling to Combat Child Labour’, 225.
811 Ibid.
812 Ibid.
813 ILO/IPEC, Institute for Human Development New Delhi, Sharma, Sharma, Raj, *The Impact of Social Labelling on Child Labour in India’s Carpet Industry*, p. 32.
814 Ibid., p. 72.
b) RugMark

The RugMark Foundation is working to eliminate child labour in the carpet industry. It was initiated following the introduction of the Harkin Bill, i.e. the Child Labour Deterrence Act of 1993. The bill was introduced by the US Senate in March 1993 and again in April 1995 to prohibit imports that have been produced by children below the age of fifteen. Consequently, Indian carpet manufacturers were afraid of an export ban on their carpets, so they were obliged to work closely with NGOs such as the South Asian Coalition on Child Servitude (SACCS), and neutral organisations such as the Indo-German Export Promotion Project or the ILO or UNICEF.

Its main offices are in the US, Canada, Germany, India and Nepal. RugMark works with local manufacturers and importers to ensure that the carpets they sell are not made by children. They encourage manufacturers to employ adults only. Manufacturers that adhere to the guidelines developed by the RugMark Foundation and pass RugMark’s random inspections of carpet factories are given the right to place the RugMark label on their carpets. The licence is issued only if at least 30 per cent of the loom units have been inspected. Initial and regular monitoring is done by RugMark inspection teams. The frequency of inspection visits is normally once a year. In June 1999, the percentage of violations of the RugMark guidelines was 3.09 per cent. In the case of a violation, a dialogue with the licensee is initiated. If persuasive methods fail, issuing of the labels stops and de-licensing follows. By 2000, seven exporters were de-licensed.

Exporters using the trademark have to pay a licence fee. The RugMark label guarantees that the carpets are free of child labour and that a contribution of the profits will be made to rehabilitate and educate former child carpet weavers. The Federal Association of Oriental Carpet

---

816 The Child Labour Deterrence Act was introduced various times, for the first time in 1992 by Senator Harkin, see Harkin; Child Labour Deterrence Act of 1999, Senate 1551 106th Congress.
818 ILO/IPEC, Institute for Human Development New Delhi, Sharma, Sharma, Raj, The Impact of Social Labelling on Child Labour in India’s Carpet Industry, 19.
819 Ibid., p. 20.
820 Ibid., p. 21.
821 Ibid.
822 Ibid.
Importers (BVOI-Germany) collects 2 per cent of the import value of all RugMark carpets for a fund to rehabilitate children who lose their jobs due to the new labelling system.\textsuperscript{823}

Since 1995, Rugmark has liberated about 3,200 children from the carpet industry in South Asia.\textsuperscript{824} Approximately 2,085 and 180 children could be sent to schools and rehabilitation programmes in India and Nepal respectively.\textsuperscript{825} However, the fate of children leaving rehabilitation centres is often uncertain.\textsuperscript{826} Yet, it is estimated that since RugMark started to work in South Asia, the number of children working in the carpet industry has been reduced from about one million to 300,000.\textsuperscript{827}

c) \textbf{STEP}

STEP is another labelling initiative in the carpet trade that does not label individual carpets, operating in India and Switzerland.\textsuperscript{828} It is based on a code of conduct including the prohibition of child labour, an independent monitoring system by an NGO and the provision of financial support for social and economic development programmes.\textsuperscript{829} This programme is intended to tackle the root cause of child labour, i.e. poverty, and it has started carpet weaving training centres and adult literacy centres as well as schools for children.\textsuperscript{830} The applicants, either importers or retailers of carpets imported from developing countries, have to sign the code of conduct and to pay a fee of SF4 per square metre of carpet imported.\textsuperscript{831} STEP was founded in 1995 by organisations such as Bread for All and Caritas.\textsuperscript{832} In August 1999, there were twenty-two exporters in India participating in the STEP programme.\textsuperscript{833} Exporters violating the

\begin{thebibliography}{99}
\item Global March Against Child Labour, \textit{The Harkin Bill}.
\item RugMark, \textit{Was wurde erreicht?}, \url{www.rugmark.de/index.php?id=12}.
\item Ibid.
\item ILO/IPEC, Institute for Human Development New Delhi, Sharma, Sharma, Raj, \textit{The Impact of Social Labelling on Child Labour in India's Carpet Industry}, p. 22.
\item RugMark, \textit{Was wurde erreicht}?
\item ILO/IPEC, Institute for Human Development New Delhi, Sharma, Sharma, Raj, \textit{The Impact of Social Labelling on Child Labour in India's Carpet Industry}, p. 28; Hilowitz, ‘Social Labelling to Combat Child Labour’, 226.
\item ILO/IPEC, Institute for Human Development New Delhi, Sharma, Sharma, Raj, \textit{The Impact of Social Labelling on Child Labour in India's Carpet Industry}, p. 28.
\item Ibid., p. 30.
\item Ibid., p. 29.
\item STEP, \textit{Über uns}, \url{www.label-step.org}.
\item ILO/IPEC, Institute for Human Development New Delhi, Sharma, Sharma, Raj, \textit{The Impact of Social Labelling on Child Labour in India's Carpet Industry}, p. 29.
\end{thebibliography}
principles contained in the code of conduct can be de-registered.\textsuperscript{834} As of August 2008, STEP was engaged in over sixty development projects.\textsuperscript{835}

All labelling programmes had some positive results. In particular the RugMark programme improved the situation of children in the carpet industry in India and Nepal. However, it has been concluded that, while at the loom level the social labelling programmes such as STEP and Care & Fair were effective in eliminating child labour, the penetration of labelling programmes at the village community level at large and their acceptance at this level was missing.\textsuperscript{836} This is due to the fact that the labelling initiatives concentrate on their looms instead of focusing on the village community.\textsuperscript{837}

The study also found that the impact of the law, that is the Child Labour (Prohibition and Regulation) Act of 1986, was more visible in the villages than the labelling initiatives.\textsuperscript{838} Apparently the fear of being fined had acted as an effective deterrent towards using child labour.\textsuperscript{839} Hired child labour especially has declined significantly, while there was increased employment of family child labour.\textsuperscript{840}

3. Evaluation

These examples show that fear of reduced exports can prompt and accelerate effective elimination of child labour taking into account the needs of the children involved. This was especially the case with the RugMark Foundation, which was initiated following increased consumer criticism of Indian carpets and the introduction of the US Child Labour Deterrence Act. However, the Care & Fair label also uses the threat of termination of contracts.

The examples described demonstrate that social labelling programmes can be implemented successfully, and that they are important when gradually removing child labour and modernising industries.\textsuperscript{841} However, since the carpets are produced at looms scattered in small villages, a better strategy is needed to reach all manufacturers involved.

\begin{itemize}
\item \textsuperscript{834} Ibid., p. 30.
\item \textsuperscript{835} STEP, Gesamtprojektliste, www.label-step.org.
\item \textsuperscript{836} ILO/IPEC, Institute for Human Development New Delhi, Sharma, Sharma, Raj, \textit{The Impact of Social Labelling on Child Labour in India’s Carpet Industry}, p. 62.
\item \textsuperscript{837} Ibid.
\item \textsuperscript{838} Ibid.
\item \textsuperscript{839} Ibid.
\item \textsuperscript{840} Ibid.
\item \textsuperscript{841} This has been also observed in general for social labelling programmes, ILO, Urmsinsky, \textit{Self-regulation in the Workplace}, p. 44.
\end{itemize}
The poor infrastructure of schools financed by labelling programmes demonstrates that labelling initiatives must be used as part of a series within a broader policy and strategy including educational and other alternatives for children. Government policies are needed to maintain the measures supporting former child labourers introduced by labelling programmes. In addition, labelling programmes appear primarily in export markets including ‘niche’ products, affluent consumers and eye-catching circumstances.\(^{842}\) Even more than in the case of codes of conduct, the success of many social labelling programmes depends on the willingness of consumers to buy the labelled products since they have to pay higher prices for, for example, a ‘child labour free’ carpet. Other measures are therefore necessary.

The various programmes differ a lot as regards their monitoring systems. Whereas RugMark has a self-monitoring scheme with ongoing inspections and regular visits, STEP uses an external inspection service. Care & Fair does not use any monitoring service. This is also the case with the many other labelling initiatives not mentioned here.\(^{843}\) The credibility and effectiveness of many programmes have thus to be questioned. Some critics argue that no carpet could be called ‘child labour free’ since monitoring systems are hardly effective.\(^{844}\)

Also, it has been noted that too many labelling initiatives and the lack of coordination between them had diluted the whole concept of labelling.\(^{845}\) Instead of working together, the existing social labelling programmes indicate a sense of competition, thereby creating confusion among the buyers.\(^{846}\) To avoid confusion and lack of transparency, the organisation Fair Trade Labelling Organizations International has started an initiative to coordinate the various social labelling programmes, i.e. the national fair trade initiatives.\(^{847}\)

Finally, only some producers or importers can afford to pay the licence fees for the labelling programmes. Participating enterprises may react with the reduction of jobs. Higher prices for consumers also may result

---

842 Ibid., p. 39.
843 Ibid., p. 44.
844 ILO/IPEC, Institute for Human Development New Delhi, Sharma, Sharma, Raj, *The Impact of Social Labelling on Child Labour in India’s Carpet Industry*, p. 35.
845 Ibid.
846 Ibid., p. 74.
in lower sales rates of the product.\textsuperscript{848} Being affordable only for some manufacturers/companies, these programmes may therefore have a trade-distorting effect and violate WTO rules. In this sense, many exporters perceive labels as having been involuntarily imposed.\textsuperscript{849}

IV. \textit{Socially responsible investment}

Socially responsible investment (SRI) refers to investment-related decisions according to social criteria. They relate to indexes, ratings, funds and shareholder initiatives.\textsuperscript{850}

Social sustainability indexes include the Dow Jones Sustainability Index and the FTSE4Good Index. They are expected to set standards for SRI.\textsuperscript{851} However, the variety of investment funds providing for SRI according to their own standards and procedures contradicts this expectation.\textsuperscript{852}

Social investment funds invest in or divest of publicly traded corporate securities depending on the social performance of companies.\textsuperscript{853} Despite the growing number of social investments,\textsuperscript{854} child labour-related investment is still rare. According to a study from 2003, only 43 per cent of US-based social investment funds referred to labour standards among which 70.9 per cent referred to equal opportunity and non-discrimination.\textsuperscript{855} In many cases the reference to labour standards is very vague, using criteria such as no sweatshop labour.\textsuperscript{856} Labour-related investment is most common among institutional investors such as insurance companies, pension funds and union funds.\textsuperscript{857}

Rating agencies screen enterprises according to social performance criteria. According to ILO research, rating agencies often incorporate all of the core ILO fundamental labour standards.\textsuperscript{858} However, as in the case of company codes, the high number of different social standards

\textsuperscript{848} ILO, Urminsky, \textit{Self-regulation in the Workplace}, p. 45.
\textsuperscript{849} ILO/IPEC, Institute for Human Development New Delhi, Sharma, Sharma, Raj, \textit{The Impact of Social Labelling on Child Labour in India’s Carpet Industry}, p. 34.
\textsuperscript{852} Ibid.
\textsuperscript{856} ILO, Urminsky, \textit{Self-regulation in the Workplace}, p. 48.
makes it difficult for companies to provide adequate information. Consequently, some initiatives have started to solve this problem creating common standards. Yet, much remains to be done.

Shareholder initiatives involve the exercise of rights based on established share ownerships as a means of influencing company behaviour. Shareholder activism is gaining more and more ground in industrialised countries. However, the number of initiatives that directly address international labour issues is relatively small.

SRI is perceived as an efficacious means of creating better social performance of companies if standards and verification systems can be improved as regards transparency, credibility etc.

V. Global reporting

Companies recently have begun to participate in reporting initiatives that aim at systematic public disclosure of a company’s non-financial information. The reports are mostly called ‘sustainability reports’. However, according to a study from 2003, only 1.9 per cent of the top hundred TNCs in OECD countries and of the top fifty in developing countries report on child labour.

A noteworthy example is the Global Reporting Initiative (GRI), which was started in 1997, and became an independent organisation in 2002. It is a multi-stakeholder network involving representatives from business, civilian society, labour organisations, investors, accountants and others. The GRI’s vision is that reporting on economic, social and environmental information enables companies to become more transparent and accountable.

---

860 An example is the SIRI- Group developing a cluster of company profiles quoted in Europäische Kommission, Europäische Rahmenbedingungen für die soziale Verantwortung von Unternehmen, p. 24.
862 Ibid.
863 For example pursuant to a study conducted by the Investor Responsibility Research Centre (IRRC) in the US, from 650 shareholder resolutions examined, fifty were found to address labour issues in 1996, quoted in ILO, Urmsinsky, Self-regulation in the Workplace, p. 51.
866 Ibid.,
868 GRI, Who We Are, www.globalreporting.org/AboutGRI/WhoWeAre.
environmental and social performance by all organisations becomes routine and comparable to financial reporting.\textsuperscript{869} Organisations including TNCs are supposed to publish reports according to the Sustainability Reporting Guidelines, which were revised in 2006 and are now called GRI 3.\textsuperscript{870} At the core of GRI 3 are performance indicators also relating to child labour issues.\textsuperscript{871} To date, more than 1,500 organisations have declared the voluntary adoption of the GRI Guidelines.\textsuperscript{872}

This initiative seems to have the potential to become an effective global reporting system leading to credible sustainability reports of companies. So far however, comparatively few companies report according to the Guidelines, and reports still have to become more responsive to stakeholders’ concerns.\textsuperscript{873} Sustainability reports are still much weaker than financial reports. Finally, GRI does not provide for an assurance or verification system.\textsuperscript{874} Thus, civil society or other stakeholders still have to engage more in monitoring social performance to ensure the credibility of reports.

