

Trade & Human Rights at Work: Next Round, please... ?

Regulatory and Cooperationist Approaches in context of the Doha Round

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Introduction

The Doha Round, which began with much ambition and great expectations as the 'Development Round' in the context of the tragic incidents of September 11th 2001, has been suspended without agreeing on any results in June 2006. Notwithstanding the lack of agreement, a significant commitment to development was demonstrated. One example was the commitment to abolish tariffs for least developed countries (LDCs) under the 'Everything but Arms' initiative within the EU Generalized System of Preferences (GSP). Improved market access for agricultural exports from developing countries today appears more closely connected to conflict prevention than it was before September 2001. The Doha Round has the potential to contribute to raising standards of living and openness in yet-closed societies in certain parts of the world. Trade can stimulate economic integration between countries and cultures that have been in conflict – European economic integration after World War Two is an often-cited example for how trade can on the long run substitute aid, that was initially provided under the Marshall Plan.

The ongoing round of trade negotiations, though currently on hold, is likely to survive and be shaped by the experiences gained from the previous round. The Uruguay-Round, that ultimately gave birth to a bundle of new agreements and set up the World Trade Organization (WTO) - both unique achievements in the history of world trade - had to overcome many breaks and finally took eight years before it was successfully completed. Contrary to the claim that anything but a rapid consensus will harm the WTO institutionally, the delay is an opportunity to take a breath and rethink positions, constellations and potential areas for consensus building.

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'Trade & human rights' is not on the agenda of the Doha round.² Despite this fact, it is one of the topics that received high academic attention in recent years. The issue can be approached from different perspectives with diverging intentions. However, from a constitutional viewpoint it has been argued, that a legitimate and lasting world economic order should be underpinned by shared global values absent protectionist tendencies.³ From a historical perspective, the example of the European Community illustrates how economic integration can spill over into shared values, political coherence and harmonization between participating countries ultimately paving the way towards constitutional tendencies.

Whatever ideological position one takes regarding social development, so called 'human rights at work' are in fact the most 'trade-related' among all human rights, since they matter in competition, including so called cross-boarder institutional competition.⁴ At this point it is helpful to clarify, that this article does *not* advocate for an inclusion of human rights at work in the Doha agenda. Instead, it outlines and compares potential political and legal options, *de lege lata* and *de lege ferenda*, in case the issue returns to the agenda. This demands clarifying how an inclusion of human rights at work in the WTO system can best be achieved technically so as to contribute to human rights implementation without putting the current WTO system on the slippery slope of protectionism. Ultimately, the discussion of a rigid regulatory approach geared towards inserting human rights at work into the trade law system is put in context with the UN Global Compact. This initiative offers a 'softer' steering mechanism at the interface of law and economics, that is based on the same internationally recognized rights, but fueled by aspirational principles for business, rather than pushing for regulation of governments through trade measures.

A. Human Rights at Work and the WTO-System

² The issue of 'trade and labour standards' was mentioned in preparatory documents for the WTO Ministerial Declaration in Doha, see WTO-Doc. JOB(01)/140, p.3, para. 6., the document is accessible online at www.ictsd.org/ministerial/doha/relevantdoc.htm (accessed Aug 15th, 2006).

³ Cp. *Petersmann*, Ernst-Ullrich: The WTO-Constitution and Human Rights, in: *Journal of International Economic Law* 3 (2000) 1, pp.19-25.

⁴ For the economic nexus between trade and human rights see Blüthner, Andreas (Fn.1), pp. 230-279, with reference to economic literature concluding that there is rather no evidence of a so-called regulatory '*race to the bottom*' in labour legislation caused by trade liberalization, than instead a positive interrelation.

This first section answers the questions if, to what extent, and how human rights at work shall be considered within the current WTO negotiations, without driving the world trade system on the slippery slope of protectionism.

I. Just history repeating...?

It has become a classical debate in international trade and economics, to what extent liberal trade can and shall be complemented with fundamental social standards. The thesis, that maximizing human welfare depends on a strengthened conjunction between liberal trade and certain minimum social standards was articulated already six decades after Adam Smith's and David Ricardo's theoretical paradigm of absolute and comparative advantages⁵. Jérôme Blanqui, a French economist, stated in 1839 that respect and progress in fundamental labour legislation between countries that maintain open trade relations depends on a harmonized approach in labour regulation⁶.

Since then diverse forms of 'social clauses' highlighting the interdependence of trade and social development have been debated and introduced in international trade agreements. Chapter XIII of the Peace Treaty of Versailles, where the foundation of the International Labour Organization was agreed on, reads

'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'.

In 1927, the *World Economic Conference of the League of Nations* dealt with the issue and recommended fair labour conditions with a view toward raising productivity.⁷ Two decades later in Havana, the social dimension of international trade, underscored already by the title *UN Conference on Trade and Employment*, resulted in the stillborn Charta of the International Trade Organization (ITO). The fragment of Chapter IV dealing with liberal trade was brought into force by 23

⁵ Cp. *Smith*, Adam: *Der Wohlstand der Nationen - Eine Untersuchung seiner Natur und seiner Ursachen* (1776). Reprint: München, 1974, S.16ff., *Ricardo*, David: *On the Principles of Political Economy and Taxation* (1817). Reprint: Hildesheim, 1977, S.158ff.

⁶ *Blanqui*, Jérôme A.: *Cours d'Économie Industrielle*, Paris, 1838/39, p.4, quoted from Hansson, Göte: *Social Clauses and International Trade*, London, 1983, p.90.

⁷ *League of Nations: Report and Proceedings of the World Economic Conference* (1927), p.49; quoted from *Charnowitz*, Steve: *The Influence of International Labour Standards on the World Trade Regime. A Historical Overview*, in: *International Labour Review* 126 (1987) 5, p.565.

member states as the GATT. The stillborn section of the Charta, namely Article 7, addressed the issue of 'Fair Labour Standards':

'[M]embers 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.'

Since then, international commodity agreements, such as for sugar (1953), tin (1954), cacao (1975) and rubber (1979), employed 'soft' programmatic clauses on fair labour standards, such as

*'in order to avoid the depression of living standards and the introduction of unfair competitive conditions in world trade, [parties] will seek maintenance of fair labour standards in the sugar industry'*⁸

In parallel, starting in the 1950s, a regulatory approach addressing the social dimension of international trade was a reoccurring topic on GATT's agenda. In 1953 the US Commission on Foreign Economic Policy proposed a draft GATT-provision that sought to create a link with the language of the GATT dispute settlement provision of Art. XXIII in stating, that *'unfair labour conditions [...] create difficulties in international trade which nullify or impair benefits under this agreement'*.⁹ A decade later, the GATT Tokyo-Round negotiations addressed the matter again, but arrived at the conclusion, that labour standards are not a question to be dealt with in the international trading system.¹⁰

In 1986, another attempt to position the issue of labour standards on the trade agenda was undertaken by the United States, when proposing the following paragraph as part of the mandate for the Uruguay-Round:

*'[T]he negotiations should review the effect of denial of workers rights on contracting parties, and the relationship of worker rights to GATT Articles, its objectives and related instruments, and consider possible ways of dealing with worker rights issues in the GATT so as to ensure that expanded trade benefits all workers in all countries'*¹¹

⁸ The text of the International Sugar Agreement is published in: United Nations: Treaty Series, Vol.258, No.3677 (1957), pp.159.

⁹ US Commission on Foreign Economic Policy: Staff Papers, Feb. 1954, pp.437, quoted from Charnowitz, Steve (Fn.7), p.574.

¹⁰ Charnowitz, Steve (Fn.7), p.565.

¹¹ GATT Doc. PREP.COM (86) W/43 (25th June 1986).

Since other Members objected to such an extension of the mandate, the US reintroduced the issue in a very late stage of the Uruguay-Round, namely in 1994. At this point in time, a few weeks before the first WTO Ministerial in Marrakech was about to conclude eight years of negotiations, this move was rather a tactical introduction of a bargaining chip to be traded off against other objectives, than a serious search for consensus on the issue itself.

Two years later the US administration succeeded in pushing the issue of labour standards back on the agenda of the newly established WTO at the second-ever Ministerial Conference in Singapore. The declaration stated, that the '*ILO is the competent body to set and deal with [labour] standards*', Members '*reject the use of labour standards for protections purposes*' and '*the WTO and the ILO will continue their existing collaboration*'.¹²

In 1998, the ILO took up this ambivalent statement by unanimously adopting the Declaration on Fundamental Principles and Rights at Work.¹³ This document complemented the WTO Singapore Declaration and highlighted four fundamental labour standards:

- Freedom of association and collective bargaining,
- the abolition of forced labour,
- the abolition of child labour and
- non-discrimination in employment.

This move played the ball back in WTO's field, since the ILO as the authoritative organization setting and dealing with human rights at work now defined the scope of essential social standards.

In advance of the fourth Ministerial Conference in Seattle, the EU proposed a WTO/ILO '*joint standing forum*', whereas the US advocate for a '*working party*'. Both proposals were strongly opposed by the 'Group of 77' that represents the developing nations and is traditionally concerned about these countries' competitive advantage

¹² Singapore Ministerial Declaration, WTO-Doc. WT/MIN(96)/Dec/W (18th December 1996).

¹³ For the negotiating history of the ILO Declaration on Fundamental Rights at Work see ILO, Report VII, ILC, 86th Session, "Consideration of a Possible Declaration of Principles of the International Labour Organization concerning Fundamental Rights and Its Appropriate Follow-up Mechanism" (Geneva, ILO, 1998). Available online at <http://www.ilo.org/public/english/standards/reln/ilc/ilc86/rep-vii.htm> (accessed 15th Aug 2006).

from cheap labour costs. In this tension-filled context prior to 'Seattle', US President Bill Clinton announced his support for labour standards as part of every trade agreement. Clinton also expressed support for a trade '*system in which sanctions would come for violating any provision of a trade agreement*'¹⁴.

