Loïca Lambert

Labour Rights, the World Trade Organisation and the Global Economy

Supervisor: Shane Darcy, Irish Centre for Human Rights

E.MA Thesis
2011 - 2012

Acknowledgments

I would like to thank my supervisor for its availability, its openness and its competent advices. I would also like to thank my parents for letting me believe that it is possible to be actor of a change. Finally, I would like to thank all the people I have met during this master for the inspiration, reflection and happiness they have brought in my life.

Abstract

Starting with the fact that recurrent and important labour rights violations occur throughout the world, this paper aims at identifying underlying causes of those violations and choose to focus on the links between labour rights and the World Trade Organisation. While a large majority of states committed themselves to the realisation of labour rights, through their obligations under the International Covenant on Economic, Social and Cultural Rights or through their engagement into the International Labour Organisation, a large majority of them are also members of the World Trade Organisation. Yet, international trade law and international human rights law have been developed within two independent spheres, which has led to what we can call the fragmentation of public international law. Therefore, the question of consistency between the norms established within those two spheres has to be raise in order to define whether the enjoyment of labour rights could be undermined by international trade law as developed by the World Trade Organisation. It is thus in this context and in order to determine how to ensure an effective enjoyment of labour rights that this paper examines the potential effects of WTO law on the mentioned rights.

Table of Acronyms

AoA	Agreement on Agriculture
CESCR	Committee on Economic, Social and Cultural Rights
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EPZ	Export Processing Zone
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
ITO	International Trade Organisation
GATT 1994	General Agreement on Tariffs and Trade 1947
UN	United Nations
UN Charter	Charter of the United
Vienna Convention	Vienna Convention on the Laws of Treaties
WTO	World Trade Organisation
WTO Agreement	Agreement Establishing the World Trade Organisation

Table of Contents

Labour Rights, the World Trade Organisation and the Global Economy

1. Introduction

Human rights, including labour rights recognised by human rights instruments, are rights for everyone. Yet, without making a surprising declaration, it can be said that labour rights are far to be a reality for a significant number of workers around the world. In Kenya, "the exemption of Export Processing (EPZs) from the application of the Employment Act and the Occupational Health and Safety Act, [...] has given rise to poor working conditions such as low salaries, excessive and unpredictable working hours, lack of training and promotion opportunities, unstable contracts, sexual harassment, violations of the rights to join trade unions and to collective bargaining as well as racial discrimination by some foreign managers against Kenyan workers".[1] In September 2010, in Cambodia, "261 factory unionists have been unfairly dismissed or suspended from work" following their participation to a strike to demand wages which could "ensure basic provisions such as sufficient nutrition and shelter".[2] In December 2011, the Vita Cortex Company, which manufactures foam packaging, closed its plant in Cork in Ireland. "Workers, including several people with more than 40 years of service to the company, were let go without redundancy payments. … Since then the 32 staff members have been staging a sit-in at the plant"[3]. Unfortunately, those examples are not exception to the rules but represent common patterns of labour rights violations reported by NGOs[4], by confederations of trade unions[5], by the Committee on Economic,

[1] E/C.12/KEN/CO/1, 19 November 2008, par. 17.
[2] Over 200 Cambodian trade union leaders suspended or illegally dismissed after mass strike ends, http://www.cleanclothes.org/news/over-200-cambodian-trade-union-leaders-suspended-or-illegally-dismissed-after-mass-strike-ends (consulted on 8 July 2012).
[3] Support the Vita Cortex Workers – About, http://vitacortexworkers.wordpress.com/about/ (consulted on 8 July 2012).
[4] See e.g. http://www.cleanclothes.org (consulted 8 July 2012).
[5] See e.g. ITUC CSI IGB – Annual Survey of violations of Trade Unions Rights, http://survey.ituc-csi.org/?lang=en (consulted 8 July 2012).

Social and Cultural Rights (CESCR)[6] or by the International Labour Organisation (ILO)[7].