In conclusion, GRI is a good basis for and certainly contributes to eliminating child labour but needs to be complemented by other instruments and initiatives.

VI. Other employer/TNC initiatives

1. The Bangladeshi exporters’ initiative

In 1993, in response to US media reports on Bangladeshi children making garments sold at Wal-Mart, Wal-Mart cancelled its contracts with Bangladeshi manufacturers.\textsuperscript{875} At the same time, the Bangladesh Garment Manufacturers and Exporters Association (BGMEA) heard of the proposed US Harkin Bill\textsuperscript{876} to prohibit imports made with child
Consequently, the BGMEA in 1994 announced an end to child labour in the Bangladeshi garment industry. As a result, thousands of children were dismissed from the factories. These children were reported to be forced to move to more dangerous and lesser paid work in the informal sector, i.e. working as street beggars, domestic servants or in prostitution. Others were reported to work in hidden sweatshops under worse conditions.

In response to these negative consequences, the ILO, UNICEF and the BGMEA signed a Memorandum of Understanding to stop dismissing children and to open schools for former child labourers. While the ILO concentrated on a monitoring, verification and compensation system for families of former child labourers, UNICEF created educational facilities. In 1997, out of 1,314 factories only 12 per cent employed children whereas in 1995, 43 per cent had employed children. In addition 10,000 children could be enrolled in education programmes.

Two main lessons have to be drawn from this example of employer action: on the one hand, it demonstrates that public pressure on companies and trade-related initiatives can prompt quick action reducing child labour. On the other hand, it has become clear that these initiatives do not help the children unless rehabilitation and education is provided for dismissed children. In addition, households lacking the additional income earned by their children have to be supported.

2. Transnational companies’ initiative in Indian seed production

After a study from 2003 had revealed that approximately 250,000 children were working in the hybrid cotton farms in Andra Pradesh, India, seed TNCs with hybrid cottonseed production in Andra Pradesh no longer denied their responsibility but started to co-operate with NGOs such as Oxfam Novib from the Netherlands or the MV Foundation from

---

878 ILO, Jankanish, Happels, Action against Child Labour, p. 236.
880 Ibid.
881 Ibid.
882 Ibid.
883 Ibid., p. 237.
884 Ibid., p. 236.
India to tackle the problem of child labour.\textsuperscript{885} The study examined cotton farms and their supply chains producing for subsidiaries of Syngenta and Unilever, Advanta, Monsanto and Proagro Seeds (subsidiary of Bayer).\textsuperscript{886} In 2000–2001, 53,500 children were found working on farms producing for these TNCs as well as Emergent Genetics.\textsuperscript{887}

In the past, the companies had claimed that they were committed to the highest standards of social responsibility but maintained that they were not in direct contact with farmers and therefore did not have the power to eliminate child labour.\textsuperscript{888} The study revealed that the companies had substantial control over the production process and thus were able to ensure that child labour could be abolished throughout the whole supply chain.\textsuperscript{889} In response to the study and criticism from various NGOs, the TNCs met in September 2003 recognising that the elimination of child labour on seed farms was part of their corporate social responsibility.\textsuperscript{890} The companies agreed to set up a Child Labour Eradication Group that would do internal monitoring co-operating with the MV Foundation.\textsuperscript{891} The initiative also consisted of giving disincentives and incentives to cottonseed farmers employing children.\textsuperscript{892}

In April 2004, the civil society organisations Germanwatch and MV Foundation found out that child labour still existed on a large scale.\textsuperscript{893} Yet, the numbers of children working on farms producing for these multinationals had declined from 53,500 to 12,375 child labourers.\textsuperscript{894}

\textsuperscript{885} India Committee of the Netherlands, D. Venkateswarlu, \textit{Child Labour and Transnational Seed Companies in Hybrid Cottonseed Production in Andhra Pradesh}, 2003, www.indianet.nl/Cotton_seeds.doc, pp. 4–5; India Committee of the Netherlands \textit{et al.}, \textit{Multinationals Pledge to End Child Labour in Indian Seed Production} 24 October 2003.

\textsuperscript{886} India Committee of the Netherlands, Venkateswarlu, \textit{Child Labour and Transnational Seed Companies}, pp. 19–23.


\textsuperscript{888} India Committee of the Netherlands, Venkateswarlu, \textit{Child Labour and Transnational Seed Companies}, p. 31 et seq.

\textsuperscript{889} Ibid., p. 34.

\textsuperscript{890} India Committee of the Netherlands \textit{et al.}, \textit{Multinationals Pledge to End Child Labour in Indian Seed Production}.

\textsuperscript{891} Ibid.

\textsuperscript{892} India Committee of the Netherlands, Venkateswarlu, \textit{Child Labour in Hybrid Cottonseed Production}, p. 15.


\textsuperscript{894} India Committee of the Netherlands, Venkateswarlu, \textit{Child Labour in Hybrid Cottonseed Production}, p. 25.
In relation to the total workforce, child labour declined from 88 per cent in 2000/2001 to 57.4 per cent in 2003/2004 in the cottonseed production.895 This decline was partly due to less cottonseed cultivation in the state as a result of the drought.896 To achieve the total elimination of child labour, the NGOs claimed that the purchasing practices of companies had to be changed so that farmers were able to employ adult workers.897 However, most of the TNCs were of the view that they provided enough profit margins to farmers to enable them to abolish child labour.898 In response, as mentioned above, in October 2004, Germanwatch submitted a complaint under the OECD Guidelines against Bayer alleging that child labour still existed in Indian supplier factories.899

The initiative proves that companies are more and more willing to cooperate with civil society and to engage in improving labour practices in their supply chains. Public pressure on TNCs is an effective means of motivating companies to take action. The initiative of the industry even had a positive impact, reducing the number of child labourers by approximately 40,000 children. However, the length (the problem of child labour has been known for over ten years) and complexity of the process demonstrates that private initiatives alone are not sufficient. Governments and public actors also have to introduce and enforce their national laws prohibiting child labour.

VII. Evaluation

All private initiatives or international public standards described in this section can be said to be useful initiatives with some positive impact. Most importantly, they provide evidence that international public pressure on TNCs and fear of reduced exports of domestic employers due to the use of child labour can prompt action that leads to good results.

However, these initiatives are still not sufficient to solve the problem of child labour. Firstly, they only target children working in the export

895 Ibid., p. 19.
896 India Committee of the Netherlands, Multinationals and Indian Companies Still Profit from Bonded Child Labour on Cottonseed Farms in India, 4 October 2004, www.indianet.nl/pb041004e.html; overall, the total number of children employed in the Indian cottonseed industry declined from 247,800 in 2000/2001 to 82,875 in 2003/2004, India Committee of the Netherlands, Child Labour in Hybrid Cottonseed Production, p. 25.
897 Germanwatch, Dem Versprechen müssen Taten folgen.
898 India Committee of the Netherlands, Venkateswarlu, Child Labour in Hybrid Cottonseed Production, p. 17.
899 See above p. 339.
industry. Secondly, they suffer from inherent structural shortcomings. Thirdly, in the light of the fact that there are some signs that child labour is re-emerging, it is doubtful whether private sector initiatives alone are able to eliminate child labour in the long term.

Although much improved in recent years, company codes of conduct still bear the risk of just being public relations exercises of global corporations. Almost every monitoring mechanism even from multi-stakeholder initiatives suffers from implementation problems. Global retailers should recognise their responsibility to improve labour standards and change their sourcing policies in supplier countries.

Most social labelling initiatives are in more direct contact with producers and have usually led to a reduction of child labourers. In contrast to codes of conduct, the examined programmes provide for useful educational and rehabilitation programmes for former child labourers. However, these initiatives have to be integrated in broader policy frameworks to be able to maintain their educational programmes and to reach more people in producer countries. In consumer countries, labels risk creating a niche market without much impact on the mainstream industry.

These results hold true for employer/TNC initiatives: they helped to reduce child labour but need to be made more effective and sustainable. Another lesson is that all initiatives should provide for rehabilitation and education programmes for children in order to achieve long-term results.

SRI is perceived as an efficacious instrument to improve social performance of companies but still hard to evaluate with regard to concrete results for the elimination of child labour. Social reporting provides a good basis for introducing good child labour policies but should be complemented by other instruments and initiatives.

Apart from the inherent shortcomings of private sector initiatives, it should be pointed out that, even if considerably improved, the concept of corporate responsibility should only complement, never replace, government action. It is a market-based approach, the success of which is based on the willingness of the consumer to reward companies that produce in a socially responsible way. As such, their success is unpredictable and can vary a lot. Besides the fact that companies alone may prove to be unable to completely abolish child labour, there is a risk that, without a legal framework for standards and enforcement, companies will gain unrestricted private sovereignty. This could be detrimental to the cause of children.
Since governments often lack the political will to introduce higher labour standards as well as to enforce them, social clauses backed by trade measures or penal fines – if designed in the right way – could be useful tools to prompt governments to take legislative and administrative action to complement and improve private sector action. In this context, one should mention the ‘Sullivan Principles’, a code of conduct for US companies in South Africa that targeted inter alia discriminatory work practices.\(^{900}\) Providing for an external monitoring mechanism and effective in the beginning, they were later superseded by congressional passage of comprehensive economic countermeasures against South Africa.\(^{901}\) It is common knowledge that these countermeasures were successful and the apartheid regime ended. This example proves that private sector action combined with or leading to government action may result in better human rights policies. As has been found above however, collective action in accordance with an international trade and labour regime is preferable to unilateral action, which might be politically or economically biased.

In addition, it is recommendable to pursue the approach of the UN Norms of holding TNCs liable for their child labour violations.

Finally, it has to be stated that, although being voluntary in character, all initiatives may nonetheless prove to be trade-distorting since they may discriminate against producers who do not participate in such initiatives. As has been found above, Indian exporters participating in labelling schemes consider these programmes as involuntarily imposed. Therefore, the question is whether these measures are trade-distorting and contrary to WTO law.

**F. CONCLUSION OF CHAPTER 4**

The main conclusion to be drawn from the analysis of trade measures is the following: social clauses and other forms of trade measures already exist and have in many cases contributed to better labour standards including the reduction of child labour. They can serve as a deterrent for companies as regards the use of child labour or be an incentive for governments to improve labour standards. As such, they tackle one major cause of child labour: societal and governmental attitudes

\(^{900}\) Compa, Darricarrère, ‘Private Labour Rights Enforcement Through Corporate Codes of Conduct’, p. 182.

\(^{901}\) Ibid.
towards child labour.\footnote{For governmental attitudes see above p. 27.} Moreover, trade measures will continue to exist although they suffer from inherent shortcomings. Therefore, the question should be how a social clause should be devised and what forum should implement such a clause, instead of asking whether to link trade and social standards in general.

The analysis of existing trade measures provides some answers. A social clause implemented on the global level would not only be an opportunity to redesign social clauses in regional and bilateral trade agreements taking into account the recommendations given above – for example to rely on international child labour standards and increasingly to use trade incentives – but such a multilateral clause could also enlarge the realm of the existing clauses, thereby creating the same conditions for all countries. The problem of the ‘race to the bottom’ could be addressed.

The lesson to be drawn from the GSPs examined above is that labour conditionality works but that the current regimes should be improved and incorporated into a multilateral mechanism. It has been found that the use of trade incentives is much preferable to punitive trade measures.

Similar conclusions follow from the unilateral legislative measures analysed above. They alone are insufficient and should be incorporated into multilateral mechanisms, thereby addressing the issue of their WTO law compatibility. The Belgian Social Label Law nonetheless is an interesting approach.

The private sector initiatives and public standards described in this work also show that labour conditionality can work. But they also demonstrate negative experiences. They highlight the negative consequences for children that were dismissed by exporters from developing countries in response to announced import prohibitions for goods made with child labour. As a result, initiatives such as labelling programmes that provide for educational and rehabilitation measures for former child labourers were developed. Although not perfect, these mechanisms proved effective. Therefore, any trade-related mechanism aimed at the abolition of child labour should contain such complementary measures. This confirms the lesson from Chapter 1 according to which education is perceived as the key solution to the problem of child labour, both as a measure of prevention and rehabilitation.
In addition, private initiatives should be complemented by a legal framework. A multilateral social clause could prompt governments to take legislative and administrative action to complement and improve private sector action. One could also consider the possibility of pursuing the approach of the UN Norms. This is however beyond the scope of this work. Yet, a future multilateral social clause could provide for complaint mechanisms against TNCs based on the model of the OECD Guidelines.

In sum, even though the existing trade measures proved effective to a certain extent, a multilateral social clause replacing or complementing them would be preferable. Thus, the answer to the question posed in the Introduction is as follows: trade measures should complement the existing ILO and UN implementation systems for the prohibition of child labour.
5 Recommendations for an ILO–WTO enforcement regime

A. INTRODUCTION

Having concluded that a social clause for the implementation of the international prohibition of child labour is recommendable, this chapter will outline the basic principles for such a clause in accordance with the findings of this work. A key finding is that any imposition of trade measures should be accompanied by complementary measures such as education and rehabilitation of the former child labourers.