Despite this provocative statement of the US administration, an informal working group composed of 35 WTO Members and chaired by Costa Rica met on December 3rd 1999 in Seattle. The state of the negotiations is reflected by a section for the draft '*Ministerial Decision on Trade, Globalization, Development and Labour*, that was never adopted due to the premature end of the Ministerial Conference. This informal document recommended that the WTO and other international organizations '*conduct and in depth discussion on trade, globalization, development and labour.*'¹⁵

Despite the fact that the ILO took up the issue in the broader context with its 'World Commission on the Social Dimension of Globalization'¹⁶, including human rights does not form part of today's mandate and agenda for the Doha Round. However, the question of the social dimension in world trade is a classical topic with potential to reappear on the trade agenda sooner or later. In addition, as agriculture persists to constitute the bottleneck for the flow of current trade negotiations, it is not hard to imagine a constellation in which developed countries reintroduce the issue.

It depends on the negotiation strategy and partners, how such a reintroduction of 'trade & labour standards would impact the Doha Round. The issue has the potential to either be used as roadblock, bargaining chip or key for the currently deadlocked negotiations. On the one hand, developing countries with a strong stake in liberalizing trade in agriculture are traditionally opposed to the inclusion of human rights at work as part of a trade agenda. On the other, those administrations and stakeholders in developed countries most concerned of the social impact of agricultural liberalization are traditionally in favor of introducing minimum social standards to trade in goods. In this constellation, one would not be surprised to witness history repeating itself in the sense that the topic of trade & human rights at work would be brought back to the multilateral trade negotiations by some developed

¹⁴ Seattle Post Intelligencer, 1st December 1999, p. A1.

¹⁵ This document is reprinted in *Blüthner* (Fn.1), Annex I.

¹⁶The full text of the Commission's report can be downloaded at <http://www.ilo.org/public/english/fairglobalization/report/index.htm> (accessed 15th Aug 2006).

countries. It remains to be seen if this would ultimately serve as roadblock, bargaining chip or stimulus within the Doha Round negotiations that so far is focused on agriculture.

II. The Situation *de lege lata*

Whereas the topic trade & environment kept the WTO dispute settlement busy over recent years, the issue of human rights has hardly been brought to litigation. To what extent market access can be differentiated on the basis of human rights compliance has yet not been tested in GATT/WTO Dispute Settlement. The exception is the recent landmark case on the EU Generalized System of Preferences (GSP), in which the Appellate Body confirmed, that a positive conditionality between tariff preferences and environmental and human rights compliance principally is in line with WTO-law. This section, therefore, starts with a brief analysis of the GSP case, before taking a closer look on the principle question of a differentiation of market access on the basis of human rights at work.

1. Generalized Systems of Preferences

In April 2004, the WTO dispute settlement ruled on the GSP of the European Union following a complaint filed by India in March 2002.¹⁷ The Appellate Body decided that differential treatment based on criteria such as environment or labour standards can be principally brought in line with WTO law, as long as similar treatment is applied to all similarly situated GSP beneficiaries.

The EU preference system grants developing countries special and differential tariff incentives based on good governance criteria, such as labour and environmental standards. The additional benefits for compliance were firstly, duty free treatment instead of just tariff preferences for some 3600 product groups, and secondly, an expanded scope of additional 316 products benefiting from the scheme.

The differential tariff treatment of the EU scheme resulted in a three-layer differentiation of imports: first, imports from developed countries that are principally not subject to the scheme; second, imports from developing countries that are

¹⁷ EC – *Conditions for the Granting of Tariff Preferences to Developing Countries*, Panel Report: WTO Doc. WT/DS246/R (1st December 2003) and Appellate Body Report: WTO Doc. WT/DS246/AB/R (7th April 2004).

subject to the general GSP preference scheme; and, third, imports from developing countries that are subject to particular GSP benefits arising from compliance with environmental and labour standards.

With regard to Art.I:1 GATT, any tariff scheme that results in treating '*like products*' from one country less favorably than from another constitutes a violation of the basic rule of most-favored-nation treatment. Preference schemes as such intent to differentiate and according to their nature and purpose, therefore, violate of the MFN clause contained in Art. I:1 GATT.¹⁸

The legal basis suitable to justify differential treatment under preference schemes otherwise inconsistent with GATT Art.I:1 is the so-called Enabling Clause¹⁹. There is little dispute that the Enabling Clause allows preference schemes that treat developing countries identically or, in other words, only differentiate on the basis of the developing-country status. The relevant issue at stake is any additional differentiation between developing countries based on additional criteria, such as human rights.

The requirements for such a justification are set out in para. 2 (a), Footnote 3, and para. 3 (c) Enabling Clause. Para 2 (a) footnote 3 defines justifiable GSPs as '*generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries*'.

Preference schemes such as the EU GSP are '*generalized*' and also '*non-reciprocal*', since compliance with environmental or social standards by a beneficiary can not be seen as reciprocal to the granted tariff preferences, at least in the technical sense of WTO-law.²⁰

¹⁸ Cp. Panel Report *European Community – Tariff Treatment on Imports of Citrus Products from certain Countries in the Mediterranean Region*, 7th Feb. 1985, GATT-Doc. L/5776, para. 4.11; for non-tariff preferences see *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber-Footwear from Brazil*, 19th June 1992, GATT-Doc. DS/18/R, reprinted in BISD39S/128, 1993, para. 6.14.

¹⁹ Decision on '*Differential and more Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*', GATT Doc. L/4903, 28th Nov. 1979, reprinted in: BISD 26S/203 (1980). The Enabling Clause substituted the '*Waiver for Generalized Systems of Preferences*', GATT Doc. L/3545, 25th June 1971, that was granted on a case-by-case basis so as to exceptionally justify MFN violations of preference differentiations.

²⁰ *Blüthner*, Andreas (Fn.1), p.474 different to *Hilpold*, Peter, Das neue allgemeine Präferenzschema der EU, in: *EuR* 31 (1996) 1, p.99 who arrives at a violation of the non-reciprocity requirement of para. 2 (a) of the Enabling Clause.

It was the criterion of *non-discrimination* that was at the heart of the Appellate Body's decision. The key question was: To what extents do differential tariff preferences based on good governance standards constitute discrimination under para. 2 (c) Enabling Clause?

At a glance, one might arrive at the interpretation of the Panel, that non-discrimination demands '*identical tariff preferences under GSP schemes be proved to all developing countries without [further] differentiation*'.²¹ One strong argument for this restrictive interpretation is that the Enabling Clause is an exception to the basic obligation of Art.I:1 GATT according to the customary rules of interpretation in public international law - Art.3:2 DSU, Art. 31:1 Vienna Convention on the Law of Treaties - and thus needs to be interpreted narrowly.

The Appellate Body reversed the Panel's conclusion on differentiation of trade preferences among GSP beneficiaries and found that the term 'non-discriminatory' does not require identical tariff treatment among all developing countries. Rather, para. 2 (a) needs to be interpreted in light of para. 3 (c) Enabling Clause, that states:

Any differential treatment and more favourable treatment provided under this clause [...] (c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

The Appellate Body found, in contrast to the Panel's view, that para. 3 (c) of the Enabling Clause does not preclude differential treatment among developing countries based on their compliance with environmental or labour standards. As long as a preference-granting scheme responds positively to developmental needs, which are not necessarily common or shared among all those countries, a differential treatment can be in line with the requirements set out in the Enabling Clause. The Appellate Body also ruled that this differentiation must not be applied arbitrarily but according to an objective standard based on beneficiaries 'development, trade and financial needs'.²²

The Appellate Body's finding can further be reasoned with particular reference to the terms '*development, trade and financial needs*'. First, by giving additional reference

²¹ Panel Report *EC-Tariff Preferences* (Fn.17) para. 7.176.

²² Appellate Body Report *EC-Tariff Preferences* (Fn.17) paras 146 ff.

to “developmental needs” as a criterion, the enumeration of para. 3 (c) Enabling Clause seemingly goes beyond the welfare generating effect of trade liberalization. When read in light of the principle of ‘sustainable development’ mentioned in para. 1 Preamble WTO-Agreement, which calls for a balanced approach of economic, social and environmental development, it would seem systematically incoherent to argue that social development can not be seen as ‘developmental need’ under the Enabling Clause. If para. 3 (c) Enabling Clause was meant to be limited in a narrow sense to trade and economic needs, the enumeration beyond those terms would appear to be redundant.²³

Despite the fact that the Appellate Body identified certain substantive and procedural failings in the EU’s preference scheme, the ruling sets out the principle criteria under which a differentiation of trade based on a countries’ social standards is legally possible. In sum, well-designed preference schemes can be applied so as to foster compliance with human rights at work in developing countries in line with current WTO law and jurisdiction. Before considering or advocating for any further means of implementation of human rights within the current trading system, this option seems a preferable and feasible way to constructively promote human rights in the global trading system.

2. Human-rights based conditionality of market access

This section considers to what extent a broader conditionality of market access and human rights compliance would be in line with WTO law *de lege lata*, which has not been yet tested in litigation. Provided there would be a legally sound track towards implementing human rights *de lege lata*, there would be little necessity to consider any regulation *de lege ferenda*, no matter what viewpoint one takes ideologically on the issue.

The question to be considered is two-fold: first, to what extent does the implementation of human rights at work through trade measures violate basic trade law obligations?, And second, what exceptional provision could eventually justify such a violation?

²³ Blüthner, Andreas (Fn.1), pp.476.