Confronted to recurrent violations, the human rights system based on individual complains, shows its weaknesses and the combat against labour rights violations, more than focusing on individual cases, should start by identifying underlying causes of those violations. While those causes are certainly complex and multiple, this paper choose to focus on the link between labour rights violations and the World Trade Organisation (WTO), considered as fundamental actor of the economic globalisation. Maybe more closely than any others human rights, labour rights are linked to economy and there is a sense that this creates a need to examine the relation between economic rules and labour rights violations. A significant part of our economy is dominated by rules of international trade law, including those established under the framework of the WTO. Yet, international trade law and international human rights law have been developed within two independent spheres, which has led to what we can call the fragmentation of public international law[8]. A large majority of states have engaged themselves in these two legal sets of rules and the question of interference and consistency between the norms established within those two spheres has to be raise in order to define whether the enjoyment of labour rights could be undermined by international trade law, and particularly by WTO law. It is thus in this context and in order to determine how to ensure an effective enjoyment of labour rights that this paper aims at examining the potential effects of the WTO law on the mentioned rights. If there is a conflict, the parallel development of these two set of rules should be questioned and there is little doubt that following the rules of international law, the conflict should be solved in favour of human rights. Article 103 of the Charter of the United Nations (UN Charter)[9] provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." Yet, one of the purposes of the United Nations is to "achieve international co-operation [...]

[6] See e.g. E/C.12/DOM/CO/3, 26 November 2012, par. 14-19.
[7] ILO, 2012.
[8] De Schutter, 2009, pp. 21 -22.
[9] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) TS 993.

in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination" [Article 1(3)] and this objective imposes obligations both on the organisation itself and on its Member States [Article 56]. Therefore, if states engage themselves in international obligations conflicting with their obligation to protect and promote human rights, the former should be set aside.[10] Furthermore, CESCR stated that "the failure of states parties to take into account their legal obligations regarding the right to work when entering into bilateral or multilateral agreements with other states, international organisations and other entities such as multinational entities constitutes a violation of their obligation to respect the right to work".[11]

The first chapter of this paper will be discussing the consecration of labour rights as human rights. While labour rights are recognised in diverse international human rights instruments, the choice has been to focus on their recognition in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[12] This choice is conceptual and aimed at affirming the need to recognise labour rights as *human rights*. The rationales behind this recognition, the normative content of the rights as well as the correlative states obligations will be examined. After that, the recent approach of the ILO in promoting labour rights will be discussed, with a focus on its influence on the recognition of labour rights as human rights.

The second chapter will examine the WTO system as well as its implications in a broader context. After a brief historic and an explanation of its *raison d'être*, some fundamental concepts of WTO law as well as the basis of its functioning will be exposed. WTO rules will then be examined in the context of the global economy in order to determine the fairness of WTO rules as well as their capability to fulfil the aims prescribed by the Preamble of the Agreement Establishing the World Trade Organisation (WTO Agreement).[13]

[10] De Schutter, 2009, p. 15.
[11] E/C.12/GC/18, 24 November 2005, par. 33.
[12] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into forced 3 January 1976) 993 UNTS 3.
[13] Agreement Establishing the World Trade Organisation (adopted on 15 April 1994, entered into force 1 January 1995), 1867 UNTS 154.

Bearing in mind that WTO rules have to be considered in context, the third chapter will examine how WTO rules can influence the realisation of labour rights as defined in the first chapter. The first part identifies main issues in regard to the interaction between WTO rules and labour rights such as the potential adverse effect of trade liberalisation on employment, the claim that trade liberalisation lead to a race to the bottom in regard to wages and working conditions, the phenomenon of outsourcing and the relation between international trade and MNCs. A second part will analyse where a conflict could arise from a legal point of view. Finally, some debated solutions to the conflict are considered, such the interpretation of treaties under the rules of international law or the incorporation of a social clause into the WTO.

2. Labour rights

Labour rights have been subject to international regulation since the creation of the ILO in 1919.[14] As underlined by Patrick Macklem, the creation of the ILO "was primarily a response to concerns by states that domestic labour market regulation would increase the price of production and create competitive disadvantages as against states that chose not to legislate to protect the interests of workers".[15] Labour rights were thus conceived at the origin as *workers rights*[16] and their development was mainly led by an objective of "fair competition" in the context of one of "the first major waves of globalisation".[17] At the same time, the establishment of the ILO may also be seen as the origin of the international human rights movement[18] and many human rights treaties have enshrined the recognition of labour rights as fundamental rights of all human beings. Among them, we can note the Universal Declaration of Human Rights (UDHR)[19] and the ICESCR. While the former was adopted by the General Assembly of the United Nations with no vote against[20], the latter is a legally binding instrument ratified by 160 States[21]. According to international human rights law, labour rights are *human rights*. Moreover, although the original aims of the ILO were defined in term of social justice and not in term of human rights, the ILO has since then emphasised the link between labour rights and human rights.[22]