The main rationales for the adoption of such a regime are the effectiveness of trade measures on child labour – if designed in the right way – the call for coherence in international law as illustrated by the case of Myanmar examined in Chapter 3 and the almost universal consensus on the prohibition of child labour in international law.

The WTO being the principal institution for trade at the global level and the ILO being the key institution for placing decent work at the centre of economic policies, such a clause should be based upon the implementation mechanisms of these institutions. In line with its objective to contribute to solving the problem of child labour, the implementation


2 See the analysis in Chapter 1.

3 Cf. Preamble and section I A of the ILO Declaration on Social Justice for a Fair Globalization.
mechanism would primarily aim at inducing compliance with the restriction of child labour rather than maintaining the balance of reciprocal trade concessions, as is the case of countermeasures under the dispute settlement mechanism of the WTO. 4

Before exploring the basic principles, the central issue of the political debate surrounding such a social clause will be briefly addressed: the fear of protectionism.

B. ADDRESSING THE FEAR OF PROTECTIONISM

As indicated in the Introduction, developing countries in the past objected firmly to the insertion of labour standards into trade agreements because they regarded this as disguised protectionism – taking away their competitive advantage from their low wage costs. 5

Firstly, whilst this fear is not totally unfounded since protectionist motives also appear in US unilateral trade measures on child labour, 6 concerns about protectionism can be dispelled by a well-devised social clause that focuses on cooperative activities and provides for trade measures under its dispute settlement mechanism only as measures of last resort. The merit of such a mechanism would also be that unilateral measures could only be adopted if the decision-making or adjudicating bodies recommend such an adoption. In addition, drawing on the approach in the Cotonou Agreement, a social clause de lege ferenda should provide for financial and technical assistance offered by international donors including industrialised countries in order to support developing countries to implement labour standards in law and practice.

Secondly, considering the human rights rationale for the agreement, it should be pointed out that there is almost a universal consensus on the prohibition of child labour in international law. The CRC prohibiting economic exploitation of children is almost universally ratified, and the majority of countries have ratified ILO Convention No. 182. 7 In addition, the prohibition of child labour can be qualified as a general principle of

---

6 The US GSP is partly based on such motives, see above p. 285.
7 See above, p. 116.
international law and as *ius cogens*. Moreover, in accordance with the ILO Declaration on Fundamental Principles and Rights at Work, by being members of the ILO, many developing countries have to implement the principles of ILO Conventions No. 138 and 182 and to report on progress made in law and practice. Thus, probably the majority of developing countries are obliged to implement the prohibition of child labour in any event.

Thirdly, in response to the often-cited argument that economic growth is the only effective means of combating child labour, it can be held that poverty is not the only cause of child labour, that European countries also introduced child labour legislation before the end of child labour and that, as just stated, child labour, to the contrary, perpetuates poverty.

Fourthly, it should be noted that according to a recent ILO study, the benefits of eliminating child labour would be nearly seven times greater than the costs. In particular, it has been found that child labour perpetuates poverty through bringing down adult wages and depriving children of an education. Therefore, it is questionable whether a comparative advantage based on child labour is a long-term economic advantage.

In addition, it is rightly argued that an advantage based on the legal situation is not a true economic comparative advantage. Most importantly, the recent ILO Declaration on Social Justice for a Fair Globalization clearly states that the violation of fundamental rights at work cannot be used as a legitimate comparative advantage.

Fifthly, the experience of the US–Cambodia FTA should also be highlighted: Cambodia benefits from its reputation of providing high labour standards, attracting international buyers by these standards.

Finally, the former Director-General of the ILO stated that, while the ILO does not have a mandate for introducing a social clause, it is ready to cooperate in such an endeavour without prejudice to the impartiality

---

8 See above, p. 110 and p. 114.
9 See above, p. 31.
11 ILO/IPEC, Khair, *Child Labour in Bangladesh*, p. 15.
13 See above, p. 6.
14 See above, p. 253.
and universality of its supervisory machinery. He was convinced that the tripartite structure of the ILO especially could be a guarantee of a valid multilateral response to the challenge of such a clause.

In conclusion, the problem of disguised protectionism can be adequately tackled and does not stand in the way of a social clause.

C. BASIC PRINCIPLES

I. Trade-related or country-related standards?

The content and scope of the prohibition of child labour to be protected under the proposed regime should be defined by the relevant UN and ILO conventions, as described in Chapter 1. The relatively far-reaching state obligations encompassing legislative, administrative, social and educational measures, minimum age legislation, preventive measures such as labour inspection and rehabilitation and re-integration measures should be stated explicitly. Thus, in contrast to the US FTAs, state obligations are not limited to domestic law enforcement. In addition, in line with the nature of the state obligation under the UN and ILO conventions, states would have to implement these obligations immediately – to the maximum of their available resources. Further resource constraints could be addressed under the gradual enforcement system.

The question arises however whether only trade-related child labour in the export sector, or all types of child labour including child labour in the domestic and service sector, should be subject to the enforcement regime of the new agreement. Child labour in the domestic industry or services sector may also be referred to as country-related child labour.

As is the case with regional social clauses, the standards subject to the dispute settlement mechanism should be trade-related. The argument relating to the effectiveness of social clauses is only valid for the export sector. Thus, in principle, only child labour in the export sector should be subject to dispute resolution. Since the trade–labour link also results from the fact that labour is the main component of production, the standard should also be product (or service)-related. In contrast to other ILO core labour standards, child labour in the production of goods has a close product-nexus because it has a direct impact on the cost of a product given that child labourers receive a lower salary than adult

16 Ibid.
workers do.\textsuperscript{17} Country-related child labour should thus in principle not be subject to the dispute resolution mechanism.

It should also be noted that country-related child labour could only effectively be targeted by country-specific measures, i.e. countermeasures. However, countermeasures have to be carefully used because of their potential for misuse and their potential ineffectiveness.\textsuperscript{18} Sanctions or countermeasures in many cases make matters worse for the most defenceless in the target state.\textsuperscript{19}

Further arguments in favour of limiting possible trade measures to trade (or product or service)-related standards may be found when analysing the WTO compatibility of such measures, given the fact that one of the basic pillars of the WTO or its predecessor, the GATT, is the non-discrimination between products of member states.\textsuperscript{20} It may therefore be difficult to justify country-specific measures under WTO law. However, it is beyond the scope of this study to examine this question in detail.

Having said this, countermeasures, i.e. country-specific trade measures, may be necessary to target grave and widespread occurrence of child labour in the domestic and services sector such as has been the case of portering in Myanmar. Hence, trade measures for types of child labour other than in the production of goods for export should be possible but carefully used and only as measures of last resort. Country-based child labour standards should be subject to a two-layered system consisting of the ILO special procedures and the ones of the new agreement de lege ferenda. Thus, under an Art. 26 complaints procedure under the ILO Constitution, the ILO Governing Body could recommend trade measures and refer the case to the relevant institutions of the new agreement.

II. Institutional structure

It would be recommendable to have a Ministerial Trade and Child Labour Council as the decision-making body. It would consist of trade, human rights and labour government representatives.

Taking due account of the best interests of the child and the practice under the Committee on the Rights of the Child,\textsuperscript{21} the Council should

\textsuperscript{17} ILO, \textit{Child Labour}, p. 19 et seq.
\textsuperscript{21} See above, p. 140.
allow for the participation of civil society with relevant expertise that can best represent the children’s interest. While there are legitimate concerns about the active participation of NGOs in international organisations because of their democratic deficiency, this democratic deficiency could be tackled by transparency requirements and demonstration of relevant expertise. It should also be noted that, in the area of child labour, civil society representatives are of major importance since trade unions often do not represent adequately the informal economy including women and children. In any event, civil society should only be given consultative status.

Recalling that the Committee on the Rights of the Child stressed that implementation should also involve the participation of the children concerned, one could also think of inviting the children themselves to particular sessions of the Council. However, taking into account their vulnerability and inexperience in working in international organisations, such participation should be limited to extraordinary sessions once per year or less, as was the case with the World Summit for Children or the UN Special Session of the General Assembly on Children. It should also be noted that the Committee on the Rights of the Child itself also does not invite children on a regular basis.

The Council should be served by a secretariat staffed by independent trade and labour experts.

Finally, there should be an annual Parliamentary Assembly consisting of members of parliaments of member states. In accordance with the EU economic agreements, it would only be feasible to accord it consultative status.

III. Cooperative activities

The cooperative activities should be based on the reporting procedures under the ILO and the Trade Policy Review Mechanism of the WTO. In accordance with the findings made under these mechanisms, issues that deserve special attention such as child labour in Export Processing Zones should be the subject of special studies. Members should cooperate with ILO/IPEC and adopt Time Bound Programmes (TBPs) in order to combat

---

22 Interview with a trade unionist, Dave Spooner, IFWEA, 16 November 2006; Hepple, Labour Laws and Global Trade, p. 54.

23 See above, p. 138.


child labour. This approach is reinforced by the ILO Declaration on Social Justice for a Fair Globalization, which calls upon the ILO to effectively assist its members in their efforts to achieve coherent social policy and sustainable development. In particular, it should assist those who wish to promote fundamental rights at work in bilateral or multilateral agreements. Possible means mentioned in the Follow-up mechanism to the Declaration are technical cooperation, information sharing and advisory services.

Special studies should support the Special Representative to the Secretary-General on Business and Human Rights in devising a common legal framework for corporate social responsibility.

The initiation of TBPs should also be supported by international assistance from industrialised countries. As analysed above, Art. 2 (1) of the ICESCR, Art. 4 of the CRC and Art. 8 of ILO Convention No. 182 call for international assistance and cooperation when implementing the rights contained in them.

Incentive regimes such as social clauses in GSPs, the US–Cambodia FTA or labelling initiatives should be devised jointly by the members and the Council in accordance with the findings made above: social clauses in GSPs should be based on ILO and UN conventions and implemented in accordance with ILO and UN jurisprudence. Granting and withdrawal decisions should be subject to a complaint mechanism, which in turn should be subject to a special appeal mechanism under the new agreement. This would ensure that cases are dealt with in an objective, efficient and timely manner.

IV. Public communications

Along the lines of the procedures under the National Contact Points under the OECD Guidelines and the NAALC public communication procedure, there should be a public communication procedure where public complaints on child labour could be brought by interested parties against government parties and corporations acting in the territory of the other member states. Only trade-related child labour should be made subject of a complaint. Communications would be handled by national offices consisting of trade, human rights and labour experts including all stakeholders, i.e. government, workers, civil society and industry.

26 Section II A (ii) of the ILO Declaration on Social Justice for a Fair Globalization.
27 Ibid., Section II A (iv).
Cases against companies should end with an action plan including the allocation of sufficient resources to remedy the situation if the allegations have been found true.

Cases against foreign governments should lead to ministerial consultations between the countries concerned where the interested parties should have a right to participate as consultants. Ideally, ministerial consultations should end with concrete action plans and follow-up actions. If this is not the case, they may precede dispute resolution as explained in the next section.

V. Consultations

Consultations could be initiated by parties to the agreement but also triggered by the public communication procedure in response to a public complaint by a private party. This constitutes an advantage over the current dispute settlement procedure under the DSU.

However, in accordance with the consultation procedure under Art. 4 and 5 of the DSU, any party may have the right to request a panel be convened within a certain period if the other party refuses to consult.

The question is whether private parties such as civil society or industry should have the right to request a panel that may lead to the imposition of trade measures. In the light of the fact that, to date, in international law, there is no trade-related enforcement mechanism for human rights violations by states that may be initiated by private parties, and taking due account of prevailing sovereignty concerns in the human rights area, private parties should principally not have this right. However, they should have the right to request a panel to be convened to make recommendations which state the violation and recommend how to remedy the situation, as is the case under the UN complaints procedures. Thus, there should not be any enforcement mechanism. In any event, due to their often unique expertise, private parties should attend the consultations and submit comments.

Finally, the party being accused of human rights violations should have the possibility of initiating a TBP together with IPEC in order to solve the dispute.

VI. Dispute settlement

The terms of reference of a panel would be to examine whether there has been a failure of the party complained against to implement in law or practice the prohibition of child labour in international law. Panellists
would be chosen from a roster of independent trade, human rights and labour experts.

Third parties including private bodies having a substantial interest would be allowed to participate and make submissions. However, private parties should not be accorded full third party status, i.e. neither the right to add claims nor the right to appeal.

The panel should base its finding on ILO and UN jurisprudence and seek the advice of these organisations. Providing sufficient time for fact-finding including in situ missions, the panel should submit a report to the Council within fifteen months after it has been established.

Panel rulings should be subject to an appeal mechanism based on the Appellate Review procedure of the DSU. The review should not exceed sixty days.

If the panel confirms the violation of the prohibition of child labour in practice, the defaulting party should propose to initiate (or continue) a TBP, highlighting the specific measures to tackle the specific problem of child labour that was subject to the dispute. As explained above, the TBP would ensure the sustainability of the special measures on child labour providing for a longer-term solution and based on the important pillars such as prevention of child labour, withdrawal of children from child labour and their rehabilitation. In accordance with the international law on cooperation and assistance as outlined above, some international aid should be available.