This legal analysis depends on what type of measure is applied by the importing country. Measures that are likely to be considered are: a non-discriminatory *sales ban* for domestic and imported goods produced in non-compliance with human rights; a *ban of all imports* that do not comply with human rights standards and, finally, a country could raise (bound) tariffs to penalize 'human rights unfriendly' imported goods.

a) *Basic Substantive Obligations*

The limited scope of this paper allows for only a summary of what substantive obligations would be violated by the three hypothetical cases outlined above.²⁴

The first case of a *sales ban* for domestic and imported products would violate Art.III:4 (in conjunction with Art.III *note ad*) and Art.I:1 GATT, because '*like products*' would be differentiated on the basis of non-product-related processing and production methods (PPMs).²⁵ Art.2.1 TBT Agreement is not applicable to PPM-based measures.²⁶

The second case, an *import ban*, clearly violates Art.XI GATT, whereas Art. XIII GATT is not applicable.²⁷

Thirdly, the alternative of 'punitive' tariffs on imports originating from countries that do not comply with human rights at work violates either Art. II:1(a) GATT in case of bound tariffs, or Art.I:1 GATT. In addition, all of these measures would contradict the spirit of Art.XXXVII:1(b) GATT that prohibits trade restrictions on products of particular interest to less-developed countries.

In sum, restrictions of market access aimed at implementing human rights at work would violate basic GATT rules and would depend on a legal justification under an exception, particularly Art.XX GATT.

b) *Justification under Art.XX GATT ?*

²⁴ *Ibid*, pp.279-375 with further references.

²⁵ The treatment of non-product-related PPMs under Art.I, III and XI GATT with regard to the 'like product' concept has created a broad and intense debate: see for example *Howse, Robert/Regan, Donald: The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, in: *European Journal of International Law* 11 (200) 2, p.256 (with further references), creatively arriving at a non-violation of Art.III GATT through narrowly interpreting this basic obligations in light of the policy objectives of the exceptional provision of Art.XX GATT.

²⁶ *Blüthner, Andreas* (Fn.1), p.284.

²⁷ *Ibid*, pp. 304.

Since the Appellate Body's Report *US-Gasoline*, at the latest, trade lawyers know that the analysis of Art.XX is *two-tiered*.²⁸ A measure at issue must first pass a 'provisional justification' through meeting one of the ten enumerative exceptions listed in Art. XX para. (a) to (j) - also called 'legitimate policy objectives'.²⁹ Second, further appraisal of the same measure under the introductory clause of Art.XX GATT, also known as 'chapeau' or 'head note', is required.

The two segments of Art.XX – justifications and the chapeau - represent two fundamental antagonists in international trade law. On one side is national sovereignty and, on the other, the fundamental principles of WTO law and the rights of other Members to comply with them (*pacta sunt servanda*).³⁰ The 'legitimate policy objectives' are reservations of *national sovereignty* that allow WTO members to seek preliminary justification for trade restrictive measures *necessary* to protect these goals. Whether a certain goal should be pursued and what is the appropriate level of protection are to a great extent sovereign decisions of the respective member state. In a second step, the flow through this loophole is filtered by the so-called necessity-test and ultimately the chapeau.

There, preliminary justified measures need to be applied least trade restrictive and must neither constitute means of 'arbitrary or unjustifiable *discrimination*', nor a 'disguised restriction of trade'. These criteria reflect the fundamental principle of non-discrimination, most prominently embraced under Art.I and Art.III GATT³¹.

With respect to the first tier, measures that would differentiate market access on the basis of a countries' compliance with human rights at work would need to meet one of the provisional justifications of Art.XX, namely either for measures *necessary to protect public morals*, Art.XX (a) GATT, or *relating to products of prison labour*, Art.XX (e)GATT.³²

²⁸ Appellate Body Report *United States – Standards for Reformulated and Conventional Gasoline*, WTO-Doc. WT/DS2/AB/R (20th May 1996), p.21.

²⁹ Appellate Body Report *United States-Import Prohibition of Certain Shrimp Products*, WTO-Doc. WT/DS58/AB/R (12 October 1998), para.149.

³⁰ Appellate Body Report *US-Gasoline* (Fn.28), p.22.

³¹ *Jackson*, John: *The World Trading System: Law and Policy of International Economic Relations*, 2nd Ed., Cambridge MA e.a., 1997, p.234 has therefore called the chapeau a 'soft MFN obligation'

³² In selected circumstances, for example in the case of worst forms of child labour or hazardous working conditions, the exception Art. XX (b)(*necessary to protect human [...] life or health*) might also apply. For a discussion of this provision in the context of human rights at work see *Blüthner*, Andreas (Fn.1), pp.333 with further references.

(1) Art.XX (e) GATT

Due to the textual reference to working conditions outside the jurisdiction of the importing country, one might be tempted to first take a closer look at Art.XX (e). If trade restrictive measures relating to prison labour are explicitly permitted, one might argue, worse labour practices such as forced or child labour must also be implicitly covered through an interpretation *a majorem ad minus*. However, this would mean expanding language beyond its ordinary meaning, and, as the International Court of Justice (ICJ) has put it, '*if the relevant words in their natural and ordinary meaning make sense in their context this is an end of the matter*'³³.

However, seemingly some latitude for interpretation with respect to the *context* of this provision exists, since prison labour is regulated but allowed in most WTO member countries and by the ILO. By contrast, forced labour in most countries and in international human rights law is prohibited. The draft history of this provision reveals an economic, and not humanitarian legal purpose, namely to outlaw competition based on distorted market prices for labour, which is also the case with forced labour.³⁴

However, systematically Art.XX GATT is an exception to the treaty's purpose in that it needs to be interpreted narrowly according to customary rules of public international law.³⁵ It remains to be seen whether dispute settlement litigation will interpret prison labour to include forced labour but it appears unlikely given the view articulated in Art.3:3 DSU that '*rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreement*'. In any event, Art.XX (e) will not provide a solid legal basis for even a preliminary justification of measures aimed at fostering compliance with all relevant human rights at work, for example non-discrimination in employment or freedom of association.

(2) Art.XX (a) GATT

³³ *United Nations*: Report of the International Court of Justice, New York, 1950, p.8.

³⁴ *Diller, Janelle M./Levy, David A.*: Child Labour, Trade and Investment: Towards the Harmonization of International Law; in: *American Journal of International Law* 91 (1997) 4, p.684, para. 182 citing an Interpreting Note to an International Trade Agreement of the League of Nations.

³⁵ See *supra* p.9.

The exceptional provision Art. XX (a) GATT allows measures 'necessary to protect public morals'. Measures aimed at improving compliance with internationally recognized human rights might be a matter of 'public morals'. Other examples that have been discussed under this justification include child labour³⁶, the denial of fundamental human rights at work³⁷ or even trade in furs from leg-hold traps³⁸ and dolphin-unfriendly fishing practices for tuna³⁹. Thus it is for good reason that leading trade scholars understand human rights as such as 'moral rights'⁴⁰.

The public morals clause of GATT Art.XX (a) has not yet been invoked in WTO litigation. However, the analogue exception of Art.XIV (a) GATS has been recently tested for the first time in the *US-Gambling* case. There, the Appellate Body noted the similarities between Art.XX GATT and Art.XIV GATS that allow one to take into account respective case law of both provisions⁴¹ - a finding that here can be applied *vice versa*.

In *US-Gambling* the Appellate Body upheld the Panel's definition of '*public morals*' based on the ordinary textual meaning, namely, that public morals '*denotes standards of right and wrong conduct maintained by or on behalf of a community or nation*'⁴². When reviewing the US measures, the Appellate Body did not pass on the question of *whether* the supply of internet gambling services is socially beneficial or morally desirable. Rather it found it sufficient, that US congressional reports and

³⁶ Charnowitz, Steve: The Moral Exception in Trade Policy, in: Virginia Journal of International Law 38 (1998) 4, pp.740.

³⁷ Torres, Raymond: Labour Standards in Trade, in: The OECD Observer (1996) 202, p.10.

³⁸ Quick, Reinhard: The Community's Regulation on Leg-Hold Traps: creative unilateralism made compatible with WTO law through bilateral negotiations? *New Directions in International Economic Law: Essays in Honour of John H. Jackson / ed. by M. Bronckers and R. Quick*. The Hague [e.a.], 2000, p. 239-257.

³⁹ Opinion issued by Australia as third party submission in Panel Report *United States - Restrictions on Imports of Tuna* (unadopted), GATT Doc. DS29/R 16th June 1994, para. 4.4.

⁴⁰ Petersmann, Ernst-Ullrich: Human Rights and International Environmental Law in the 21st Century: The Need to Clarify their Interrelationships, in: Journal of International Economic Law 4 (2001) 1, p.18.

⁴¹ Appellate Body Report *US - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO-Doc. WT/DS285/AB/R (7th April 2005): para. 291.

⁴² Appellate Body Report *US-Gambling* (Fn.41), para. 296, for a similar definitions see also Feddersen, Christoph T.: Focusing on Substantive Law in International Economic Relations: The Public Morals of GATTs Art.XX (a) and Conventional Rules of Interpretation, Minnesota Journal of Global Trade 7 (1998) 1, p.96; Blüthner, Andreas (Fn.1), p.342.

testimony were *considering* moral standards of conduct, such as pertaining to money laundering, organized crime, fraud, underage and pathological gambling.⁴³

Rather expecting a country to undertake considerations on public morals, than reviewing the national authorities substantial judgment, reflects the two-tier structure of Art.XX GATT, particularly the checks and balances between provisional justification and chapeau.⁴⁴ In addition, setting a standard of substantial review for public morals would have easily overstretched the Appellate Bodies' authority and capacity with a view to potential issues in future cases. For example, to what extent is the import of beef to India in conflict with Hindu religion? Does importing pork conflict with the morals of Islamic or Jewish populations? Alternatively, where does market access for fashion media end and pornography begin? With the standard of review chosen in *US-Gambling* the Appellate Body wisely circumvented the situation of slipping into the role of moral adjudicator.

In sum, the Appellate Body refrained from substantially reviewing the moral judgments of its members. At the same time the Appellate Body ruled that 'public morals' can be determined by national authorities and found it sufficient that *standards of right and wrong conduct* have been considered by relevant national authorities.