According to Patrick Macklem, if labour rights are *human rights*, they protect "universal elements of what it means to be a human being from the exercise of sovereign power".[23] And if labour rights are *workers rights*, they are promoting "the exercise of sovereign power in ways that foster just relationships between employers

[14] International Labour Organization (ILO) Constitution, (adopted 1 April 1919, entered into force 28 June 1919) 15 UNTS 40.
[15] Macklem, 2005, p. 64.
[16] *Ibid.*, p. 63.
[17] Alston, 2004, pp. 462 – 463.
[18] Macklem, 2005, p. 61; Leary, 1996, p. 25.
[19] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).
[20] Oraá Oraá, 2009, p. 168.
[21] United Nation Treaty Collection – Databases, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en, (consulted on 2 July 2012).
[22] Leary, 1996, p. 39.
[23] Macklem, 2005, p. 61.

and employees".[24] But those two views are certainly not incompatible, as highlighted by Virginia Leary: "Today, we use the terminology of human rights rather than social justice, but human rights cannot exist without social justice. The rights of workers must be seen as essential to issues of social justice, human rights, and democracy and must be promoted as such".[25] It is thus why the same author points out "the regrettable paradox" that "the human rights movement and the labour movement run on tracks that are sometimes parallel and rarely meet".[26]

Concretely, if it seems that some labour rights are well recognised as human rights, such as the prohibition of forced labour or the right to join or form a trade union, "there is less agreement about the normative value and interpretation" about some other labour rights that sometimes risk to be considered as "technical labour standards", such as the right to a minimum wage or the right to safe working conditions.[27] Similarly, it is argued that "a formulation of the right to work/employment has only remained in such general and ambiguous provisions that it is difficult to confirm its existence as internationally recognised human right".[28] When analysing labour rights, focussing on their recognition in the ICESCR is thus lead by the necessity to defend labour rights as *human rights*. Moreover, this focus permits to avoid the recent development by the ILO of "core labour standards", which could lead to a minimal view on labour rights.[29] It can be argued that this recognition of labour rights as human rights is significant in regard to the trade and labour rights debate because of the strength of human rights as a legal and political argument. The first section of this chapter will then examine the rationales behind the recognition of labour rights in the ICESRC, the normative content of the rights and the corresponding states obligations. The following section will focus on the recent approach adopted by the ILO for the promotion of labour rights and on how this approach could undermine the recognition of some labour rights as human rights.

[24] *Ibid.*, p. 62.
[25] Leary, 1996, p. 43.
[26] *Ibid.*, p. 22.
[27] *Ibid.*, p. 38.
[28] Drzewicki, 2001, p. 235.
[29] Alston, 2004.

2.1. Labour rights under the ICESCR

2.1.1. The right to work and the rights at work

2.1.1.1. The right to work and the rights at work as fundamental rights

The right to work and the rights at work have been enshrined in different human rights treaties and are recognised as being part of the set of economic, social and cultural rights. It is interesting to formulate some further observations regarding the *raison d'être* of the right to work and the rights at work as a fundamental rights. It certainly allows a better understanding of those rights and their normative content. Manuel Branco underlines that the majority of the world population lives today in a capitalist society where the means of production are privatised and that this majority of people cannot ensure its subsistence through the access to lands.[30] Regarding this capitalist mode of production, the main way to ensure our subsistence is to obtain an income through our labour.[31] "Therefore, in a society characterized by the wage relation, to live means to work".[32] It is important to note that this wage relationship is characterised by an intrinsic inequality, the wage promised to the job seeker being directly linked to his/her economic survival, which constitute an impediment to his freedom of contract. Indeed, a wage relation is supposed to engage two parties with an equal negotiation power but the fact that one party has its economic survival in the balance weakens its negotiation power and threatens the equality of the two parties in the negotiation process.[33] If it can be agreed with those statement, it is also important to bear in mind that the right to work, seen a way to earn an income, should include the right to be self-employed and should not necessary mean the right to enter in a wage relation. Moreover, if most of the people live today in a capitalist society, some are not. In this regard, the question has to be asked whether economic activities of indigenous