If there is only a failure to adopt adequate national legislation, the country should adapt its legislation within fifteen months.

If the country does not make due efforts to implement a TBP and to design the specific measures to tackle the problem of the dispute within a certain period, the complainant party may request to reconvene the panel, which in turn may impose a monetary enforcement assessment. In line with the proportionality requirement of international law, the financial amount would be based on criteria such as the gravity of the problem, the trade effect, reasons of non-enforcement such as political will or resource constraints and efforts of the party to remedy the problem. The fine should be paid into a fund established for tackling the problem of child labour including rehabilitation measures.

If the defaulting state fails to pay the determined amount within a certain period, the complaining party may take appropriate measures including the suspension of trade concessions as a measure of last resort.

The complaining party should seek to suspend the concessions in the sector where the child labour occurred and, in accordance with the proportionality principle, seek to suspend the smallest amount possible. If needed, the complaining party should also devise an emergency plan with the support of IPEC in case employers start to dismiss children without supportive educational measures.

This new dispute resolution mechanism would exclude the adoption of unilateral trade measures by the parties to the agreement.

In line with the period for dispute settlement under the NAALC, the final report should be issued approximately 500 days after the beginning of consultations, thereby providing for enough time for fact-finding but not extending the dispute over too long a period.
Concluding summary

This section provides a summary of results reached during the course of this work. An epilogue putting the work into the broader context of the current trends in public international law and suggesting further questions for research completes this work.

A. SUMMARY OF RESULTS

This work has explored whether the existing UN and ILO implementation systems regarding the international prohibition of child labour should be complemented by a legal framework providing for trade measures. It asks whether trade rules should be used to combat child labour and how such a linkage should be framed in international law. With regard to the trade and labour debate, the work focuses on arguments relating to the effectiveness of social clauses and addresses the issue of coherence in international law.

The work starts with presenting the problem of child labour. Not all work done by children is intolerable. The main institutions dealing with child labour differentiate between light work or beneficial work on the one hand and child labour or exploitative child labour on the other hand. Child labour can be defined as the denial of the right to education and of the opportunity to reach full physical and psychological development. There is still widespread child labour today – in the larger group of children aged five to seventeen, 218 million children can be regarded as child labourers. The main causes of child labour are poverty as well as governmental and societal attitudes. Strategies for combating child labour should be multi-pronged including legislation, policy intervention, education and social protection programmes.
The second chapter defines the content and scope of the international prohibitions of child labour. Child labour as defined by UNICEF and the ILO is prohibited by numerous human rights conventions. The most important are the CRC and the ILO Minimum Age Convention No. 138 and Worst Forms of Child Labour Convention No. 182. All UN and ILO conventions follow the differentiation between tolerable child work and exploitative child labour. With the exception of ILO Convention No. 182, all conventions can be said to prohibit all of the three categories of child labour distinguished by the ILO, namely labour that is performed under the minimum age for this kind of work and thus likely to impede a child’s education and full development, hazardous work and the unconditional worst forms of labour. Whilst not being customary law, the prohibition of child labour is a general principle of international law and forms part of *ius cogens*.

The third chapter undertakes a stocktake of the ILO and UN implementation mechanisms. It is found that by mainly deriving their effectiveness from the mobilisation of shame and lacking the possibility of imposing trade sanctions, both implementation mechanisms can be considered to be rather weak. Whilst providing a solid basis for the implementation of human rights, both systems need to be strengthened. The question of complementing the systems by a legal framework providing for trade measures has thus to be further explored.

Since according to Art. 33 of the ILO Constitution, the Governing Body may already recommend to the International Labour Conference that it in turn recommends the ILO constituents to adopt trade measures, a linkage between child labour norms and existing trade rules is also preferable for reasons relating to the coherence of international law.

The fourth chapter examines the effectiveness of existing trade measures. It analyses social clauses in trade agreements and trade incentive regimes, unilateral legislation providing for trade measures as well as private sector action aimed at the eradication of child labour. It finds that trade measures on child labour, if designed in the right way and implemented under certain conditions, can be useful tools for helping the fight against child labour. Trade measures should be used rather as a threat and as measures of last resort, and should be accompanied by rehabilitation, educational and other supportive measures for former child labourers and their families. Trade incentive regimes especially have proven effective.

Given the numerous existing social clauses, the main question regarding trade measures for child labour is how to devise a social clause. A multilateral social clause complementing or replacing existing
social clauses is recommendable since it can take into account the
lessons learned from the existing social clauses and, most importantly,
would put all countries on the same footing. Such a multilateral clause
could thus help to prevent a ‘beggar-thy-neighbour’ policy.

This study concludes by outlining recommendations for a future
multilateral social clause on trade and child labour de lege ferenda based
on ILO and WTO enforcement regimes.

B. EPILOGUE

Besides suggesting a further means of reducing child labour, this work
intends to contribute to the broader debate on trade and human rights
with a focus on the process of constitutionalisation of the international
trade order.1

It has been rightly held that the interaction of trade and labour entails
issues of constitutionalisation, referring to necessary legislative changes
of the existing trade and human rights treaties as well as to changing
methods of interpretation of these treaties.2 There is an increasing
consensus that progress in trade and human rights can no longer be
made within a single functionalist institution but that a framework that
allows equality of legitimate interests to be taken into account, brings
about practical co-ordination of differing policy goals and allows for
balancing of the fundamental interests involved is needed.3

Having found that trade measures may help to reduce child labour, it
has become clear in this work that the linkage of trade and child labour
in international law is intrinsically related to the question of what
institutional legal framework should govern such a linkage. In the quest
for such a framework, some recommendations for the introduction of
a multilateral social clause de lege ferenda taking into account the lessons
learned from existing social clauses are made.

1 On the ‘constitutionalisation’ or ‘constitutionalism’ debate see for example Cottier,
‘Trade and Human Rights’, 129 et seq.; D. Z. Cass, ‘The “Constitutionalization” of
International Trade Law: Judicial Norm-Generation as the Engine of Constitutional
Development in International Trade’, European Journal of International Law, 12 (2001),
Journal of World Trade, 37 (2) (2003), 241–81, 259 et seq.; P. Stoll, ‘Freihandel und
Verfassung. Einzelstaatliche Gewährleistung und die konstitutionelle Funktion der
Welthandelsordnung (GATT/WTO)’, Zeitschrift für ausländisches öffentliches Recht und
Völkerrecht (1997), 83–146.


3 Ibid.; see also M. Oesch, Standards of Review in WTO Dispute Resolution (Oxford University
 Ideally, in order to put such a clause on a firm basis, before actually devising such a clause in more detail, it would be recommendable to analyse the compatibility of trade measures on child labour in WTO law. Further questions for research would be whether other (core) labour standards should be included in such an agreement.

Whilst labour standards so far have not been on the agenda of trade talks during the Doha Round, there are some signs that the discussion of the insertion of a social clause into the WTO will come back to the agenda. The former EU Trade Commissioner and present Director-General of the WTO, Pascal Lamy, predicted that, with the accession of China to the WTO, labour rights might be back on the agenda. In a keynote speech at a conference on globalisation, the German Chancellor Angela Merkel maintained that trade talks had to include social standards. In her view, child labour especially has to be banned.

It should also be noted that, recently, the reluctance of developing countries to adopt any sort of social clause has started to decrease. This might be due to the increasing recognition by producers of the value added by sustainable production. Especially in the case of child labour, where evidence of the long-term gains of the abolition exists and where the majority of countries have ratified ILO Convention No. 182 and the CRC, opposition should be decreasing. A further sign in this direction is the new Chinese law on worker protection.

As the most recent joint study on trade and employment by the ILO and WTO demonstrates, the organisations at least have started to cooperate in the research area.

Hopefully, further cooperative initiatives will follow soon in response to the invitation by the ILO to economic institutions to contribute to the implementation of a decent work agenda.

---

4 Quoted in Greven, Social Standards, p. 44.
6 ILO, Investing in Every Child.
9 This includes the promotion of the fundamental rights at work including the effective abolition of child labour, Section A (iv) and II C of the ILO Declaration on Social Justice for a Fair Globalization.


‘Facing Up to the Complexities of the ILO’s Core Labour Standards Agenda’, European Journal of International Law, 16 (2005), 467–80.


BRIDGES, ‘Caribbean ACP Countries Launch Negotiations with EU’, 8(14) (22 April 2004).


General Guidelines for Periodic Reports, thirteenth session, 20 November 1996, CRC/C/58.


Dorsch, G., Die Konvention der Vereinten Nationen über die Rechte des Kindes (Berlin: Duncker & Humblot, 1994).


Friedrich-Ebert-Stiftung, B. Hamm, Die OECD-Leitsätze für multinationale Unternehmen – Ihr Einsatz durch zivilgesellschaftliche Organisationen in Deutschland (Bonn: Friedrich Ebert Stiftung, 2005).


*Who We Are*, www.globalreporting.org/AboutGRI/WhoWeAre.

*What We Do*, www.globalreporting.org/AboutGRI/WhatWeDo/.


IFWEA, Interview with a Trade Unionist, Dave Spoones, 16 November 2006.


A Future without Child Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (Geneva: International Labour Office, 2002).

A Global Alliance against Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (Geneva: International Labour Office, 2005).


ILCCR: Individual Observations concerning Convention No. 29, Forced Labour, 1930


Revision of the Procedure for the Examination of Representations submitted under Article 24 of the Constitution, Governing Body, Committee on Legal Issues and International Labour Standards, 276th session, (Geneva: International


The End of Child Labour: Within Reach, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (Geneva: International Labour Office, 2006).


India Committee of the Netherlands et al., Multinationals and Indian Companies Still Profit from Bonded Child Labour on Cottonseed Farms in India, 4 October 2004, www.indianet.nl/pb041004e.html.

Multinationals Pledge to End Child Labour in Indian Seed Production, 24 October 2003, www.indianet.nl/pb031024e.html.


Irmscher, T. H., Die Behandlung privater Beschwerden über systematische und grobe Menschenrechtsverletzungen in der UN-Menschenrechtskommission, Das 1503-Verfahren nach seiner Reform (Frankfurt: Peter Lang, 2002).


Körting, C. ‘Global Compact – Bilanz und Perspektive’, in DGB Bildungswerk, Global Policy Forum Europe et al. (eds.), *Verbindliche Regeln für Multis –...*
Corporate Accountability, Zwischenbilanz und Zukunftsperspektiven (Düsseldorf: DGB Bildungswerk, 2006), pp. 10–12.


Nowak, M., *UN Covenant of Civil and Political Rights, CCPR Commentary* (Strasbourg/Kehl: N.P. Engel Publisher, 1993).

*UN Covenant of Civil and Political Rights, CCPR Commentary*, second edition (Strasbourg/Kehl: N.P. Engel Publisher, 2005).


Seventeen Frequently Asked Questions about UN Special Rapporteurs, Fact Sheet No. 27 (under revision), www.ohchr.org/Documents/Publications/FactSheet27en.pdf.


Oxford Dictionary of the English Language (Oxford University Press, 1933), vol. VIII.


Richter, D., *Das fremde Kind, Zur Entstehung der Kindheitsbilder des bürgerlichen Zeitalters* (Frankfurt am Main: S. Fischer Verlag, 1987).


stern, Kinderarbeit für den Heine-Versand, 6 (2007).


Human Rights Council Resolution 60/251, 3 April 2006.