Based on these findings, it is hard to imagine that future WTO-litigation would exclude measures concerning internationally recognized human rights from the scope of public morals clauses in WTO-law. Human rights at work are by definition internationally agreed standards that distinguish between right or wrong conduct. Art. XX (a) GATT will apply in a given case, if respective national authorities took into account and seriously considered moral aspects such as the protection of children, unfair labour practices abroad or gender discrimination. It would be not a matter of public morals if respective trade measures were just driven by protectionism such as restricting competition from countries with low labour costs. In sum, trade measures concerning human rights could pass the provisional justification of GATT Art.XX (a).

⁴³ Panel Report *US – Measures Affecting the Cross-Boarder Supply of Gambling and Betting Services* WT/DS285/R (10th November 2004): para. 6.486; Appellate Body Report *US-Gambling* (Fn.41), paras 296, 298.

⁴⁴ See supra p.12.

(3) Necessity-test

Before passing on the chapeau of Art.XX GATT, provisionally justified measures under Art.XX (a) GATT must comply with the so-called '*necessity-test*'.

The necessity of a measure, according to Appellate Body Report *Korea – Various Measures on Beef*, is determined through "a process of weighing and balancing a series of factors".⁴⁵ Since then the so-called *necessity-test* has been significantly modified and refined in comparison to early GATT/WTO dispute settlement practices. In *Thailand – Cigarettes*, measures were only considered *necessary*, if there was '*no alternative measure consistent with the General Agreement, or less inconsistent with it, which [can] be expected to employ to achieve [the] policy objectives*'. In a nutshell, the Appellate Body reviewed if a country had chosen the least-trade restrictive measure to achieve its policy objective.

Since *Korea-Beef*, the Appellate Body has characterized the necessity test as a process of 'weighting and balancing' that:

*[...] comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could "reasonably be expected to employ" is available, or whether a less WTO-inconsistent measure is "reasonably available".*⁴⁶

This process begins with an assessment of the "relative importance" of the interests or values furthered by the challenged measure.⁴⁷ The Appellate Body identified two factors that are relevant in most cases⁴⁸ One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce. Through a "weighing and balancing" comparison of measures, taking into account the interests or values at stake, it is decided whether a measure is "necessary" or, alternatively, whether another, WTO-consistent measure is "reasonably available".⁴⁹

⁴⁵Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS121/AB/R (12th January 2000): para. 164.

⁴⁶*Ibid.*, para. 166.

⁴⁷*Ibid.*, para. 162. See also Appellate Body Report, *EC-Measures Affecting Asbestos and Asbestos-containing Products*, WTO-Doc. WT/DS135/R (12th March 2001): para. 172.

⁴⁸Appellate Body Report, *Korea –Beef* (Fn.45): para. 164.

⁴⁹*Ibid.*, para. 166.

The necessity test reflects the joint understanding of members that substantive GATT obligations should not be deviated from casually. An alternative measure will be only found "reasonably available", where it is not merely theoretical in nature, or where the alternative imposes an undue burden on the Member, such as prohibitive costs or substantial technical difficulties. In sum, a reasonable alternative must be a measure that would preserve the Member's right to achieve its desired level of protection with respect to the objective pursued.⁵⁰

Accordingly, a range of factors would be taken into account when applying the 'necessity-test' to measures geared towards implementing human rights at work, such as:

- The relative importance of the policy objective, namely the implementation of human rights at work;
- the effectiveness of the measure with regard to the human rights objective, namely, reaching the exporting sectors that are in non-compliance with human rights at work and providing positive change,
- the practical availability of less-trade restrictive alternatives that can be expected to effectively be employed, such as labeling schemes, incentives provided within GSP-schemes⁵¹, human rights conditionality within government procurement⁵², other multilateral implementation schemes, such as ILO-monitoring, or possibly even corporate citizenship initiatives, such as the UN Global Compact⁵³,
- the 'collateral damages' for international trade and commerce, namely industries and sectors that comply with respective human rights standards, but are non-intentionally affected by the measure.

Further, a decisive factor is the burden of proof, namely to what extent the defending party succeeds in establishing a *prima facie* case for the necessity of a measure. This means putting forward evidence and arguments that enable a panel to assess the challenged measure in light of the relevant factors to be "weighed and balanced"

⁵⁰ Appellate Body Report, *EC – Asbestos* (Fn.47): paras. 172-174. See also Appellate Body Report, *Korea – Beef* (Fn.45): para. 180.

⁵¹ See supra p.7.

⁵² for a further elaboration of this option and its compatibility with WTO-law see *Blüthner*, Andreas (Fn.1), pp.459 with additional references.

⁵³ See infra p.25.

in a given case. A measure will ultimately be considered "necessary" when the weighting and balancing process reveals that it is "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'"⁵⁴

In sum, the necessity-test imposes high hurdles for trade-restricting measures aimed at fostering human rights at work. It remains to be seen whether such a measure will pass this roadblock on the way towards a justification under Art.XX GATT.

(4) Chapeau

The focus of the chapeau rests on the application of a measure.⁵⁵ The purpose of the chapeau is to ensure that the rights of other members are not frustrated through measures that are otherwise justified under Art.XX (a)-(j) GATT⁵⁶

Passing the necessity-test would not prejudice a measure's review under the chapeau. Here, the key questions are whether the GATT permits trade measures with '*extrajurisdictional effect*' - meaning with effect outside the jurisdiction of the importing country. If so, what are the requirements regarding coherence in human rights implementation arising from the chapeau's 'soft non-discrimination' requirements? Would a differentiation between countries where regarding human rights *the same conditions prevail* constitute an *arbitrary discrimination*? Would it be *unjustifiable* to demand compliance with human rights at work abroad, if these standards are not respected domestically?

- Arbitrary or unjustified discrimination

Reflecting the principle of non-discrimination contained in the substantial provisions of Art.I, Art.III and Art. XIII GATT, the chapeau cannot logically refer to the same standards by which a violation of a substantive rule has been determined to occur.⁵⁷

⁵⁴ Appellate Body Report, *Korea –Beef* (Fn.45): para. 161.

⁵⁵ Appellate Body Report *US-Gasoline* (Fn.28), p.22; Appellate Body Report *US-Gambling* (Fn.41): para. 339.

⁵⁶ Appellate Body Report *US-Gasoline* (Fn.28), *Ibid*.

⁵⁷ Appellate Body Report *US-Gasoline* (Fn.28), *Ibid*; Panel Report *US-Gambling* (Fn.43), para. 6.578; Appellate Body Report *US – Shrimp* (Fn.29) para. 150, which states: [under the chapeau, first,] 'the

In *US – Gambling*, the Appellate Body confirmed the interpretation that had been proposed by literature⁵⁸, namely, that “*arbitrary or unjustifiable discrimination*” defines a standard of consistency for the application of measures with regard to the objectives contained in the general exception.⁵⁹ Without further distinguishing between the criteria ‘arbitrary’ and ‘unjustified’, the Appellate Body in *US – Gambling* reviewed the non-discriminatory restriction of domestic *and* remote gambling services under US – legislation. In so doing the Appellate Body applied the chapeau as ‘*soft national treatment*’ obligation.

When stepping back from *US – Gambling* and taking a more principled look on the legal interpretation of the terms ‘arbitrary’ and ‘unjustifiable discrimination’, they seem to refer to different dimensions of ‘consistency’. These dimensions are the fundamental principles of ‘most-favored nation’ and ‘national treatment’.

On the one hand, ‘*arbitrary*’, in its ordinary textual understanding means an ‘*unrestrained exercise of the will, caprice or preference [...] based on random or convenience or choice rather than on reason or nature*’⁶⁰. ‘Reason’ with regard to exceptional measures under the chapeau needs to be understood with respect to the policy objective at stake. A measure under the chapeau is not based on reason, if it does not contribute consistently to the policy objective put forward. Interpreted in the context with the chapeau’s term ‘*discrimination between countries where the same conditions prevail*’ a measure needs to be applied consistently to countries that are similar with regard to the *respective policy objective*.

This sets up the requirement to treat countries with similar human rights conditions similar – and countries with a different human rights situation differently, or in other words, provide most-favored-nation treatment with regard to human rights. For example, conditionality between market access and forced labour would result in

application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be *arbitrary or unjustifiable* in character.’ (original emphasis).

⁵⁸ Blüthner, Andreas (Fn.1), pp.353, 374.

⁵⁹With regard to Art. XIV GATS, see Panel Report *US-Gambling* (Fn.43): paras. 6.578-6.581, where the Panel discusses Appellate Body decisions relating to the chapeau of Article XX of the GATT 1994.

⁶⁰ Websters Third New International Dictionary, Vol.2, London, 1966, p.110.

arbitrary discrimination if applied only to some countries but e.g. not Myanmar (Burma), that is suspended as ILO member due to persistent forced labour.

On the other hand, '*unjustified*' accordingly can be understood as complementing 'soft national treatment obligation' with regard to legitimate policy objectives. This understanding accords with the Appellate Body's application of the chapeau in *US – Gambling* for Art.XIV GATS. 'Justifications' within Art.XX GATT are the policy objectives of para. (a) to (j). Measures are therefore 'unjustified' if they require human rights compliance of imports, but are not equally applied domestically, provided otherwise the same conditions prevail.

In sum, the proposed interpretation of the chapeau's terms 'arbitrary and unjustifiable discrimination' sets up a consistency-test that is two-fold: first measures otherwise inconsistent with the GATT must be applied non-discriminatorily regarding domestic and imported goods; and, second, must not discriminate between imports from third countries with regard to the policy objective at stake, in our case human rights at work.

- Disguised restriction of international trade

A human rights-based measure that has passed the necessity-test and the consistency-test under the chapeau, is still prohibited if it is a 'disguised restriction of international trade'. This requirement may appear redundant since the criteria set out in Art.XX GATT already aim at detecting protectionist restrictions of international trade hiding behind legitimate policy objectives.