[30] Branco, 2009, p. 26.
[31] *Ibid.*, p.27.
[32] *Ibid.* p.26.
[33] *Ibid.*, p. 27

people should be considered under the right to work.[34] Speaking about economic rights in general, Shareen Hertel and Lanse Minkler affirm that "all humans have an inherent right to the resources necessary for a minimally decent life. Economic rights may mean more than that, but they surely mean at least that".[35] Correlatively, it is important to understand the role played by the right to work in securing other economic, social and cultural rights. According to Philip Harvey, "this contributory function stems in part from the breadth of the right to work itself and in part from its effect on both the level of unmet social need in a society and the level of resources available to meet those needs".[36] Indeed, the right to work can contribute to ensure adequate standards of living to people around the world but the right adequate standard of living stands as a human right by itself and is recognised in the ICESCR [Article 11] and the right to work is thus the right of people to earn their livelihood by themselves.[37]

Beside this link to economic survival, it is important to understand other dimensions of the right to work. Krzysztof Drzewicki stresses the importance of other perceptions of the right to work. First, as we have seen "the interdependence between labour conditions, social justice and universal peace" played an historic role in the recognition of labour rights and social justice and continues to be a "prime objective" of the ILO.[38] Second, "the concept of labour as human value, social need and a means for self-realisation and development of human personality" is also deservedly integrated in the ILO discourse.[39] According to him then, it is through this link to social justice and human dignity that the right to work was recognised as a human right. It is indeed primordial to not consider the right to work as only a way to earn an income but also as a mean of social accomplishment. This view is supported by the fact that for "people who do not participate in economic activities, the lack of participation is seen as a

[34] Human Rights Resources Center – University of Minnesota, Circle of Rights - Economic, Social and Cultural Rights Activism : A Training Resource, Section 5, Module 10, http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module10.htm (consulted on 2 July 2012).
[35] Hertel and Minkler, 2007, pp. 1-2.
[36] Harvey, 2007, p. 118.
[37] Human Rights Resources Center – University of Minnesota, Circle of Rights - Economic, Social and Cultural Rights Activism: A Training Resource, Section 5, Module 10, http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module10.htm, (consulted on 2 July 2012).
[38] Drzewicki, 2002, p. 223.
[39] *Ibid.*, pp. 223-224.

severe deprivation by these victims of unemployment. It can lead to social isolation and to the disintegration of personality".[40] If the right to work is seen as a mean to social accomplishment, it seems clear that this work must fulfil some characteristics, like being a decent work, freely chosen or accepted in order to fully fulfil this function. Indeed, CESCR stresses the importance of a work freely chosen or accepted while "respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work".[41]

Finally, CESCR recognised the importance of the different dimensions of the right to work in the following words: "Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community".[42] This statement expresses clearly the need to understand the right to work in its economic as well as its social dimension. Both dimensions have to be considered in an interdependent relation with the rights at work, such as the right to earn a living wage and the right to just and fair working conditions, in order to be completely fulfilled. The right to work has also to be understood as being in interrelation and in interdependence with others human rights. For instance, the right to occupational health and safety is "strongly supported by the more general right to health".[43] The right to a work freely chosen and accepted is also linked to the prohibition of slavery and forced labour.

2.1.1.2. The content of the right to work and the rights at work

The right to work is recognised by article 6 of the ICESCR as follow:

[40] Human Rights Resources Center – University of Minnesota, Circle of Rights - Economic, Social and Cultural Rights Activism : A Training Resource, Section 5, Module 10, http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module10.htm (consulted on 2 July 2012).
[41] E/C.12/GC/18, 24 November 2005, par. 4.
[42] *Ibid.*, par. 1.
[43] Spieler, 2005, p. 280.

"1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual".

The right to work is thus "the right for everyone to gain his living by work" and "encompasses all forms of work, whether independent work or dependent wage-paid work"[44]. The right to work means thus "the right to work means, first of all, the right to participate in the producing and servicing activities of human society and the right to participate in the benefits accrued through these joint activities to an extent that guarantees an adequate standard of living".[45] This chosen definition could include activities of indigenous people, such as fishing or hunting and the right to work could then contribute to protection of these activities. However, this issue is also closely connected to land rights, which is a complex and controversial issue in itself.[46] Without undermining the importance and the relevance of the question, this issue will thus not be included in the scope of this paper. Krzysztof Drzewicki has accurately qualified the right to work as "nothing but a complex normative aggregate, and not a single legal concept"[47] and different aspects of the right to work have to be identified and analysed.