*Note on Integrity Measures, www.unglobalcompact.org/About TheGC/integrity.html.*

*What is the Global Compact, www.unglobalcompact.org/About TheGC/index.html.*


*Consideration of the Reports of States Parties under Art. 40 of the Covenant, 19 October 2007, CCPR/C/NIC/3.*


UN Sub-Commission on Promotion and Protection of Human Rights, *Contemporary Forms of Slavery, Report of the Secretary-General on the*


Index

abolition
  of child labour
    advantages of 389
    ILO conventions on 88–9, 95–6
    international action for 33, 34, 35
      in Kerala (India) 26
    and private sector initiatives 371–2,
      373, 374–5
  of forced labour 86–7, 107–8
  of slavery 36–7, 44–5
  UN conventions on 38–45, 54–5,
    80, 96–7
Abolition of Forced Labour Convention
  (No. 105, 1957, ILO) 86–7,
    107–8
abuse, sexual
  rights of children to protection against
    75–7, 78, 81, 97–8
  UN Special Rapporteur on 148
accountability, corporate 336
activism, by shareholders 367
  adidas, complaints procedures against 338–9
adoptions, ‘sham’ 40
Africa, attitudes towards child labour in 27
Agreement on Textiles and Clothing
  (1995, WTO) 248–9
agriculture
  child labour in 24
  hazardous work conditions in 20
  legislation in United States 111–12
Alien Tort Claims Act (ACTA, US) 334–5
Alston, P. 105, 106, 171
apparel industry
  codes of conduct in 349–50, 352–3
  see also textile industry
Archer Daniels, litigation against 335
Argentina, human rights violations in 151
Ariès, P. 15
armed conflicts
  children in 22
  protection of 78–9, 79–80
  UN special representative for the 148
Atlanta Agreement 359
attitudes
  cultural, towards childhood 16–17
  towards child labour 27–8, 373
  towards social clauses, by developing countries 389
audits, social 325–6, 355–6
Australia, ratification of ILO conventions by 171–2
Bangladesh
  child labour in 179–80, 327–8, 351
  education in 26–7, 28
  garment industry exporters’ initiative in 368–9
  status in US GSP of 295
  Barcelona Traction case (ICJ) 49, 115
Bayer, complaints procedures against 339
Belarus
  freedom of association in 164
    EU GSP complaints procedure on 311–12
Belgium
  Social Label Law in 323–4, 327, 328–9,
    331, 332, 374
  complaints mechanism in 328
  implementation of 324–7, 327–8
Benin, child labour in 135
Bhagwati, J.N. 7
bonded labour 21–2, 39
  in Pakistan 161
  see also forced labour; servitude; slavery
Brazil, child labour in 135, 152, 351
Brown, D.K. 7
business associations, codes of conduct of 352–4
Business Social Compliance Initiative 352

Cambodia
child labour in 148
legislation on 250
Free Trade Agreement with United States 378
Textile Agreement with United States 248–9
implementation of 250–2
social clause/labour standards in 249–50, 253
trade incentives 252–3
UNICEF activities in 152
Cambroon, child labour in 163
Canada Post case (NAALC) 220
Care & Fair programme 361–2
Cargill, litigation against 335
CARIFORUM–EU Economic Partnership Agreement 264–5
coopération and capacity building provisions in 270–1
dispute settlement mechanism 267–9, 269–70
and prohibition of child labour 269
institutional structure 265–6
social clauses/labour standards in 266–7, 269
carpet industry
child labour in 24, 30, 141, 296–7
social labelling programmes 361–4
causes see explanations for child labour
Central African Republic, US GSP status of 295
Central American Free Trade Agreement (CAFTA) 315
child slavery 21–2, 37–8, 39
‘sham’ adoptions and 40
child soldiers 22
prohibition to enlist and recruit 78–9, 79–80, 97
childhood
cultural attitudes towards 16–17
definitions of 16–17
historical images of 15–16, 27
social conception of 15–16
children
in armed conflicts 22
see also application to children; humanitarian law
international protection of 78–9, 79–80
UN Special Representative for 148
definition of 68, 96
health of, threatened by hazardous working conditions 19–20
involvement in illicit activities of 22, 98
participation of 381
rights of
to protection 61–2
from economic exploitation 62–4, 67–75
from sexual exploitation and sexual abuse 75–7, 78, 81, 97–8
UN efforts to promote 1–2
UNICEF and 151–2, 153
see also CRC; human rights
trafficking of 22, 38
prohibition of 77–8
vulnerability of 30
Chile
Association Agreement with EU (2005) 271
coopération and capacity building provisions in 273–4
dispute settlement mechanism 273–4
institutional framework of 271–2
social clauses/labour standards in 272–3
and prohibition of child labour 273
child labour legislation in 238
Free Trade Agreement with United States (2007) 236
consultation procedures in 240–1
cooperative activities in 240, 246, 247
dispute settlement mechanism in 241–3, 247–8
enforcement of 243–6
institutional framework of 239, 242
public communications procedure in 239–40
social clause/labour standards in 236–9, 246–7
China, US trade measures against 320
Clean Clothes Campaign (CCC) code 357
cocoa industry
child labour in 24–5, 321–2
in Côte d’Ivoire 320–1, 353
litigation against 335
code of conduct in 353–4
codes of conduct 336–7
in cocoa industry 353–4
harmonisation of 328
private sector 348, 359–60
business associations 352–4
corporate 348–9, 372
studies of 349–52
framework agreements as 357–9
model codes as 354–5
Clean Clothes Campaign (CCC) as example of 357
codes of conduct (cont.)
- multi-stakeholder 354–5, 357
- Ethical Trading Initiative (ETI) as example of 356–7
- SA8000 as example of 355–6
- prohibition of child labour in 349–52, 360
- public sector 347–8, 359
- ILO Tripartite Declaration on Principles concerning Multinational Enterprises as example of (1977) 340–1
- OECD Guidelines for Multinational Enterprises as example of 337–40
- UN Global Compact as example of 341–4
- UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights as example of (2003) 332–3, 344–7, 373
- in sporting goods industry 352–3, 358–9
- in textile industry 349–50, 357
- see also companies; transnational corporations
- Colombia, US GSP petitions against 293–4
- combating child labour 31, 34, 386–7
- education as a means of 32
- international action as a means of 33, 34
- national legislation as a means of 31–2
- see also prohibition
- companies
- relocating to developing countries 8–10
- sustainability reports by 368
- see also codes of conduct; transnational corporations
- comparative advantages, based on child labour 378
- Compendium on Cooperation Strategies (European Commission) 259, 263–4
- competition, fair 242
- complaints procedures 142
- of Belgian Social Label Law 328
- at ILO
- under Constitution 174–7, 177–8, 213, 380
- procedures against Myanmar 177, 183–91, 191–2, 194
- under Tripartite Declaration of Principles concerning Multinational Enterprises 340–1
- individual 142, 212
- of multilateral social clause on prohibition of child labour 382
- of OECD Guidelines for Multinational Enterprises 337–40
- at UN
- of CRC 140–1
- of Global Compact 343–4
- of Human Rights Council/Commission on Human Rights 149–51, 153
- of ICCPR 129–32
- of ICESCR 135–7
- see also dispute settlement
- compulsory education
- Kenyan legislation on 162–3
- and minimum age for employment 90, 94
- compulsory labour see forced labour
- conflicts see armed conflicts
- constitutionlisation of international trade order 388
- consumer boycotts 195
- Convention on the Rights of the Child see CRC
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949) 75–6
- corporate accountability 336
- corporate codes of conduct 348–9, 372
- studies of 349–52
- corporate social responsibilities 332–3, 335–6, 372–3
- extraterritorial legislation on 334–5
- and human rights violations 333–4, 345–7
- Côte d’Ivoire
- blood diamonds from 330
- forced child labour in cocoa industry in 320–1, 353
- US GSP status of 297
- Cotonou Agreement (EU) 253–4
- cooperation and capacity building provisions in 263–4, 279
- institutional framework in 254–5
- social clauses in 260
- human rights clause as one of 255–8
- penalties in 260, 261, 262–3
- and prohibition of child labour in 260–1
- labour standards clause as one of 258–60, 263
- cotton seed production, child labour in 339, 369–71
- countermeasures
- and prohibition of child labour 380
- proportionality requirements for 207–8, 261
- country-related child labour 379–80
- Craven, M. 133
- CRC (Convention on the Rights of the Child, 1959, UN)
on definitions of childhood 16
implementation of 137–42
on prohibition to enlist and recruit child soldiers 78–9, 79–80
on prohibition to traffic in children 77–8
on right to be protected from economic exploitation 67–75, 80–1
on right to be protected from sexual exploitation and sexual abuse 75–7, 78, 81
see also children

crime against humanity 117–19
cultural attitudes, towards childhood 16–17
customary international law 48–50, 50–2
prohibition of child labour as 110, 120, 387
prohibition of slavery as 52, 82
UDHR as 52–3
Czechoslovakia, representations at ILO against 174

Deardoff, A.V. 7
debt bondage see bonded labour
Declaration on Fundamental Principles and Rights at Work (1998, ILO) 5–6, 103–7, 109–10, 193, 227
implementation of 389
reporting system of 167–72
and US–Jordan FTA 227, 228
Declaration of Philadelphia (Declaration concerning the aims and purposes of the International Labour Organization, 1944,) 3, 8
Declaration on Social Justice for a Fair Globalization (2008, ILO) 6, 378
declarations, as instruments of international law 46
definitions
of child 68, 96
of child labour 14–15, 17–19, 88–9, 94, 386–7
prohibition of 199
worst forms of 98–9
of childhood 16–17
of economic exploitation 68–9
of effectiveness 13
of exploitation 80
of forced labour 57–8, 82–3, 319
and child labour 58–9, 60, 83–5, 86
of hazardous work 94
of health 98
of implementation 123
of labour 17, 33–4
of labour law 198, 236
of light work 92
of principle 113
of prostitution 75
of servitude 46–7
and child labour 54–5, 56–7, 60
of slave trade 36, 38, 54
and child labour 40–5, 45–6
of trade measures 12–13
of trade sanctions 12–13
of trafficking of children 77
of transnational corporations 332–3, 340
DeMause, L. 15
democratic deficiencies of NGOs 380–1
demography, and child labour 25
developing countries
attitudes towards social clauses by 389
exports of 298
relocation of firms to 8–10
value of trade preferences for 297–9, 312–13
development finance cooperation in Cotonou Agreement 264
see also technical assistance cooperation
diamond trade
Kimberley Process Certification Scheme in 318, 329–30
implementation of 330–1
dispute settlement mechanism
under CARIFORUM–EU EPA 267–9, 269–70
and prohibition of child labour 269
under Cotonou Agreement, in labour standards clause 259–60, 263
under EU–Chile Association Agreement (2005) 273–4
and prohibition of child labour 277
in multilateral social clause on prohibition of child labour 281, 282–4, 383
under NAALC 210–13, 216, 222, 225–6, 235–6
enforcement of 213–18
under NAFTA 205–6, 216, 217
under US–Chile FTA 241–3, 247–8
enforcement of 243–6
under US–Jordan FTA 231–4, 235–6
at WTO 217
see also complaints procedures
domestic legislation see national legislation
domestic service, children working in 20–1
Dominican Republic, US GSP petitions against 295
Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC) 207–8, 261
drugs trafficking, children involved in 98
economic development, and child labour 31
economic exploitation 68–9
   of child labour
      of prohibition of 80–1
         in CRC 67–75
         in ICESCR 62–4, 66
         in NAALC 207
         in UDHR 53
   and slavery 40–1
economic measures see trade measures
education
   in Bangladesh 26–7, 28
   basic, free 101
   and child labour 26–7, 32
   compulsory
      Kenyan legislation on 162–3
      and minimum ages for employment 90, 94
      for girls 28
      in India 27, 32
   effectiveness 13
      of Belgian Social Label Law 328
      of EU GSP implementation system 307–8
      of EU social clauses in economic agreements 277–9
      of human rights protection 10–11
      of ILO implementation system 191–2, 192–4
      of IPEC 182–3, 193–4
      of trade measures 13, 145
      of UN implementation system 142–5, 194
      of US GSP implementation system 295–7, 299–300
El Salvador
   EU GSP complaints procedure against 312
   US GSP petitions against 293, 295–6
   employer initiatives 372
   Bangladeshi garment exporters’ initiative as example of 368–9
employment
   conditions of, ILO conventions on 87–8
   minimum age for admission to 16, 89–90, 94
   see also Minimum Age Convention (No. 138, ILO)
   versus work 69–70
   The End of Child Labour: Within Reach (ILO Global Report) 170
enforcement
   of dispute settlements
      under NAALC 213–18
      under US–Chile FTA 243–6
   of internationally recognised labour standards, under US–Jordan FTA 231
   of national laws 27–8, 199–200
   enslavement, crime of 117

Ethical Trading Initiative (ETI) 356–7
Ethyl Corporation v. Government of Canada case 205–6
ETI (Ethical Trading Initiative) 356–7
European Commission of Human Rights (ECHR), on forced labour 58
European Court of Justice (ECJ) 205
European Union (EU)
   CARIFORUM–EU Economic Partnership Agreement of 264–5
      cooperation and capacity building provisions in 270–1
      dispute settlement mechanism in 267–9
      and prohibition of child labour in 269
      institutional framework of in 265–6
      social clauses/labour standards in 266–7, 269
Chile Association Agreement (2005) of 271
   cooperation and capacity building provisions in 273–4
   dispute settlement mechanism in 273–4
   institutional framework in 271–2
   social clauses/labour standards in 272–3
   and prohibition of child labour 273
Commission, Compendium on Cooperation Strategies of 259, 263–4
Cotonou Agreement of 253–4
   cooperation and capacity building provisions in 263–4, 279
   institutional framework in 254–5
   social clauses in 260
      human rights clause 255–8
      penalties 260, 261, 262–3
      and prohibition of child labour 260–1
   labour standards clause 258–60, 263
   GSP of 300–2, 302–3, 303–4, 312–13, 315
   implementation of 304–7, 308
      effectiveness of 307–8
   social clauses in 314
      human rights clause 302, 314
      labour standards 303, 316
   special incentives arrangement 308–9, 313–14, 316
   withdrawal procedures under 309–12, 314–15, 316–17
Jordan Association Agreement (1997) of 274–5, 277
   dispute settlement mechanism in 276
   and prohibition of child labour 277
GSPs (Generalized Systems of Preferences) (cont.)
- implementation of 304–7, 308
- effectiveness of 307–8
- social clauses in 314
- human rights clause as one of the 302, 314
- labour standards as one of the 303, 316
- special incentives arrangement 308–9, 313–14, 316
- labour standards protection in 315–16, 374
  - implementation of effectiveness of 295–7, 299–300
  - petition and review process as part of 290–2, 293–4, 317
  - reporting system as part of 290
  - social clauses 382
  - application of 293–5, 316
  - on prohibition of child labour 287–8, 288–90
  - value of 297–9, 312–13
- see also trade preferences; value of Guatemala, US GSP status of 295
- Guest, Iain 151