However, the Appellate Body has in addition seen the chapeau as an expression of the principle of good faith without particularly referring to the term 'disguised restriction of international trade'. The principle of good faith is a general principle of international law, also known as the doctrine of *abus de droit*, which prohibits the abusive exercise of states rights.⁶¹

⁶¹ Appellate Body Report *US – Shrimp* (Fn.29): p.61, para. 158.

Here, the main issue for human rights-based trade measures is their intended 'extrajurisdictional' effect: At the end of the day, these measures force other members to change their human rights policies within their jurisdiction even though measures are in fact applied at the borders of the importing country.

Early GATT dispute settlement panels argued, 'extrajurisdictional' measures *as such* would seriously impair the objectives of the GATT since a country could unilaterally determine policies from which other countries could not deviate without jeopardizing their rights under the Agreement.⁶² The GATT obligations would then only bind countries with identical internal regulations.⁶³ Based on these arguments measures with an extrajurisdictional effect, even if otherwise justified, can constitute an *abus de droit* and a 'disguised restriction of international trade' and are therefore *per se* not permitted under the GATT.⁶⁴

Under WTO-litigation, the issue of 'extrajurisdictionality' has not been explicitly been addressed. The Appellate Body in *US – Shrimp* circumvented to rule on the matter: The case concerned a US-measure with 'extrajurisdictional' effect, namely fishing practices in Thailand that endangered sea turtles. Instead of passing on 'extrajurisdictionality', the Appellate Body noted that '*sea turtles are highly migratory species, passing in and out of waters subject to the [...] jurisdiction of various coastal states, [including] waters subject to United States jurisdiction. We note only that in the specific circumstances of the case before us, there is a sufficient nexus*'⁶⁵

A closer look into the Appellate Bodies' reasoning in the *Shrimp*-case is needed in order to understand the extent such a 'sufficient nexus' could potentially arise between an importing country and the human rights situation abroad.

First, it was noted by the Appellate Body, that sea turtles, are protected under CITES⁶⁶, a *de facto* universally agreed environmental agreement⁶⁷. The protection of

⁶² Panel Report *US-Tuna II* (Fn.39), para. 5.38.

⁶³ Panel Report *United States-Restrictions on Imports of Tuna* (not adopted), GATT-Doc DS21/R (3rd September 1991): para. 5.27.

⁶⁴ Panel Reports *US-Tuna I* (Fn.63) and *US-Tuna II* (Fn.39), systematically hardly convincing addressed this issue either under Art.III GATT or the provisional justifications of Art.XX (a)–(j).

⁶⁵ Appellate Body Report *US – Shrimp* (Fn.29): para.133 (emphasis added).

⁶⁶ Convention on International Trade in Endangered Species of Wild Fauna and Flora, published in: I.L.M. 12 (1973), pp.1058.

⁶⁷ see *Sand*, Peter H.: Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment, in: *European Journal of International Law* 8 (1997) 1, pp.29.

sea turtles, one might argue, is therefore not just a domestic but universally accepted policy goal.

Second, the physical migration of the turtles was a decisive factor in the conclusion of a 'sufficient nexus'. The protection of the global sea turtle population was therefore not an exclusive concern of a single WTO-member.⁶⁸ Some might argue that particular human rights have either an *erga omnes* effect or even constitute *ius cogens*. Even though the beneficiaries of these rights are not migratory in a physical sense like sea turtles, matters of fundamental human rights can, however, equally reach beyond the jurisdiction and concern of a single member state.

A third aspect the Appellate Body addressed in the *Shrimp* case was the requirement to enter into 'serious, across-the-board negotiations' with the objective to achieve a bilateral or multilateral agreement to solve the according policy objective.⁶⁹ The Appellate Body saw it as a necessity and matter of good faith, to negotiate before enforcing import restrictions against the exports of other countries.⁷⁰ In *US-Gambling*, the Appellate Body watered down the necessity to negotiate when it ruled that '*consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case*'.⁷¹ With regard to human rights related measures it remains to be seen if either exhausted consultations within the human rights system or separate negotiations about the measure at stake will be required.

At the end of the day, even though one interprets the latest Appellate Body rulings so as to no longer categorically prohibited 'extrajurisdictional' measures, the set of positive criteria required do not make Art.XX GATT a sound basis for fostering human rights through the world trading system *de lege lata*.

In summing up, this section elaborated to what extent a human rights based conditionality of market access can be brought in conformity with the GATT *de lege lata*. The exercise of thinking through such a hypothetical case illustrates, that on the

⁶⁸ similarly Appellate Body Report *US – Shrimp* (Fn.29), para. 133.

⁶⁹ *Ibid.* para. 166.

⁷⁰ *Ibid.*, para. 172.

⁷¹ Appellate Body Report *US-Gambling* (Fn.41): para. 316.

basis of the current treaty practice there is hardly a sound legal basis for a trade-based enforcement of human rights at work. Even if it would be possible to provisionally justify those measures under Art. XX(a) GATT, the necessity-test sets up an initial high hurdle on the way to GATT-conformity. In addition, even if one reads the *US-Shrimp* decision as having turned the principal denial of ‘extrajurisdictional’ measures into a list of ambitious but positive criteria (‘sufficient nexus test’), there is no reliable path for human rights enforcement through Art.XX GATT *de lege lata*.

III. De lege ferenda

Assumed the topic of human rights at work would return to the negotiation tables of a revived Doha-Round, opponents and advocates would confront the question of the legal design of a ‘social clause’ *de lege ferenda*. This section discusses two options based on two fundamental premises, namely, that options *de lege ferenda* must

- conform to the WTO-System, in particular be ‘protectionism-proof’ and,
- effectively implement human-rights at work.

The options to be assessed on the basis of these premises are:

- first, amending the GATT through an exceptional provision for the protection of human rights at work, mostly proposed for Art.XX GATT⁷², and second,
- a new WTO-Agreement on Trade-Related International Labour Rights (TRILs).

1. A “Social Clause” Exception under Art.XX GATT?

The strength of a “social clause” under Art.XX GATT, which most likely would be realized through an interpretative agreement (Art.IX:2 GATT) on Art.XX GATT as a whole, results from its relative conformity with the objective to effectively implement human rights, which appeals human rights advocates. It provides individual WTO-members with a *carte blanche* for unilateral trade measures. Since there is no need for prior authorization of exceptional measures through the WTO or other bodies,

⁷² *Trebilcock*, Michael J./Howse, Robert: *The Regulation of International Trade*, 1st Ed., London (e.a.), 1995, pp.411; *Willers*, Dietrich: *Sozialklauseln in Internationalen Handelsverträgen* [Social Clauses in International Trade Agreements], in: *Weltfriede durch Soziale Gerechtigkeit*, Baden-Baden, 1994, p.169; *Leary*, Virginia: *Workers Rights in International Trade: The Social Clause* (GATT, ILO, NAFTA, US Laws), in: *Fair Trade and Harmonization* (Vol.2, Legal Analysis), Bhagwati Jagdish/Hudec, Robert E. (ed.) Cambridge MA, 1996, p.182.

market access restrictions necessary to achieve human rights objectives could be applied on short notice, which has been found to maximize the economic force of sanctions on a target country.⁷³

The weakness of this approach is its lack of system conformity. The threat for the WTO-system results from the unilateral character of exceptions, which interferes with the legal principle of reciprocity. Furthermore, exceptional measures open loopholes towards the slippery slope of protectionism and power politics. A country targeted by sanctions is limited to look for *ex post* remedy under dispute settlement. Even in case of judicial success, implementation depends on the availability of effective countervailing trade measures, which are not at the disposal of developing countries with marginal import markets. Without addressing the downsides of this approach, the judicial bodies of the WTO would be left with the task to fix this shortcoming through judicial activism.

2. A new TRILs-Agreement?

The strength of a self-standing TRILs-Agreement *de lege ferenda* is laterally reversed to a “social clause”, namely it conforms to the WTO-system. A multilaterally negotiated TRILs-Agreement could be legally designed to achieve coherence with core pillars of the trading system and the interests of developing countries. Also this “legislative” way of building prior consensus between Members on a new agreement is preferable to shifting the burden to the jurisdiction, as it would be the case under GATT Art. XX. In addition, implementation under a TRILs-Agreement would ensure *ex ante* WTO-law compliance through dispute settlement. A TRILs would include human rights at work as legal obligations – as it is the case for intellectual property rights under TRIPs - instead of as a unilateral legal exception – the case under GATT Art. XX. A Member who sought to enforce TRILs would first need to win a case against the Member violating human rights before trade measures could be authorized. Such implementation through dispute settlement reduces the risk of disguised protectionism and avoids an erosion of the rule of law through unilateral power politics.

The main weakness of a TRILs relates to the present concept of “nullification and impairment”, contained in the WTO dispute settlement provisions. “Nullification and

⁷³ see *Hufbauer, Gary/Schott, Jeffrey/Elliott, Kimberly: Economic Sanctions Reconsidered, History and Current Policy, Washington, 2nd ed. (1990), pp.100.*

impairment” reflects the core principle of economic reciprocity in the trading system in restricting implementation measures to the value of “nullified” benefits resulting from a breach of WTO law. On the one hand, provided a TRILs would have to comply with this principle, the implementation is limited to the level of ‘nullification’ of trade benefits arising from ‘impairment’ of human rights at work. In other words: there would be no implementation in cases where a TRILs-violation does not result in measurable negative economic consequences to the complaining party. Only if WTO-members would agree on qualifying the principle of “nullification and impairment” to principally cover fundamental human rights violations, the TRILs-Agreement would be an option to harmonize the conflicting demands of system conformity and human rights effectiveness.