The legal recognition of a right to work raises the difficult and controversial question of the existence of a right to have a job. In its General Comment No. 18, CESCR declares that "the right to work should not be understood as an absolute and

[44] E/C.12/GC/18, 24 November 2005, par. 6
[45] Human Rights Resources Center – University of Minnesota, Circle of Rights - Economic, Social and Cultural Rights Activism : A Training Resource, Section 5, Module 10, http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module10.htm (consulted on 2 July 2012)
[46] *Ibid.*, Section 5, Module 18, http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module18.htm, (consulted on 2 July 2012)
[47] Drzewicki, 2002, p. 227

unconditional right to obtain employment".[48] This should not imply the meaningless of the right to work in terms of the quantity of jobs available. According to Philip Harvey, "the right to work is intended to protect the right of job-seekers actually to be employed in freely chosen jobs, not simply to compete on terms of equality for scarce employment opportunities".[49] However, it is truly difficult to argue that the general understanding of the right to work does include the possibility to claim the individual right to have a job in front of a Court. Regarding this issue, José Pérez declares that the "right to work is paradoxical from a legal point of view".[50] According to him, if we consider the right to work as a simple promotion of the principle of full employment, its usefulness is quite limited since governments always seek to reduce unemployment. But if we consider the right to work as a legal rule which entitles individuals to claim their right to have a job, "it is a right that cannot be secured, because if we do not change something fundamental in our economies, there always will be some unemployed".[51] The assumption that governments always seek to reduce unemployment has to be nuanced. If in theory it is often in the politic interest of governments to reduce unemployment, it doesn't mean that other policies cannot enter in conflict with this goal. According to José Pérez, "we can examine the policy choices that governments make from a political or an economic point of view, but not from a legal one".[52] However, most of economic, social and cultural rights are linked to policies which might be difficult to assess in legal terms. Nevertheless CESCR declares in its General Comment on the right to work that "the adoption of legislation or policies which are manifestly incompatible with international obligations in relation to the right to work"[53] are a violation of the right. For this reason, the recognition of the right to have a job, even as a simple principle of full employment, might have relevance from a legal point of view.

An important dimension of the right to work is the right to the protection of employment. Mainly, this has been translated concretely by the protection against unfair dismissal. In its General Comment n° 18, CESCR held that the right to work includes

[48] E/C.12/GC/18, 24 November 2005, par. 6.
[49] Harvey, 2007, p. 123.
[50] Pérez, 2005, p. 221.
[51] *Ibid.*, p. 221.
[52] Pérez, 2005, p. 221, note 3.
[53] E/C.12/GC/18, 24 November 2005, par. 32.

"the right not to be deprived of work unfairly".[54] The Termination of Employment Convention of the ILO[55] defines the lawfulness of a dismissal in those terms: "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service" [Article 4]. The maintenance as well as the access to employment is also protected against discrimination. CESCR recalls in its General Comment on the right to work that "under its article 2, paragraph 2, and article 3, the Covenant *prohibits any discrimination in access to and maintenance of employment* on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social *or other status*, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality".[56] The protection against unfair dismissal as well as the prohibition of discrimination based on "other status" are particularly relevant in regard to unfair dismissal or discriminatory treatment of trade unionists.

The right to a work freely chosen and accepted is intrinsically linked to the prohibition of slavery, servitude and forced labour. CESCR has reaffirmed the link between the right to work and the prohibition of forced labour as enunciated in article 4 of the UDHR, article 5 of the Slavery Convention and article 8 of the International Covenant on Civil and Political Rights[57].[58] Forced labour is defined by the Forced Labour Convention of the ILO[59] as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" [Article 2(1)]. This dimension of the right to work presents certain relevance in the current European context. Regarding the alarming increase of the youth