Han Young case (NAALC) 221, 224
- Hansenne, Michael 5, 8
- Havana Charter (1948, International Trade Organization) 3–4
- hazardous work by children 19–20
- ILO conventions on 90–2, 94, 98–9, 99–100

health
- of children, threatened by hazardous working conditions 19–20
- definitions of 98
- see also light work; work

history, images of childhood
- in 15–16, 27

human rights
- clauses
  - in Cotonou Agreement (EU) 255–8, 260–1
  - in EU GSP 302, 314
  - in Lomé IV Convention (EU) 261–2
  - as customary international law 50–2
  - in India 147
- protection of 42–3, 43–4
- effectiveness of 10–11
- and trade measures 10–11, 195, 388
  - in Cotonou Agreement 260, 261, 262–3
- violation of
  - child labour as, and Human Rights Council (UN) complaints
    - procedure 150–1
  - and EU GSP implementation system 304–7
  - and social responsibilities of TNCs 333–4, 345–7
- see also children; rights of; ICCPR; ICESCR; UDHR

humanitarian law
- international
  - application to children 78–9
  - see also children; in armed conflicts

ICCPR (International Covenant on Civil and Political Rights, 1966, UN) 47, 53–62, 80, 81, 96–7
- implementation of 124–32
  - see also human rights

ICESCR (International Covenant on Economic, Social and Cultural Rights, 1966, UN) 62–7, 80–1
- implementation of 132–7
  - see also human rights

ICFTU (International Confederation of International Trade Unions) 183–4
- illicit activities, children involved in 22, 98