B. The Global Compact

I. Introduction

This section aims to present and elaborate a “cooperationist” policy model addressing the social dimension of globalization: the U.N. Global Compact (GC).⁷⁴ This initiative, kicked-off by U.N. Secretary General Kofi Annan in 1999, is rather based on cooperation than choosing a regulatory approach for realizing universally accepted values, including human rights at work. This section will provide a basic understanding of this initiative and its context, where it comes from, what it is, and what it is not. One point of emphasis will lie on how substantive principles and procedural mechanisms fuel implementation in comparison to the implementation of human rights at work under the WTO-system.

II. Background and Context

The emergence of the Global Compact can best be understood in the context of the growing institutional cooperation between stakeholder groups in globalization. The United Nations (U.N.) has been working with the private sector for more than fifty years; for example, through the procurement of goods and services. Since then, the U.N. and business have been interacting through intergovernmental processes and policy networks. In addition, nongovernmental organizations (NGOs) cooperate with

⁷⁴ For the emerging literature dealing with the Global Compact see *Nowrot, Karsten: The New Governance Structure of the Global Compact*, in: *Essays in Transnational Economic Law* 47 (2005), p.5, Fn.4 with further references.

the U.N. both in the field and at the political level. In 1999 more than 44,000 nongovernmental groups existed (1991: 23,600) and around 3,500 enjoy an official consultative status within the United Nations.⁷⁵

However, thirty years ago the relevant U.N. bodies perceived business for their aim and work rather as part of the problem, than part of the solution. Accordingly, rigid rules for corporate behavior were the means of early U.N. approaches to business. In the 1970s, the U.N. Center for Transnational Corporations (CTC) drafted a “U.N. Code of Conduct” aimed at setting minimum behavior standards for multinationals.⁷⁶ Since member states did not come to an agreement, the code was never adopted and the CTC has been closed down some years ago.

In this context, the approach of the GC can be seen as a change of paradigms. At the beginning of the new century, the United Nations and world societies were facing increasingly complex and particularly interconnected economic, social, and environmental challenges that call for cooperation. Secretary General Annan’s starting point to respond to these new challenges was the recognition that business should rather be perceived as part of the solution, than as part of the problem.

Accordingly, he underscored that the United Nations and business share common goals, even though diverging interests might drive them. For example, the United Nations contributes to the “soft infrastructure” for business by advocating respect of public goods and universal values, such as human rights, peace and stability.⁷⁷ The private sector can contribute to these goals not only through philanthropic action or community projects but also through the way good corporate citizens are conducting their business, including sound social and environmental investment.

⁷⁵ *Nelson, Jane: Building Partnerships: Cooperation between the United Nations System and the Private Sector, New York, United Nations (2001), p.19.*

⁷⁶ For more information on the work of the CTC, see United Nations, Center on Transnational Corporations, ‘The CTC Reporter’, a periodical that ran from 1976 to 1991; and United Nations, Department of Economic and Social Development: Transnational Corporations and Management Division, Advisory Studies, New York (1987–90), online at <http://unctc.unctad.org.aspx/ctcTitle.aspx> (accessed 15th August 2006).

⁷⁷ For further research in international cooperation and global public goods from a U.S. perspective, see *Nye, Joseph S.: American National Interest and Global Public Goods, in: International Affairs 78, (2002) 2, pp. 233–44.*

On the macro level, Secretary General Annan was aware that the globalization process is not irreversible, as proclaimed by some in the late 1990s.⁷⁸ He saw the threat of a backlash to globalization, if it would not become more inclusive and sustainable. Accordingly, nine months before the failure of the Seattle WTO ministerial conference, he proposed a compact based on universally shared values to the stakeholders of globalization gathering in Davos. The overriding goal he had in mind for this compact was to offer a framework that helps to fill the gap between the well-functioning global economic governance, underpinned by strong rules and appropriate enforcement through the WTO, and social and environmental pillars, which do not yet.⁷⁹

III. How the Compact Came About

The first high-level meeting on the Global Compact was held on July 26, 2000, in the rooms of the General Assembly at the U.N. Headquarters in New York.⁸⁰ This was the official “kick-off” for the GC. In a forward-looking speech at the World Economic Forum in Davos on January 31, 1999, U.N. Secretary General Kofi Annan addressed the following words to the gathering of world business leaders:

⁷⁸ This statement expresses what political scientists call “weak globalization thesis,” which sees “globalization” as nothing entirely new compared to traditional “economic integration” that still allows a range of viable policy alternatives. However, this paper does not aim at analyzing or contributing in depth to the already fuzzy definition of “globalization.” On globalization, its definition problems, and the role of business, see *Leisinger*, Klaus M.: “Globalization, Minima Moralia of Multinational Companies.” Available online at http://www.novartisfoundation.com/en/articles/business/globalization_multinational_companies.htm (accessed 15th August 2006).

⁷⁹ *Kell*, Georg: “Dilemmas in Competitiveness”, paper presented at the Community and Citizenship Business and Human Rights seminar at a conference Toward Universal Business Principles, London School of Economics and Political Science, London, May 22, 2001. Available online at http://www.unglobalcompact.org/NewsAndEvents/speeches_and_statements/index.html (accessed 15th August 2006).

⁸⁰ A wealth of information on the New York meeting and the Global Compact, including U.N. documents, the commitments of participants, case studies, speeches, press information and the full text of papers can be accessed from the homepage <http://www.unglobalcompact.org> (accessed 15th August 2006). For a four-page special section on the Global Compact, see International Herald Tribune, January 25, 2001. The work on the Global Compact within the United Nations, however, started as early as 1998. For one of the first presentations of the concept, see *Kell, Georg/Ruggie, John*: “Global Markets and Social Legitimacy: The Case of the ‘Global Compact,’” paper presented at the conference Governing the Public Domain beyond the Era of the Washington Consensus: Redrawing the Line between the State and the Market, York University, Toronto, Canada (November 4–6, 1999), p.7. Available online at http://www.unglobalcompact.org/NewsAndEvents/speeches_and_statements/index.html (accessed 15th August 2006).

*Let us choose to unite the power of markets with the authority of universal ideals. Let us choose to reconcile the creative forces of private entrepreneurship with the need of the disadvantaged and the requirements of future generations.*⁸¹

Forty-four founding participants initially took up this proposal from various business sectors. The GC includes major global players such as Asea Brown Boveri (ABB), BASF, DaimlerChrysler, Dupont, Nike, Union de Banques Suisse (UBS), and Volvo. Furthermore, a significant number of selected small and medium-sized enterprises and associations are lending their support to the GC. The range of civil society organizations (CSOs) represented in the GC includes leading human rights organizations such as Amnesty International and Human Rights Watch, major environmental groups like the World Wildlife Fund (WWF), and social initiatives, for example Business for Social Responsibility and Transparency International.⁸² Additionally, the International Organization of Employers and the International Confederation of Free Trade Unions are actively supporting the GC.

IV. Substantial Pillars of the Compact

The GC is based on ten principles, which were drawn from three universally accepted U.N. declarations in the area of human and labour rights and environment, including the ILO Declaration on Fundamental Human Rights at Work from 1998.⁸³ These principles were translated from state duties to promotional principles addressing the business community and read as follows:

Human rights

1. World business should support and respect the protection of internationally proclaimed human rights within their sphere of influence, and
2. make sure they are not complicit in human rights abuses.

Labor

3. Businesses should uphold freedom of association and the effective recognition of the right to collective bargaining,

⁸¹ Secretary General Annan's speech in Davos (UN-Doc. SG/SM/6881/Rev.1) is accessible online at <http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.r1.html>. (accessed 15th August 2006).

⁸² A list of all participants of the Global Compact is available online at <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (accessed 15th August 2006). Delegates from eighteen countries were also present at the New York meeting as observers, including developed countries like the United States, Germany, and Norway and developing countries like India, Pakistan, and Thailand.

⁸³ See supra, p.5.

4. The elimination of all forms of forced and compulsory labor,
5. The effective abolition of child labor, and
6. The elimination of discrimination in respect of employment and occupation.

Environment

7. Businesses should support a precautionary approach to environmental challenges,
8. Undertake initiatives to promote greater environmental responsibility, and
9. Encourage the development and diffusion of environmentally friendly technologies.⁸⁴

These original nine principles were on the occasion of the 2004 Global Compact Summit 2004 supplemented with a tenth principle, namely:

10. Businesses should work against all forms of corruption, including extortion and bribery

Human rights make up the first pillar of the GC, as participants have committed themselves to promoting human rights within their sphere of influence and not being complicit in their violation. The commitment to human rights may be particularly beneficial for the purpose of economic and social rights⁸⁵. Through their products, companies can make a vital contribution towards meeting economic and social needs. They have expertise and resources at their disposal, which could efficiently be deployed in implementing, for example, the human rights to food and health.⁸⁶ Additionally, it is interesting to note that the United Nations are starting to clarify the human rights content of the GC by linking it with existing voluntary and legally nonbinding instruments like U.N. Codes of Conduct.⁸⁷ Further, relevant U.N. treaty bodies are starting to directly refer to the GC and its participants in official U.N. documents and regulations.⁸⁸

⁸⁴ The full version of the Global Compact principles is available online at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (accessed 15th August 2006).

⁸⁵ For more information on the three dimensions of human rights, see *Riedel*, Eibe H.: "Menschenrechte der dritten Dimension" ("Third Dimension Human Rights"), *EuGRZ* 16 (1989) 1: pp. 9–21.

⁸⁶ For an innovative approach to engage business into combating vitamin and mineral deficiencies as a matter of the human right to food, see www.gainhealth.org (GAIN – The Global Alliance for Improved Nutrition; accessed 15th August 2006).

⁸⁷ For example, the U.N. Code of Conduct for Law Enforcement Officials, available online at http://www.unhchr.ch/html/menu3/b/h_comp42.htm (accessed 15th August 2006), is referred to by different Global Compact publications. Due to the flexible and project-based approach of the Global Compact and its structural differences compared to Codes of Conduct, this approach seems to be questionable.