[54] *Ibid.*, par. 4
[55] C158 - Termination of Employment Convention (adopted 22 June 1982, entered into force 23 November 1985) 1753 UNTS 380
[56] *Ibid.*, par. 12
[57] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
[58] *Ibid.*, par. 9
[59] C029 – Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55

unemployment rate in developed countries[60], the European Union encourages Member States to take appropriate actions to promote youth employment, including "supporting a first work experience and on-the-job training".[61] If the initiative has to be welcomed, one must be careful concerning the forms that this support might take. For instance, in the United Kingdom, it has been argued that some government work experience schemes, including those aimed at combating youth unemployment are violating the right to a work freely chosen or accepted. Indeed, "two jobseekers were illegally forced to take part in government work experience schemes, without pay and under the "menace of penalty" of losing their benefits".[62]

After examining the right to work recognised in article 6 of the ICESCR, the rights at work recognised in article 7 of the ICESCR will now be examined:

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
(a) Remuneration which provides all workers, as a minimum, with:
(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
(b) Safe and healthy working conditions;
(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of Seniority and competence;
(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays".

[60] Youth employment, http://www.ilo.org/global/topics/youth-employment/lang--en/index.htm (consulted on 2 July 2012).
[61] Youth employment: opportunities, http://europa.eu/legislation_summaries/employment_and_social_policy/community_employment_policies/em0054_en.htm (consulted on 2 July 2012).
[62] Shiv, 2012.

While the General Comment on the right to work of CESCR focuses on article 6 of the ICESCR, the Committee stresses that the term "work" in this article must be understood as *decent work.*[63] This qualitative aspect of the right to work includes components such wages, working hours, working conditions (particularly occupational health and safety). Those components are thus an inherent and fundamental part of the right to work and article 6 and 7 are closely interrelated and interdependent.

The right to a remuneration which provides a decent living standard for the worker and his/her family is a necessary component of the right to work if we agree that one of the rationales behind of the right to work is to allow individuals to ensure their own economic survival. Philip Harvey stresses that the right to work "has not been secured if employment is only made available on terms that leave full-time workers in a condition of poverty".[64] A living wage might be difficult to determine and might depend on the country considered but this shouldn't undermine the reality of this dimension of the right to work guaranteed by the Covenant.[65]

The right to health and safety working conditions is supported by the right to health, "increasingly recognised as a necessary component of social and economic rights that guarantee physical security".[66] Emily Spieler underlines that "the recent development of a literature on the right to health challenges the relegation of occupational safety and health to a lower tier of importance in labour rights discussions".[67] The right to health and safety working conditions is an important component in the realisation of the right to health when we know that "workplace risks are a significant source of morbidity, mortality, and disability".[68]

2.1.2. The right to form and to join trade unions

Article 8, par. 1 of the ICESCR recognises the right to form and to join trade unions:

[63] E/C.12/GC/18, 24 November 2005, par. 7.
[64] Harvey, 2002, p. 381.
[65] *Ibid.*, p. 381.
[66] Spieler, 2005, p. 279.
[67] *Ibid.*, p. 281.
[68] *Ibid.*, p. 281.

"1. The States Parties to the present Covenant undertake to ensure:
(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country."

The right to join and form trade unions, together with the right to bargain collectively, stem directly from the right to freedom of association. However, these rights have also to be understood is the context of their relation to the right to work and the rights at work. According to Patrick Macklem, the *raison d'être* of those rights can be seen from different perspectives. On the one hand, those rights exist because "domestic social justice requires that employees be entitled to participate in establishing the terms and conditions of work".[69] On the other hand, they are "an element of freedom of association, which it regards as part of what it means to be a human being".[70]

The dimension of collective bargaining thus plays a role in securing other labour rights. Indeed, "it is often only through the collective strength that workers can muster

[69] Macklem, 2005, p. 62.
[70] *Ibid.*, p. 62.

in a trade union that they can hope to protect their economic, social and occupational interests".[71]

The right to bargain collectively is not explicitly mentioned in the article 8 of the Covenant but CESCR declared that this right was included in the right of a trade union to function freely.[72]

2.1.3. The obligations of states

Under article 2 (1) of the ICESCR, each state has the obligation "to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant".

Before analysing in more details the significance of this article in term of states obligations, it is necessary to underline that states parties to the Covenant have in any case the obligation to move towards the full realisation of the right. They also have the obligation to achieve this full realisation at some point. The concept of progressive realisation and available resources cannot therefore be used as an excuse for states to undermine their responsibility in the full implementation of this right.