implementation systems 122–3
- of Belgian Social Label Law 324–7, 327–8
- of EU
  - economic agreements 257–8, 278
  - GSP 304–7, 308
  - effectiveness of 307–8
- of ILO 154–5, 376–7, 387
- of conventions 111–12, 112–13, 157
- effectiveness of 191–2, 192–4
- of Kimberley Process Certification Scheme 330–1
- of OECD Guidelines for Multinational Enterprises 337–40
- reporting system 155–7, 157–9, 159–60, 160–5, 165–6, 166–7
- of Tripartite Declaration of Principles concerning Multinational Enterprises 340–1
- of UN 123–4, 145–54, 387
  - of CRC 137–42
  - effectiveness of 142–5, 194
  - of ICCPR 124–32
of ICESCR 132–7
Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights 344–5
of US
GSP 290–2, 317
effectiveness of 295–7, 299–300
national trade measures 320–1
US–Cambodia TA 250–2
of WTO 376–7
incentives see trade incentives
India
child labour in 24, 26
attitudes towards 27–8
carpet weaving as 30
cotton seed production as 339, 369–71
legislation on 61
education in 27, 32
human rights in 147
implementation of CRC in 141
individual complaints procedures 142, 212
of CRC 140–1
of ICCPR 130–2
of ICESCR 136
Indonesia, US GSP status of 296
Industrial Revolution, child labour in 27
InFocus Programme (ILO) 169–70
informal economy, children working in 21
intergovernmental organisations, NAALC 202–3
International Cocoa Initiative 353–4
International Confederation of International Trade Unions (ICFTU) 183–4
international cooperation see technical assistance/cooperation
International Court of Justice (ICJ)
on customary international law 48–9, 50
on general principles of law 110–11
on international obligations of states 114–15
role in ILO Constitution’s complaints procedure 176–7
International Covenant on Civil and Political Rights see ICCPR
International Covenant on Economic, Social and Cultural Rights see ICESCR
International Criminal Court (ICC), on slavery 117–19
International Criminal Tribunal for the Former Yugoslavia, on crimes against humanity 118–19
international labour movements 224
International Labour Organization (ILO) on child labour 18–19, 21, 34
Conference 164, 187–8
Conventions
on conditions of work and employment 87–8
on medical examinations 108
No. 5 - Minimum Age (Industry) (1919) 16
No. 29 - Forced Labour (1930) 82–6, 107–4, 163–4
application of 83, 183–91
No. 81 - Labour Inspection (1947) 108
No. 87 - Freedom of Association and Protection of the Right to Organise (1948) 164
No. 105 - Abolition of Forced Labour (1957) 86–7, 107–8
No. 138 - Minimum Age (1973) 70–2, 88–9, 95, 108, 109
No. 171 - Night Work (1990) 108
comparisons with Minimum Age Convention (ILO, 1973) 95, 98, 99, 102
and IPEC 180
declarations
on the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia, 1944) 3, 8
on Fundamental Principles and Rights at Work (1998) 2, 5, 103–7, 109–10, 193, 227
on Principles concerning Multinational Enterprises (1977) 340–1
on Social Justice for a Fair Globalization (2008) 6, 378
and US–Jordan FTA 227, 228
implementation system 154–5, 376–7, 387
of conventions 111–12, 112–13, 157
of Declaration on Fundamental Principles and Rights at Work (1998) 167–72, 389
effectiveness of 191–2, 192–4
InFocus Programme 169–70
on rights of children 2
social clauses of 2–3, 5–6
possible multilateral 194, 378
special procedures in Constitution complaints procedure 174–7, 177–8, 213, 380
International Labour Organization (ILO) (cont.)
procedures against Myanmar
177, 183–91, 191–2, 194
direct contacts procedure 183
Myanmar case as example of use of 190–1
representations as part of 173–4
technical assistance by 178–9
in Cambodia 251, 252
IPEC (International Programme on the
Elimination of Child Labour)
179–83, 193–4
on trade measures 186–7
International Labour Rights Fund (ILRF)
320–1
international law
customary 48–50, 50–2
prohibition of child labour as 110,
120, 387
prohibition of slavery as 52, 82
UDHR as 52–3
general principles of 110–11, 113
prohibition of child labour 113–14,
377–8, 387
humanitarian, application to
children 78–9
instruments of
against child labour 1–2
declarations as 46
norms of, and *ius cogens* 114–15
‘soft’ 35
UDHR as 47–8
International Law Commission (ILC),
on *ius cogens* 114–15
international obligations of states
35, 81
under Abolition of Forced Labour
Convention (No. 105, ILO) 87
under CARIFORUM–EU EPA 266–7, 269
under Cotonou Agreement (EU)
human rights clause as example of
255–8
labour standards clause as example of
258–60
under CRC 72–3, 74–5, 76, 77, 79, 81–2
under EU–Chile Association Agreement
(2005) 272–3
under EU–Jordan Association Agreement
(1997) 275–6
under Forced Labour Convention (No. 29,
ILO) 85–6
under ICCPR 59–60, 60–1, 62, 81
under ICESCR 64–6, 66–7, 81
ICJ on 114–15
under Minimum Age Convention
(No. 138, ILO) 93–4, 109
in multilateral social clause to eliminate
child labour 282, 379
under NAALC 198–201, 207, 232
on prohibition of child labour 120, 377–8
under Slavery Convention (UN) 44–5
UN Charter on 48, 52
under US–Cambodia TA 249–50
under US–Chile FTA 236–9, 246–7
under US–Jordan FTA 226–30, 231–2
under Worst Forms of Child Labour
Convention (No. 182, ILO)
100–2, 109
international organisations
social clauses of 2–6
see also multilateral social clauses
International Programme on the
Elimination of Child Labour
(IPEC) 179–83, 193–4
International Trade Organization, founding
principles of 3–4
interstate complaints procedures 142
of ICCPR 129–30
of ICESCR 136–7
interstate dispute settlement procedures,
of NAALC 217–18
investments, socially responsible 366–7, 372
investors, rights of 217, 280
involuntariness, and forced labour 57–8
IPEC (International Programme on the
Elimination of Child Labour, ILO)
179–83, 193–4
Iraq, invasion of Kuwait by (1990) 188
Israel, legislation on child labour in 161
*ius cogens* 114–15
labour protection being part of 10
and non-derogation clauses 116–17
prohibition of child labour as 114,
115–19, 120, 377–8, 387
prohibition of slavery as 115
*John Doe I* v. Nestlé et al. case 335
*John Doe I* v. UNOCAL case 333, 334
Jordan
Association Agreement with EU (1997)
274–5, 277
dispute settlement mechanism in 276
and prohibition of child labour 277
institutional framework in 275
social clauses/labour standards
in 275–6
and prohibition of child labour
276–7
child labour legislation in 230
Free Trade Agreement with US
(2000) 226
comparisons with NAALC and 235–6
consultation provisions in 230–1, 232
dispute settlement mechanism in 231–4, 235–6
institutional framework in 230
social clause/labour standards in 226–30, 234, 236
juridical personality, destruction of 40–1
Kenya, legislation on compulsory education in 162–3
Kerala (India), abolition of child labour in 26
Kimberley Process Certification Scheme 318, 329–30
implementation of 330–1
Kuwait, invasion by Iraq (1990) 188
labelling see social labelling
labour, definitions of 17, 33–4
Labour Inspection Convention (No. 81, ILO, 1947) 108
labour laws definitions of 198, 236
in Mexico 199–200
labour movements, international 224
labour standards in CARIFORUM–EU EPA 266–7, 269
in Cotonou Agreement 258–60, 263
in EU GSP 303, 316
in EU–Chile Association Agreement (2005) 272–3
internationally recognised 86, 103, 107, 227, 249–50
promotional approach towards 104–7, 170–2
in NAALC 198, 235
enforcement of 210–13
protection of in GSPs 315–16, 374
in social investment funds 366
in trade agreements 196, 208, 280, 389
US–Jordan FTA as example of 231
and trade measures 2–4, 211, 269–70, 274, 279, 280–4, 377
in future multilateral social clause 282
international debates about 6–8, 8–10, 10–11
see also social clauses
and relocation of firms to developing countries 8–10
and terms of trade 7–8, 104, 208–9, 237–8, 283
in US–Cambodia TA 249–50, 253
in US–Chile FTA 236–9, 246–7
in US–Jordan FTA 226–30, 234, 235
Lamy, Pascal 389
Langille, B.A. 105–6
law enforcement see enforcement
League of Nations, Slavery Convention (1926) 35–8, 45–6
Lee, T. 10
legal status, of UDHR 47–8
legislation on child labour 31–2
inadequacy of 28
international 35
national 28, 31–2
in Chile 238
enforcement of 27–8, 229
in France 113
in Germany 112–13
in Israel 161
in Jordan 230
in Switzerland 112
trade measures in 318
in United States 111–12, 162, 179–80, 200, 229, 362
extraterritorial, on corporate social responsibilities 334–5
Levi Strauss, activities in Bangladesh 351
Libya, implementation of CRC in 141–2
light work see also hazardous work; work 92–3
Lomé IV Convention (EU), human rights clause 261–2
Malaysia, US GSP petitions against 294
marriages, forced 39
Massachusetts Act on Burma (Myanmar) 322–3, 331
material breach of treaties 241
Maupain, F. 105–6, 171
medical examinations, ILO conventions on 108
Merkel, Angela 389
Mexico child labour in 200–1
labour laws in 199–200
Middle Ages, childhood in 15
migration, and child labour 25–6
Minimum Age Convention (No. 138, ILO, 1973) 70–2, 88–9,
88–95, 108, 109
comparisons with Worst Forms of Child Labour Convention (No. 182, ILO, 1999) 95–6, 98, 99, 102
see also employment; minimum age for admission to
minimum age for employment 89–90, 94
Minimum Age (Industry) Convention (No. 5, ILO, 1919) 16
mining, hazardous work conditions in 20
minorities, discrimination of, and child labour 28–9
model codes of conduct 354–5
Clean Clothes Campaign (CCC) as example of 357
Moldova, and EU GSP 312
monetary enforcement assessments of NAALC 214–16
of US–Chile FTA 243–6
multi-stakeholder codes of conduct 354–5, 357
Ethical Trading Initiative as example of 356–7
SA8000 as example of 355–6
Multifibre Arrangement 248–9
multilateral social clauses 195, 280–1, 331–2
of GATT 195–6
ILO on 194, 378
on prohibition of child labour 278–9, 281–4, 375, 387–8, 388–9
cooperative activities in 381–2
dispute settlement mechanism in 281, 282–4, 383
institutional framework of 380–1
international obligations of states in 379
public communications procedure in 382
trade-related child labour in 379–80
see also international organisations;
social clauses of
Myanmar
forced labour in 163–4
EU GSP complaints procedure against 309–10
ILO complaints procedures against 177, 183–2, 191–2, 194
UNOCAL court case 333, 334
freedom of association in 164
human rights violations in 151
trade measures against 189, 318, 322–3, 331
NAALC (North American Agreement on Labour Cooperation) 195–6, 197–3, 222–3
comparisons with US–Jordan FTA 235–6
cooperative activities in 218
dispute settlement mechanism in 210–13, 216, 222, 225–6, 235–6
enforcement of 213–18
implementation system of 206–10
public communication procedures as part of 203–6, 218–22, 223–5, 282
institutional framework of 201–2, 218
intergovernmental set-up of 202–3
NAOs (National Administrative Offices) under 202
National Committees under 202
obligations of states in 198–201, 207, 232
NAFTA (North American Free Trade Agreement), dispute settlement mechanism in 205–6, 216, 217
national legislation on child labour 28, 31–2
in Chile 238
enforcement of 27–8, 199–200
in France 113
in Germany 112–13
inadequacy of 28
in Israel 161
in Jordan 230
in Switzerland 112
trade measures in 318
in United States 111–12, 162, 179–80, 200, 229, 362
national trade measures, and prohibition of child labour 318, 322, 331–2, 374
neo-liberalism, in trade agreements 280
Nestlé, litigation against 335
NGOs
participation of 380–1
in CRC reporting system 140
in ICESCR reporting system 133
Nicaragua
policies on child labour in 129
US GSP petitions against 293
Nicaragua case (ICJ) 50
Niger, US GSP petitions against 296
Night Work Convention, (No. 171, ILO, 1990) 108
‘nimble fingers’ argument, in justifications of child labour 29
non-derogation clauses 60, 66, 73, 82
and ius cogens 116–17
norms
of international law, and ius cogens 114–15
of UN on responsibilities of TNCs 332–3, 344–7, 373
obligations see international obligations of states
OECD (Organisation for Economic Cooperation and Development)
Guidelines for Multinational Enterprises 337–40
on labour standards 8
Oil Platforms case (ICJ) 110–11
Organisation for Economic Cooperation and Development see OECD
Pakistan
bonded labour in 161
card labour in 180
EU GSP procedures against 310–11, 315
stitching leather soccer balls 333, 358–9
Paraguay, US GSP status of 295
parental consent, and child labour 84
pay rates, and child labour 29–30, 32–3
penalties
under CARIFORUM–EU EPA 268–9, 269–70
under Cotonou Agreement, human rights clause 260, 261, 262–3
in future multilateral social clause 283–4
under NAALC enforcement system 214–16
under US–Chile FTA dispute settlement mechanism 243–6
under US–Jordan FTA dispute settlement mechanism 233
Permanent Court of International Justice, on international obligations of states 59–60
Peru, child labour in 20
political dialogue, in Cotonou Agreement (EU) 256–7, 258
pornography 76
poverty, and child labour 26, 378, 386–7
Pregnancy Testing case (NAALC) 221, 224
private actors, excluded from NAALC dispute settlement 217–18, 225
private sector
codes of conduct 348, 359–60
business associations 352–4
studies of 349–52
framework agreements as 357–9
model codes as 354–5
Clean Clothes Campaign (CCC) as example of 357
multi-stakeholder 354–5, 357
Ethical Trading Initiative (ETI) as example of 356–7
SA8000 as example of 355–6
initiatives to eliminate child labour 371–2, 373, 374–5
Programmes of Action (UN)
for the Elimination of the Exploitation of Child Labour (1993, UN) 43
prohibition
of child labour 107, 119–20
in CARIFORUM–EU EPA 269
in codes of conduct 349–52, 360
in Cotonou Agreement, human rights clause of 260–1
as customary law 110, 120, 387
definition of 199
in EU–Chile Association Agreement (2005) 273
as general principle of international law 113–14, 377–8, 387
in ICESCR 62–4
international obligations of states for 120, 377–8
as ius cogens 114, 115–19, 120, 377–8, 387
in multilateral social clauses 278–9, 281–4, 375, 378–8, 388–9
and cooperative activities 381–2
and dispute settlement mechanisms 281, 282–4, 383
and institutional framework 380–1
and international obligations of states 379
and public communications procedure 382
and trade-related child labour 379–80
in NAALC 199, 222
in social clauses 277, 279–80
of GSPs, United States 287–8, 288–90
reluctance of developing countries to accept 389
in social labelling programmes 364–6, 372, 374–5
in trade measures 2, 11–12, 33, 182–3, 373–4, 376, 386, 387
in EU economic agreements 260–3, 270, 273, 276, 278–9
national/unilateral 318, 322, 331–2, 374
see also combating child labour of exploitation of child labour 80–1
in CRC 67–75
in ICESCR 62–4, 66
in NAALC 207
in UDHR 53
of servitude 59
of slavery
as customary international law 52, 82
as ius cogens 115
to enlist and recruit child soldiers 78–9, 79–80, 97
of trafficking of children 77–8
promotional approaches, towards international labour standards 104–7, 170–2
promotion of exploitation of child labour 80–1
in CRC 67–75
in ICESCR 62–4, 66
in NAALC 207
in UDHR 53
of servitude 59
of slavery
as customary international law 52, 82
as ius cogens 115
to enlist and recruit child soldiers 78–9, 79–80, 97
of trafficking of children 77–8
promotional approaches, towards international labour standards 104–7, 170–2
promotional approaches, towards international labour standards 104–7, 170–2
proportionality requirements, for countermeasures 207–8, 261
prostitution
children working in 20, 22
ILO conventions on 97–8
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949) 75–6
definitions of 75
protection
of children in armed conflicts 78–9, 79–80, 148
of human rights 42–3, 43–4
effectiveness of 10–11
and trade measures 10–11, 195, 388
in Cotonou Agreement 260, 261, 262–3
of labour standards
in GSPs 315–16, 374
in social investment funds 366
in trade agreements 208, 280, 389
US–Cambodia Textile Agreement as example of 249–50, 253
US–Chile FTA as example of 236–9, 246–7
US–Jordan FTA as example of 226–30, 234, 236
and trade measures 2–4, 194, 211, 269–70, 274, 279, 280–4, 377
in future multilateral social clause 282
international debates about 6–8, 8–10, 10–11
see also social clauses
rights of children to 61–2
from economic exploitation 62–4, 67–75
from sexual exploitation and sexual abuse 75–7, 78, 81, 97–8
protectionism
of Belgian Social Label Law 328–9
fear of 377–9
public communication procedures
in multilateral social clause on prohibition of child labour 382
of NAALC 203–6, 218–22, 223–5, 282
of US–Chile FTA 239–40
public sector
codes of conduct 347–8, 359
ILO Tripartite Declaration on Principles concerning Multinational Enterprises as example of (1977) 340–1
OECD Guidelines for Multinational Enterprises as example of 337–40
UN Global Compact as example of 341–4
UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (2003) as example 332–3, 344–7, 373
‘race to the bottom’ scenario, in trade and labour protection debate 8–10
Rassam, A.Y. 51–2
rating agencies, for social investments 366–7
regional trade agreements, social clauses in 195–7
rehabilitation programmes, for former child labourers 372
relocation of firms to developing countries, and labour standards 8–10
remedies, possibilities for, in NAALC 204–5
reporting systems 142–3, 143–4, 144–5
of CRC 137, 138–9, 140
impact of 141–2
urgent action procedure 139
of EU–MERCOSUR Agreement 279
Global Reporting Initiative (GRI) 367–8
of ICCPR 125–6, 127–9
impact of 129
of ICESCR 132, 134–5
impact of 135
impact of 160–5
of US GSP 290
representations
against member states of ILO 173–4
Myanmar case as example of 184
responsibilities
corporate social 332–3, 335–6, 372–3
extraterritorial legislation on 334–5
and human rights violations 333–4
rights
of children
promotion of, UN efforts at 1–2, 151–2, 153
to protection 61–2
from economic exploitation 62–4, 67–75
from sexual exploitation and sexual abuse 75–7, 78, 81, 97–8
see also CRC
of investors 217, 280
non-derogable, and ius cogens 116–17
of workers 108
see also human rights
Rome Statute see International Criminal Court (ICC)
RugMark Foundation 141, 362–3
SA8000 (Social Accountability International, SAI) 355–6
Schachter, O. 50–1
Schneuwly, P. 293, 317–18
seed production, child labour in 339, 369–71
servitude
definitions of 46–7
and child labour 54–5, 56–7, 60
prohibition of 59
see also bonded labour; forced labour; slavery
sexual exploitation and sexual abuse of children, UN Special Rapporteur on 148
rights of children to protection against 75–7, 78, 81, 97–8
'sham' adoptions 40
shareholder activism 367
Simma, Judge 110–11
slave trade, definitions of 36, 38, 54
slavery
abolition of 36–7, 44–5
UN conventions on 38–45, 54–5, 80, 96–7
child 21–2, 37–8, 39
'sham' adoptions and 40
child labour as form of
in ILO conventions 96–7
in UN treaties and conventions 41–2, 45, 80
as crime against humanity 117–19
definitions of 36–7, 39–40, 54, 56–7, 117–18
and child labour 40–5, 45–6
and economic exploitation 40–1
prohibition of
as customary international law 52, 82
as ius cogens 115
see also bonded labour; forced labour; servitude
Slavery Convention (1926, League of Nations) 35–8, 45–6
Slovenia, child labour in 161–2
soccer balls, stitched by children 180, 333, 358–9
Social Accountability International (SAI), SA8000 355–6
social audits 325–6, 355–6
social clauses
absence of, as unfair trade advantage 7–8
in EU economic agreements 196–7, 277–9, 280, 281
CARIFORUM–EU EPA as example of 266–7, 269
Chile Association Agreement (2005) as example of 272–3
Cotonou Agreement (EU) as example of 260
human rights clause in 255–8, 260–1, 262–3
labour standards clause in 258–60, 263
Jordan Association Agreement (1997) as example of 275–6, 276–7
and fear of protectionism 377–9
in GSPs of EU 302, 303, 314, 316
of US 382
application of 293–5, 316
and prohibition of child labour 287–8, 288–90
of international organisations 2–6
multilateral 195, 280–1, 331–2
of GATT 195–6
ILO on 194, 378
on prohibition of child labour 278–9, 281–4, 375, 387–8, 388–9
cooperative activities in 381–2
dispute settlement mechanism in 281, 282–4, 383
institutional framework of 380–1
international obligations of states in 379
public communications procedure in 382
trade-related child labour in 379–80
and prohibition of child labour 277, 279–80
in GSPs of US 287–8, 288–90
reluctance of developing countries to accept 389
in trade agreements 195–7, 223–4, 389
in trade-related agreements 223–4, 235, 389
in US trade agreements
US–Cambodia TA as example of 249–50, 253
US–Chile FTA as example of 236–9, 246–7
US–Jordan FTA as example of 226–30, 234, 235, 236
see also protection; of labour standards
social investment funds 366
social justice, ILO on 2–3, 6, 378
social labelling 360–1
Belgian law on 323–4, 327, 328–9, 331, 332, 374
complaints mechanism in 328
implementation of 324–7, 327–8
social labelling (cont.)
programmes 327
in carpet industry 361–4
and prohibition of child labour 364–6, 372, 374–5
social responsibilities
Corporate 332–3, 335–6, 335–6, 372–3
extraterritorial legislation on 334–5
and human rights violations 333–4
socially responsible investment (SRI)
366–7, 372
social security, and child labour 26
social sustainability indexes 366
’soft’ law 35
UDHR as 47–8
soldiers
children as 22
prohibition to enlist and recruit
78–9, 79–80, 97
Sony case (NAALC) 220, 221
Sosa v. Alvarez-Machain case 334–5
South Africa, code of conduct for US
companies working in
(‘Sullivan Principles’) 373
Special Rapporteurs/Representatives (UN)
147–9, 346
sporting goods industry
child labour in 180, 333, 358–9
codes of conduct in 352–3, 358–9
SRI (socially responsible investment)
366–7, 372
states
international obligations of 35, 81
under Abolition of Forced Labour
Convention (No. 105, ILO) 87
under CARIFORUM–EU EPA
266–7, 269
under Cotonou Agreement (EU)
human rights clause as example of
255–8
labour standards clause
as example of 258–60
under CRC 72–3, 74–5, 76, 77, 79, 81–2
under EU–Chile Association
under EU–Jordan Association
under Forced Labour Convention
(No. 29, ILO) 85–6
under ICCPR 59–60, 60–1, 62, 81
under ICESCR 64–6, 66–7, 81
ICJ on 114–15
under Minimum Age Convention
(No. 138, ILO) 93–4, 109
in multilateral social clause to
eliminate child labour 282, 379
under NAALC 198–201, 207, 232
on prohibition of child labour 120, 377–8
under Slavery Convention (UN) 44–5
UN Charter on 48, 52
under US–Cambodia TA 249–50
under US–Chile FTA 236–9, 246–7
under US–Jordan FTA 226–30, 231–2
under Worst Forms of Child Labour
Convention (No. 182, ILO)
100–2, 109
practice of, and development of
international customary law
by 49–50
see also governments
statistics, on child labour 22–5, 34, 386–7
STEP programme 363–4
Stern, R.M. 7
street children 21
Sudan
forced labour in 164
loss of GSP status in United States 292
‘Sullivan Principles’ 373
‘sunshine effect’ 204
Supplementary Convention on the
Abolition of Slavery, the Slave
Trade, and Institutions and
Practices Similar to Slavery (1956,
UN) 38–45, 54–5, 80, 96–7
suspension
of trade benefits
under NAALC enforcement system
214–16
under US–Chile FTA 245–6
of treaties 261
sustainability reports 368
Swaziland, US GSP petitions against 296
Switzerland
legislation on child labour in 112
trade measures by, against Myanmar 189
TAESA case (NAALC) 220
technical assistance/cooperation
in CARIFORUM–EU Agreement 270–1
in Chile–EU Association Agreement
273–4
in Cotonou Agreement 263–4, 279
in CRC 140
of ILO 178–9
in Cambodia 251, 252
IPEC programme 179–83, 193–4
in US–Chile FTA 246
see also development finance
cooperation
technology, and child labour 30–1
terms of trade, and labour standards
7–8, 104, 208–9, 237–8, 283
INDEX 433