⁸⁸ See for example, "Draft Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights," UN-Doc. E/CN.4/Sub.2/2002/13, available online at <http://www1.umn.edu/humanrts/links/NormsApril2003.html> (accessed 15th April 2006).

Human rights at work constitute the second pillar of the GC. These labour principles of the GC correspond to the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work.⁸⁹ This historical second-ever declaration by the ILO clarified which of the 183 ILO Standards are “core labour rights” because of their human-rights dimension and at the same time correspond to the debate of ‘trade & human rights at work’ within the WTO.

The third pillar of the GC, which holds the environmental principles, can be traced back to the Rio Declaration of 1992.⁹⁰ Among the ecological principles, the spread of environmentally sound technologies seems of particular significance for the aim of Sustainable Development (SD),⁹¹ since it likewise addresses economical, ecological and developmental policy needs⁹². The seventh principle of the GC contains the precautionary principle, also enshrined at the Rio Conference, which might be seen as representing the time dimension in the concept of SD.⁹³

The concept of SD provides the unwritten and underlying concept of the GC and its ten principles. Due to its integrative effect, SD can provide a common ground for an initiative of partners with divergent backgrounds and particular interests. As the GC embraces a liberal and open world economy, but at the same time addresses social and environmental aspects, the initiative aims to foster basically all three pillars of

⁸⁹ See supra. p.5.

⁹⁰ The text of the Rio Declaration and other milestones in international environmental law are online at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (accessed 15th August 2006). Further, it is interesting to note that Murphy, David F.: African Enterprises and the Global Compact: Adding Value through Human Relationships, Tunis, Tunisia: New Academy of Business (2001), available online at <http://www.new-academy.ac.uk/research/africanenterprise/report.pdf> (accessed 15th August 2006), traces the environmental principles of the Global Compact back to African values as described already in the late 1950s.

⁹¹ Environmentally Sound Technologies (ESTs) as defined by Agenda 21 “protect the environment, are less polluting, use all resources in a more sustainable manner, recycle more of their wastes and products, and handle residual wastes in a more acceptable manner than the technologies for which they were substitutes. (ESTs) are not just individual technologies, but total systems, which include know-how, procedures, goods and services, and equipment as well as organizational and managerial procedures.

⁹² Sustainable Development is commonly defined as “development that provides economic, social and environmental benefits in the long-term, having regard to the needs of living and future generations.” Cp. *Gilpin*, Alan: Dictionary of Environment and Sustainable Development, Chichester, e.a. (1996): p.35. For the foundation of the concept of Sustainable Development, see the so-called “Brundtland Report”, *World Commission on Environment and Development: Our Common Future*, New York Oxford Univ. Press (1987).

⁹³ See *Ruggie*, John: The Global Compact as Learning Network, available online at http://www.ksg.harvard.edu/cbg/research/j.ruggie_global.governance_global.governance.net.pdf (accessed 15th August 2006). The essence of the precautionary approach is described in Principle 15 of the Rio Declaration, which states: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.

sustainability on the global level. Also, the composition of participants represents economic, social and environmental interests, which perfectly suits the integrative imperative and the threefold approach of SD. Consequently, the GC was incorporated in the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg (“Rio plus 10”) and the Rio process as a whole.⁹⁴

To sum up, the GC contains ten principles drawn from universally accepted U.N. treaties covering the areas of human and labour rights, environmental policy and the promotes practices geared towards reducing bribery and corruption. Sustainable development may be seen as the underlying common sense building the bracket between the divergent range of stakeholders engaged in this initiative.

V. Procedural Pillars of the Compact

In addition to the ten substantive principles, the GC is also characterized by important procedural components, and two formal obligations for participants that ensure due progress of the initiative.

First, participation depends on a letter signed by the CEO and sent to U.N. Secretary General Kofi Annan proclaiming that the company will embrace and promote actively the principles and objectives of the GC. The CEO commitment meanwhile corresponds with the strategic importance the GC has for some businesses. It allows a top-down approach for the internal implementation of the GC based on the top-management’s decision.

From an international relations perspective, the CEO-letter and the Secretary General’s response confirming the participation can be seen as a very ‘soft’ institutional agreement on jointly promoting the GC’s principles. So far corporations have not been recognized as legal subjects in public international law.⁹⁵ However, a compact meanwhile nearly 3000 CEO’s and the Secretary General of the UN agreed on, however, might be seen as the birth of an innovative form of engagement in international relations.

⁹⁴ The Results of the World Summit on Sustainable Development in Johannesburg (WSSD +10) are available online at <http://www.un.org/events/wssd/> (accessed 15th August 2006).

⁹⁵ Beside the cases of so called state contracts, which are treaties between states and the private sector, mostly on subjects regarding business opportunities in the country, like investment or extraction of raw materials and natural resources. As a starting point for further research, see Maniruzzaman, A. F. M.: State Contracts in Contemporary International Law: Monist versus Dualist Controversies, in: European Journal of International Law 12 (2001) 2: pp. 309–28, discussing different forms of state contracts.

Second, once a year the participants have to publicly prove concrete undertakings in promoting the principles of the compact on the GC web-portal.⁹⁶ This procedural element of the GC ensures enduring engagement and concrete action towards implementing the substantial principles. This is necessary to avoid free-riding, namely just signing a letter and taking advantage of being part of this high-profile initiative, for example enjoying the privilege of active participants to undertake corporate communication with the GC logo. Free riders not fulfilling this requirement are regularly criticized by NGOs for “blue washing” their image with help of the U.N., that is, white washing their image with the legitimacy of the United Nations blue flag.

In practice, the obligation to communicate progress results into constructive competition as a driving force for implementation of the nine principles through exchanging best practices between the participants. Best practices within the GC incorporate the economically, ecologically or socially applied capacity of companies, most prominently through the realization of concrete projects. Publishing such best practices serves as a stimulus or yardstick to other participants.

Beyond these entry requirements, the procedural structure of GC itself rests on three core elements: dialogue, learning and projects.

First, multi-stakeholder “policy dialogues” are held on the contemporary challenges of globalization and corporate citizenship, aimed at providing a key platform for substantive discourse. Participation in these dialogues is voluntary and open to all GC stakeholders: business, labour and civil society organizations. Drawing on the core strength of the United Nations and its convening power, GC dialogues offer a unique, added feature: proximity to governments and operational entities of the United Nations. This allows results coming out of dialogues to influence both the policy-making level and the operational activities on the ground. The overall objective is to facilitate mutual understanding, create a climate of collaboration and a culture of innovative but concrete solutions.

Second, ever since the GC was launched in July 2000, learning has been an integral part of both its vision and day-to-day operations. Learning is aimed at helping the participants in internally applying ideas and experiences from dialogues and project

⁹⁶ Online at www.unglobalcompact.org (accessed 15th August 2006).

cooperation. At the heart of the GC learning network is the Learning Forum, which operates on the one hand as Web-based forum and database, on the other convenes meetings of participants presenting their concrete undertakings with a view to the nine principles. The Learning Forum invites the participants to share good practices and to identify and fill knowledge gaps around issues related to the GC. The goal is to establish a rich and useful repository of both corporate practice and fundamental research, a platform of knowledge that integrates the views of all relevant stakeholders, while simultaneously increasing the transparency of companies' activities. The Learning Forum on the global level aims to inform the formation of local and regional learning structures.

Third, the participants shall join United Nations specialized agencies in public-private partnership projects (PPPs). The GC is an expression of shared values that allow identifying common goals between participating companies, U.N. agencies, labour (unions) and civil society organizations (NGOs). These common goals, once agreed on, have led to hundreds of partnership projects that contribute to the achievement of the GC's principles. Through partnership projects, GC participating companies can complement their knowledge, expertise and resources with public institutions participating in the GC.

Even before the GC came to birth, a number of U.N. organizations cooperated successfully with the private sector on a project basis and therefore have the relevant experience with private-public partnerships on the operational level.⁹⁷ Accordingly, participants of the GC, too, were already implementing partnership projects in many countries, before the GC arose. However, the Global Compact further encouraged participating businesses to increase the number of projects worldwide, particularly in developing countries. At the same time, the GC offers companies a communication platform and the organizational and technical services of U.N. agencies—particularly through the United Nations Development Programme (UNDP). Recently, the GC Office in close cooperation with UNDP developed the following project criteria:

⁹⁷ The ILO, for example, has a great deal of experience of cooperation with transnational companies; see, for example, the decent work program online at <http://www.ilo.org/public/english/decent.htm> (accessed 15th August 2006). Also worth mentioning are the partnership programs of the UNIDO that aim, for example, to improve the interface between transnational companies and their SME suppliers in developing countries, available online at <http://www.unido.org/doc/4364> (accessed 15th August 2006). An overview of the relations between the U.N. and business is online at <http://www.un.org/partners/business/index.asp> (accessed 15th August 2006).

1. The project objective(s) support(s) one or several U.N. Millennium Development Goals and correspond with one or more GC Principles.
2. Partners and beneficiaries participate in drafting, implementing, monitoring and evaluating the project.
3. Partners and beneficiaries contribute financially or with their work to the implementation of the project.
4. In their design, projects follow the concept of sustainability and capacity building.
5. The partnership project produces measurable results corresponding with its objective(s).
6. The project has the potential to be replicated elsewhere, within the project country or outside.
7. Innovative and successful partnership projects are replicated by becoming part of regional or national sector policies.
8. Project activities continue after funding from external sources ceases, that is, projects are institutionally sustainable.