The progressive realisation of economic, social and cultural rights has often been misinterpreted[73] and the nature of the obligations of the states under the ICESCR has been clarified by the General Comment No. 3 of CESCR. The Committee recalls that the *raison d'être* of the Covenant is *"*to establish clear obligations for States" and that "it thus imposes an obligation to move as expeditiously and effectively as possible" towards the full realization of the rights guaranteed by the Covenant.[74]

The progressive realisation of the rights does not prevent some obligations under the ICESCR to be of immediate effect. Indeed, the obligation *to take steps* is of immediate effect, together with the obligation to undertake the guarantee of the non-discrimination in the enjoyment of the rights enunciated by the Covenant [article 2

[71] Fenwick, 2002, p. 55.
[72] Macklem, 2005, p. 71.
[73] Eide, 2001, p. 22.
[74] E/1991/23, 14 December 1990, par. 9; Eide, 2001, p. 22.

(2)][75]. In addition, CESCR recognises that other provisions of the Covenant "would seem to be capable of immediate application by judicial and other organs in many national legal systems".[76] The right to form and to join trade unions contained in article 8 and the right to fair wages and equal remuneration contained in article 7 (a) (i) are thus of immediate application according to CESCR. At the same line, the Limburg principles affirm that "although the full realisation of the rights recognised in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time".[77]

The understanding of the progressive realisation of these rights by the Committee also includes the view that "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".[78]

Article 2 (1) of the Covenant declares that each states has the obligation to take steps *to the maximum of its resources available*. Indeed, it is often alleged that the realisation of economic, social and cultural rights requires the use of resources while the realisation of civil and political require only negative obligations by the States. It seems quite clear that it is an oversimplification.[79] The Maastricht Guidelines declares that "in many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications".[80] For instance, the adoption of legislations which protect workers, such as legislation guaranteeing a living wage or limiting working hours does not necessarily have resource implications. It could be argued that their enforcement does not imply more significant resources in comparison to civil and political rights.

Like other human rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. The *obligation to respect* requires State parties to refrain from interfering directly or

[75] E/1991/23, 14 December 1990, par. 1 – 2.
[76] *Ibid.*, par. 5.
[77] Limburg Principles, 1987, par. 8.
[78] E/1991/23, 14 December 1990, par. 9.
[79] Eide, 2002, p. 24.
[80] Maastricht Guidelines, 1997, par. 10.

indirectly with the enjoyment of those rights. The *obligation to protect* requires States parties to take measures that prevent third parties from interfering with the enjoyment of those rights. The *obligation to fulfil* includes the obligations to provide, facilitate and promote those rights.[81] Following this framework, the General Comment No. 18 of CESCR identifies the specific obligations of states under article 6 of the ICESCR. It can noted that the Committee declares that the *obligation to protect* includes that "specific measures to increase the flexibility of labour markets must not render work less stable or reduce the social protection of the worker".[82] Such a comment has not yet been made with regard to articles 7 and 8 of the Covenant.

A better way to understand the content of labour rights and the correlative obligations of states might be to adopt a "violations approach".[83] This "violations approach" was developed by a group of international human rights experts and resulted in the formulation of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights by this group of experts[84]. Those guidelines identify clear violations of economic, social and cultural rights. In its General Comment No 18, CESCR reproduces the "violation approach" proposed by the Maastricht Guidelines and identifies violations by states of their obligations under the article 6 of the Covenant. In a general way, the Committee states that: "Violations of the right to work can occur through the direct action of States or State entities, or through the lack of adequate measures to promote employment. Violations through acts of omission occur, for example, when States parties do not regulate the activities of individuals or groups to prevent them from impeding the right of others to work. Violations through acts of commission include [...] the adoption of legislation or policies which are manifestly incompatible with international obligations in relation to the right to work".[85] In a more specific way, the Committee declares that violation of the obligation to respect includes "the failure of states parties to take into account their legal obligations regarding the right to work

[81] See for instance, E/C.12/GC/18, 24 November 2005, par. 22
[82] *Ibid.*, par. 25
[83] Chapman, 2007, p. 155-156
[84] *Ibid.*, p. 155
[85] E/C.12/GC/18, 24 November 2005, par. 32

when entering into bilateral or multilateral agreements with other States, international organizations and other entities such as multinational entities".[86]