textile industry  
child labour in 179–80  
Bangladeshi garment industry  
exporters’ initiative to combat 368–9  
codes of conduct in 349–50, 357  
dispute under US–Jordan FTA 233–4  
exports by developing countries 298  
see also apparel industry  
Thailand, US GSP petitions against 296  
TNCs see transnational corporations  
Tomato case (NAALC) 222  
TotalFinaElf, and environmental damage in Russia 333  
trade  
in slaves 36, 38, 54  
terms of, and labour standards 7–8, 104, 208–9, 237–8, 283  
trade agreements  
neoliberalism in 280  
in US–Cambodia TA 249–50, 253  
in US–Chile FTA 236–9, 246–7  
in US–Jordan FTA 226–30, 234, 236  
of United States 196, 280, 281  
use of Declaration on Fundamental Principles and Rights at Work in 171–2  
trade benefits  
suspension of  
under NAALC enforcement system 214–16  
under US–Chile FTA 245–6  
trade incentives 251, 284, 316–17, 374  
in EU GSP 302, 307, 308–9, 313–14, 316  
in US–Cambodia TA 252–3  
trade measures 12–13  
against Myanmar 185–7, 188–90, 294, 309–10, 322–3, 331  
effectiveness of 13, 145  
and human rights protection 10–11, 195, 388  
in Cotonou Agreement 260, 261, 262–3  
ILO on 186–7  
and labour protection 2–4, 194, 208, 211, 269–70  
in future multilateral social clause 282  
international debates about 6–8, 8–10, 10–11  
and prohibition of child labour 2, 11–12, 33, 182–3, 373–4, 376, 386, 387  
in economic agreements 260–3, 270, 273, 276, 278–9  
in national/unilateral trade measures 318, 322, 331–2, 374  
suspension of trade benefits as example of under NAALC enforcement system 214–16  
under US–Chile FTA 245–6  
and UN Charter 188  
trade preferences  
value of 297–9, 312–13  
see also GSPs  
trade-related agreements, social clauses in 223–4, 235, 389  
trade-related child labour 379–80  
trade sanctions 12–13  
trade unions  
measures against Myanmar 189  
participation in framework agreements 357–9  
submissions filed at NAALC under complaints procedures 219  
trafficking  
of children 22, 38  
prohibition of 77–8  
of drugs, involvement of children in, ILO conventions on 98  
transnational corporations (TNCs)  
definitions of 332–3, 340  
in seed production, tackling child labour 369–71  
social responsibilities of 332–3, 333–6, 335–6  
to abolish child labour 371–2  
extraterritorial legislation on 334–5  
for violations of human rights 333–4  
see also codes of conduct; companies  
treaties  
interpretation of 40, 42–3, 46, 47, 55–6  
material breach of 241  
suspension of 261  
Trinidad and Tobago, child labour in 135  
Tripartite Declaration on Principles concerning Multinational Enterprises (1977, ILO) 340–1  

UDHR (Universal Declaration of Human Rights, 1948, UN) 45–53, 80  
and prohibition of child labour 273  
see also human rights  
Uganda, US GSP petitions against 296  
UNCTAD (United Nations Conference on Trade and Development) 284–5  
UNICEF  
on child labour 18, 34  
promotion of children’s rights by 151–2, 153  
unilateral trade measures, and prohibition of child labour 318, 322, 331–2, 374
United Kingdom, Factory Act (1833) 32
United Nations
Charter
on international obligations 48, 52
and trade measures 188
Commission on Human Rights 152–3
Programme of Action for the
Elimination of the Exploitation of
Child Labour (1993) 43
on transnational corporations and
human rights 345–6
Committee on Economic, Social
and Cultural Rights 124,
132–3, 142–3
comments on ICESCR by 65–6, 133–4
and ICESCR reporting system 134–5
on NGO participation 133
Committee on the Rights of the Child
72–3, 124, 137–41, 143, 381
reviews by 70
Convention of the Rights of the Child
(CRC, 1959)
on definitions of childhood 16
implementation of 137–42
on prohibition to enlist and recruit
child soldiers 78–9, 79–80
on prohibition to traffic in
children 77–8
on right to be protected from economic
exploitation 67–75, 80–1
on right to be protected from sexual
exploitation and sexual abuse
75–7, 78, 81
Global Compact (1999) 341–4
Human Rights Committee 61, 124–5,
126–7, 142
comments on ICCPR 57, 60, 127
and ICCPR reporting system 125–6,
127–9
Human Rights Council 145–6, 152–3
complaints procedure 149–51
on human rights and TNCs 347
Special Rapporteurs/Representatives
of 147–9
universal periodic review mechanism
of 146–7
human rights standards set by 42–3
implementation systems at 123–4,
145–54, 387
effectiveness of 142–5, 194
International Covenant on Civil and
Political Rights (ICCPR, 1966) 47,
53–62, 80, 81, 96–7
implementation of 124–32
International Covenant on Economic,
Social and Cultural Rights
(ICESCR, 1966) 62–7, 80–1
implementation of 132–7
Norms on the responsibilities of
transnational corporations and
other business enterprises with
regard to human rights (2003)
332–3, 344–7, 373
Office of the High Commissioner for
Human Rights (OHCHR), on child
labour 44
promotion of children’s rights by 1–2
Secretary-General, Special Representative
on human rights and TNCs 346
Sub-Commission on Prevention of
Discrimination and Protection of
Minorities, Programme of Action
for the Prevention of the Sale of
Children, Child Prostitution and
Child Pornography (1992) 44
Supplementary Convention on the
Abolition of Slavery, the Slave
Trade, and Institutions and
Practices Similar to Slavery (1956)
38–45, 54–5, 80, 96–7
UN Sub-Commission on the Production
and protection of Human Rights
Universal Declaration of Human Rights
(UDHR, 1948) 45–53, 80
and prohibition of child labour 273
Working Group on Contemporary Forms
of Slavery 43–4
United States
Alien Tort Claims Act (ATCA) 334–5
implementation of
effectiveness of 295–7, 299–300
petition and review process as part
of 290–2, 293–4, 317
reporting system as part of 290
social clauses in 382
application of 293–5, 316
on prohibition of child labour 287–8,
288–90
legislation on child labour in 111–12,
162, 200
Child Labour Deterrence Act (Harkin
Bill) as example of 179–80, 362
Fair Labor Standards Act (1938) as
example of 229
occupational fatalities of youngsters
in 20
Section 307 of the Tariff Act of 1930
‘Sullivan Principles’ 373
trade agreements 196, 280, 281
US–Australia FTA as example of 171–2
US–Cambodia FTA as example of 378
US–Cambodia TA as example 248–9
implementation of 250–2
social clause/labour standards in 249–50, 253
trade incentives in 252–3
US–Chile FTA (2007) as example of 236
consultation procedures in 240–1
cooperative activities in 240, 246, 247
dispute settlement mechanism in 241–3, 247–8
enforcement of 243–6
institutional framework of 239, 242
public communications procedure under 239–40
social clause/labour standards in 236–9, 246–7
US–Jordan FTA (2000) as example of 226
comparisons with NAALC and 235–6
consultation provisions in 230–1, 232
dispute settlement mechanism in 231–4, 235–6
institutional framework of 230
social clause/labour standards in 226–30, 234, 236
trade laws 284
African Growth and Opportunity Act (AGOA) as example of 285, 286, 297, 298
Caribbean Basin Initiative as example of 284
Omnibus Trade and Competitiveness Act (1998) as example of 284
Trade and Development Act (2000) as example of see United States, GSP
trade measures by
against China 320
Massachusetts Act on Burma (Myanmar) as example of 322–3, 331
against Myanmar 189, 318
Tariff Act (1930) Section 307 as example of 318–20, 321–2
application of 320–1
Universal Declaration of Human Rights (UDHR, 1948, UN) see UDHR
universal periodic review, of Human Rights Council (UN) 146–7
unlawfulness, in convention against sexual exploitation of children 76
UNOCAL, litigation against 333, 334
urgent action procedures, of CRC 139
utilization rates, of trade preferences 313
values, of trade preferences 297–9, 312–13
Van Liemt, G. 4
Veerman, P.E. 14
Venezuela, freedom of association in 164
Vienna Convention on the Law of Treaties (VCLT) 40, 42–3, 46, 55–6
on ius cogens 114
on material breach of a treaty 241
violations of human rights
child labour as example of, and Human Rights Council (UN) complaints procedure 150–1
and EU GSP implementation system 304–7
and social responsibilities of TNCs 333–7, 345–7
vulnerability, of children 30
Washington State apple case (NAALC) 220
Weiner, M. 32
WFSGI (World Federation of the Sporting Goods Industry) code of conduct 352–3
women
and customary international law 51–2
workers, rights of 221
work
conditions of, ILO conventions on 87–8
versus employment 69–70
see also hazardous work; light work
workers, women, rights of 221
World Social Summit (Copenhagen, 1995)
ternational labour standards recognised by 86
on social clauses 194
Worst Forms of Child Labour Convention (No. 182, ILO, 1999) 84, 95–103, 108–9
comparisons with Minimum Age Convention (No. 138, ILO, 1973) 95–6, 98, 99, 102
and IPEC 180
WRAP (Worldwide Responsible Apparel Production Principles) 352–3
WTO (World Trade Organization)
Agreement on Textiles and Clothing (1995) 248–9
dispute settlement at 217
implementation system of 376–7
on international labour standards 103, 104, 107
law/rules compatibility issues
and multilateral social clause on child labour 389
and national/unilateral trade measures 328–9, 331, 380
and private sector initiatives on child labour 373
social clauses rejected by 5
Books in the series

The Challenge of Child Labour in International Law
FRANZISKA HUMBERT

Shipping Interdiction and the Law of the Sea
DOUGLAS GUILFOYLE

International Courts and Environmental Protection
TIM STEPHENS

Legal Principles in WTO Disputes
ANDREW D. MITCHELL

War Crimes in Internal Armed Conflicts
EVE LA HAYE

Humanitarian Occupation
GREGORY H. FOX

The International Law of Environmental Impact Assessment: Process, Substance and Integration
NEIL CRAIK

The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond
CARSTEN STAHN

Cultural Products and the World Trade Organization
TANIA VOON

United Nations Sanctions and the Rule of Law
JEREMY FARRALL

National Law in WTO Law: Effectiveness and Good Governance in the World Trading System
SHARIF BHUIYAN

The Threat of Force in International Law
NIKOLAS STÜRCHLER

Indigenous Rights and United Nations Standards
ALEXANDRA XANTHAKI

International Refugee Law and Socio-Economic Rights
MICHELLE FOSTER

The Protection of Cultural Property in Armed Conflict
ROGER O’KEEFE
Interpretation and Revision of International Boundary Decisions
Kaiyan Homi Kaikobad

Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law
Jennifer A. Zerk

Judiciaries within Europe: A Comparative Review
John Bell

Law in Times of Crisis: Emergency Powers in Theory and Practice
Oren Gross and Fionnuala Ní Aoláin

Vessel-Source Marine Pollution: The Law and Politics of International Regulation
Alan Tan

Enforcing Obligations Erga Omnes in International Law
Christian J. Tams

Non-Governmental Organisations in International Law
Anna-Karin Lindblom

Democracy, Minorities and International Law
Steven Wheatley

Prosecuting International Crimes: Selectivity and the International Law Regime
Robert Cryer

Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein

Dispute Settlement in the UN Convention on the Law of the Sea
Natalie Klein

The International Protection of Internally Displaced Persons
Catherine Phuong

Imperialism, Sovereignty and the Making of International Law
Antony Anghie

Necessity, Proportionality and the Use of Force by States
Judith Gardam

International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary
Ole Spiermann

Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order
Gerry Simpson

Local Remedies in International Law
C. F. Amerasinghe
Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law
Anne Orford

Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of Law
Joost Pauwelyn

Transboundary Damage in International Law
Hanqin Xue

European Criminal Procedures Edited by
Mireille Delmas-Marty and John Spencer

The Accountability of Armed Opposition Groups in International Law
Liesbeth Zegveld

Sharing Transboundary Resources: International Law and Optimal Resource Use
Eyal Benvenisti

International Human Rights and Humanitarian Law
Rene Provost

Remedies Against International Organisations
Karel Wellens

Diversity and Self-Determination in International Law
Karen Knop

The Law of Internal Armed Conflict
Lindsay Moir

International Commercial Arbitration and African States: Practice, Participation and Institutional Development
Amazu A. Asouzu

The Enforceability of Promises in European Contract Law
James Gordley

International Law in Antiquity
David J. Bederman

Money Laundering: A New International Law Enforcement Model
Guy Stessens

Good Faith in European Contract Law
Reinhard Zimmermann and Simon Whittaker

On Civil Procedure
J. A. Jolowicz

Trusts: A Comparative Study
Maurizio Lupoi

The Right to Property in Commonwealth Constitutions
Tom Allen
International Organizations Before National Courts
August Reinisch

The Changing International Law of High Seas Fisheries
Francisco Orrego Vicuña

Trade and the Environment: A Comparative Study of EC and US Law
Damien Geradin

Unjust Enrichment: A Study of Private Law and Public Values
Hanoch Dagan

Religious Liberty and International Law in Europe
Malcolm D. Evans

Ethics and Authority in International Law
Alfred P. Rubin

Sovereignty Over Natural Resources: Balancing Rights and Duties
Nico Schrijver

The Polar Regions and the Development of International Law
Donald R. Rothwell

Fragmentation and the International Relations of Micro-States: Self-determination and Statehood
Jorri Duursma

Principles of the Institutional Law of International Organizations
C. F. Amerasinghe