These criteria underscore that entering into partnerships with other participants only based on financial sponsorship instead of incorporating corporate expertise and resources into concrete projects constitutes a second-best engagement. Due to the divergent interest groups, a crucial factor for the overall success of the GC is whether and to what extent the partners are willing and able to enter in concrete and sustainable cooperation at the project level. This is crucial, not only because implemented projects are the means of concrete implementation of the ten principles, but also, because project cooperation provides the opportunity of mutually beneficial learning and organizational development. It is important to note that the opportunities for mutual learning through the GC are not only for the benefit of business participants, but also for NGOs and particularly envisaged reform of the United Nations. As U.N. Secretary General Kofi Annan underscored: *“I see the Global Compact as a chance for the U.N. to renew itself from within, and to gain greater relevance in the twenty-first century.”*⁹⁸

To sum up, the GC is based not only on ten substantial principles but also on a range of procedural mechanisms. First, there are two requirements for participating, namely the letter of commitment by the CEO and the annual “going public” with at least one example of how the nine principles were implemented. Second, the GC itself is based

⁹⁸ The infra paragraphs are based on official and informal information provided by the Global Compact Office. For further reading, see *Blüthner*, Andreas: “Der Global Compact – Ein Globalisierungspakt über Werte und Effizienz” (The Global Compact: A Globalization Pact on Values and Efficiency), in *Kooperation oder Konkurrenz Internationaler Organisationen. Eine Arbeitstagung zum Verhältnis von Vereinten Nationen und Europäischer Union am Beginn des 21. Jahrhunderts*, Baden-Baden, Nomos (2001), pp. 72–79.

on three procedural elements: dialogue, learning and projects. “Policy Dialogues” create a climate of mutual understanding and collaboration, the “Learning Forum” provides resources for applying ideas and experience from dialogues and project cooperation and finally, partnership projects provide concrete action on the implementation stage.

VI. What the Global Compact Is Not

The cooperationist policy model of the GC will become even clearer if one considers what the GC is not. First of all, the ten principles of the GC are not designed as and do not constitute minimum standards. Minimum standards define a general behavioral baseline. Their content is fixed and they are directed to prohibit worst practices, like employing child labour.

In contrast, the content of the GC is structured in the form of promotional obligations, representing flexible guidelines and aspirational benchmarks directed to foster best practices, for example, projects supporting the education of former child labourers. One pragmatic reason for the flexible content of the ten principles is that, due to the wording, there is no precise consensus about the meaning of the principles yet. So it seems hardly possible to define the “precautionary principle” for diverse industry sectors or to draw a clear line where the corporate sphere of influence on human rights begins or ends. The aspirational approach of the GC necessarily has considerably greater flexibility and openness than is the case with concepts based on minimum standards or fixed rules.⁹⁹ For putting the principles into practice, the GC relies on the “patchwork effect” of specific individual projects and not on rigid regulation.

Some, therefore, may be left wondering whether the GC lacks the teeth to convert the principles into practice. Anyone who arrives too hastily at this conclusion is overlooking the fact that the GC is not a classical regulatory control instrument. It relies on setting the right incentives, the effect of voluntary transparency, the willingness of business to respond to constructive competition and a changing market environment that increasingly rewards good corporate citizenship.

⁹⁹ For the nature of principles and their distinction to rules, see *Dworkin*, Ronald: Taking Rights Seriously, London, Duckworth (1977), pp. 22–26; *Alexy*, Robert: On the Structure of Legal Principles, in: *Ratio Juris* 13 (2000) 3: p. 294.

Finally it should be stressed that the GC is not intended to replace governmental action or other forms of governance in the areas of human rights, labour rights, and environmental protection, nor can it do so. While governmental regulations usually set minimum standards, best practices within the GC aim to go beyond these. Due to the project nature of the GC, concrete action on the operational level so far can only offer a positive complement to governmental action. Accordingly, many governments have declared their support for the GC, even if they are not directly involved in its actions.

VII. Reasons why the Global Compact Delivers

The GC still is a new and innovative, but also much disputed initiative. However, there is a bundle of reasons explaining why this initiative is still rapidly growing, developing and providing significant results at the project level:

1. The United Nations has experience and core competence as a neutral broker. It is capable of resolving communication problems and achieving consensus and cooperation between unequal partners on the international level. This negotiating expertise will be valuable to companies not only in the actual implementation of the ten principles, but also as they enter into more constructive relations between the stakeholders of the globalization process.

2. The United Nations and business might have different and sometimes diverging interests, but they share some common goals. By providing peace and promoting human rights, for which the United Nations and its Secretary General were awarded the Nobel price, the United Nations is also creating the “soft infrastructure” companies with their global business operations depend on. This becomes even more clear with regard to the increasing length, complexity and transnational interdependence of business value chains. Therefore, “positive peace” has become a public good also demanded across borders by globally operating companies. At the macro level, the overlapping goals and interdependent interests of the United Nations and business became strikingly evident through the terrorist attacks of September 11, 2001, and their negative impact on stability, world peace, and the world economy.

3. As producers and investors, companies are already playing a role in putting the universal principles of the United Nations into practice. Products delivered by

companies can contribute to realizing human rights, such as for example the right to food and the right to health. There would appear to be scope for increasing this potential held by companies, not least through technological progress, but also through partnership projects under the GC.¹⁰⁰

4. Economic and development policy goals coincide. Sustainable economic development, which companies can best contribute through foreign direct investment, reduces poverty and poverty diminishes, this creates markets for companies.¹⁰¹

5. Companies are aware of how to use market forces and by doing so, to create values efficiently. The GC is the first global initiative so firmly based on the creative and constructive potential of markets and their actors.

6. Political steering potential is moving towards companies. The participants of the GC have demonstrated through embracing globally shared values and through their project efforts that they are responsively executing their growing importance as good corporate citizens.

7. A strategic strength of the GC lies in the “best practices approach,” which puts emphasis on the advantages of the individual partners. This approach paves the way for detecting synergies and win-win situations and stimulates a results-oriented climate for projects.

8. Last, but by no means least, the success of the GC backs the maintenance and development of the liberal world trading system, as it decreased the pressure to deal with human rights, labour rights and environmental standards within the WTO.

VIII. The Global Compact and the World Trading System

With a view to the long-standing and sometimes harsh debate about the social and environmental dimension of globalization, the GC as platform for constructive

¹⁰⁰ Secretary General Kofi Annan asked world business to support the U.N. in its combat against HIV within the framework of the Global Compact, see “Another Five Years at the UN Helm for Annan, of Course,” International Herald Tribune, June 27, 2001.

¹⁰¹ Jürgen Strube, as Chairman of the BASF Executive Board of Directors on the occasion of accession to the Global Compact, said the following, “We regard it as a matter of principle to act in a socially responsible manner. Anything that benefits society ultimately benefits business, and when business prospers, society prospers as well. The Global Compact addresses this win-win situation on the global level.”

cooperation in these areas of global governance came to birth at the right point of time for those having a stake in the functioning of the liberal trading system.

Free trade increases the *overall* welfare of all partners involved. The fundamental validity of this basic tenet of liberal trade theory is scarcely disputed today. But supporters of liberal trade are often asked whether the prosperity created for trading partners in total, ultimately generates societal values in a specific country or for particular societal groups and individuals. Development policy advocates often question whether the effects of prosperity gained through liberal trade actually trickle down to all levels of society. With a view to the ongoing Doha Round, the “development question”, including the question of social development, remains to some extent open to the WTO.

In the recent past, the world trading system has faced “new issues,” prominently the interdependence between trade on the one side with environmental policy and human and labour rights on the other. The issue of implementing social and environmental standards through trade measures necessarily causes an intervention in the market. The implementation of labour rights and environmental policies within the WTO is at least to some extent based on the credible threat of trade sanctions. This easily could erode not only the economic basis for environmental and social progress in the targeted country, but also the basic consensus between WTO members about open markets. Accordingly, supporters of liberal trade tend to recognize these “trade ands” as a threat to liberal trading system, increasing the risk of new trade disputes and protectionism for the WTO. These “not-only-trade-related” issues will presumably not disappear from the trade agenda on the long-run; or – as discussed above – might return on the agenda of trade negotiations sooner than widely expected.

The GC aims to realize these values that cannot be without risks addressed within the WTO and through trade instruments.¹⁰² As stated by U.N. Secretary General Kofi Annan, the GC is based on the recognition that liberal trade is a necessary prerequisite for the realization of the ten principles and economic development.¹⁰³ Accordingly, the GC is based on the assumption of a positive nexus between liberal trade and the universal values of the United Nations. By setting incentives for the

¹⁰² For the relationship between the Global Compact and the WTO, see Kell and Ruggie (Fn.80).

¹⁰³ Qtd. from Kell (Fn.79).

realization of environmental and social goals, its instruments not only are compatible with, but also build upon market forces and rely on cooperation. On the contrary, the various proposals on tying up trade with labour and environmental goals mainly function because of pressure, compulsion and ultimately might cause confrontation.

Finally, a fundamental difference between the WTO and the Global Compact occurs when comparing the addressees of the universal principles and their realization. Regarding human rights at work, implementation through the WTO-system depends on a domino-chain of legal force: first a member country needs to force another through trade measures, second the target country would need to change and enforce its domestic labour legislation that finally would need to result in compliance at the level of concrete business operations. Instead, the Global Compact is straightly directed to where the realization of good workplace practice happens – or not, namely: concrete business operations worldwide. Such straight road towards the addressees promises not only faster implementation, but also reduces welfare losses caused by economic sanctions and rigid regulatory systems that interfere with markets instead of directly stimulating market actors.

To sum up, the approach of the GC constructively addresses the concerns of stakeholders in liberal trade regarding the enforcement of environmental and social standards within the WTO. The Global Compact enables businesses to actively strengthen the legitimization a liberal trading system through a voluntary and market-based approach towards putting human rights principles into practice. The Global Compact, in particular with regard to its constantly improving governance structure and rapidly increasing participation¹⁰⁴, offers a significant potential to fill gaps in the non-economic areas of global governance.

¹⁰⁴ For the recently improved internal governance structure of the Global Compact see Nowrot, Karsten (Fn.74), pp.1.