2.2. Labour rights under the ILO Framework

Since 1919, the ILO has played an important role in the development of international labour standards by the adoption of a number of Conventions and Recommendations. Those Conventions and Recommendations are of fundamental importance in order to better understand the normative content of labour rights. Labour rights recognised in articles 6, 7 and 8 of the ICESCR can be read in relation with corresponding ILO Convention which constitutes useful tools of interpretation. CESCR itself has used the Forced Labour Convention or Termination of Employment in order to define forced labour and unfair dismissal.[87] The choice focussing on the recognition of labour rights in the ICESCR is a conceptual choice led partly by the low rate of ratifications of some ILO Conventions[88] in comparison with the ICESCR, which is widely ratified (with the notable and unwelcomed exception of the United States) and partly because of the recent ILO approach in regard to "core labour standards" explained below, approach which might undermine the recognition of certain labour rights as *human rights*.

In 1998 the ILO adopted the Declaration on Fundamental Principles and Rights at Work[89], which privileges what has been called a set of "core labour standards"[90], consisting of the rights to freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation. The particularity of these "core labour standards" is that all member of the ILO have to respect them, "whether or not they

[86] *Ibid.*, par. 33
[87] *Ibid.*, par. 9 and 11.
[88] ILOLEX – Databases of International Labour Standards – Ratifications, http://www.ilo.org/ilolex/english/newratframeE.htm (consulted on 2 June 2012)
[89] Declaration on Fundamental Principles and Rights at Work (adopted 6 June 1998) 37 ILM 1233
[90] Alston, 2004, p. 458.

have ratified the relevant ILO Conventions"[91]. However, these "core labour standards" as such are "subject only to monitoring by strictly promotional means" and not to the supervisory mechanisms of the ILO[92]. Philip Alston considers that this "emphasis on promotional techniques" is likely to lead to a "gradual downgrading of the role of the ILO's traditional 'enforcement' mechanisms"[93]

This reflects only a part of the criticism brought by some authors about these "core labour standards". The choice of the core can also be criticised and Philip Alston has alleged that this choice "was not based on the consistent application of any coherent or compelling economic, philosophical, or legal criteria, but rather reflects a pragmatic political selection of what would be acceptable at the time to the United States and those seeking to salvage something from what was seen unsustainably as a broad array of labour rights".[94]

The relevance of defining a core in itself can moreover be questioned by the fact that it establishes a hierarchy between different labour rights, considered as fundamental rights. Indeed, some of the components of the fundamental labour rights exposed above are not included in the "core labour standards" defined by the ILO. For instance, Clyde Summer emphasises that "there is no suggestion that there should be a global minimum wage or that a right to a "fair wage" or even a "living wage" is a core labour right. There is general acceptance that the differential in wages due to the availability of cheap labour serves as a legitimate comparative advantage in international trade and that low wage countries should not be deprived of this advantage".[95] In a more general way, we can say that the right to just and fair conditions of work is not part of the core. Yet, the importance of recognising these as rights is fundamental. Speaking about occupational health and safety, Emily Spieler stresses that "without a clear statement that workers have a human right to safe workplaces, international and national discussions can

[91] ILO, The ILO: What it is - What it does, International Labour Organization, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082364.pdf (consulted 2 June 2012), p. 14.
[92] Royle, 2010, p. 258.
[93] Alston, 2004, p. 458.
[94] Alston, 2004, p. 485.
[95] Summer, 2001, p. 66.

continue without any concern for the persistence of sometimes astonishingly abusive conditions".[96]

While this is not the space to analyse in detail the relevance of defining "core labour standards" or "core labour rights", the choice to consider the right to work under the ICESCR is partly made in reaction to the development of this core. Indeed, we can see a trend followed by many actors of the trade and labour rights debate to refer to the latter by only these "core labour standards".[97] The choice to consider labour rights under the ICESCR is thus led by the willingness to not adopt what we can call a minimalist view on labour rights while we analyse their compatibility with the WTO and the Global Economy. And to remind ourselves that the right to just and fair conditions of work is a fundamental right recognised in an international human rights instrument, including the right to a "living wage".

[96] Spieler, 2005, p. 276.
[97] Alston, 2004, pp. 475-476.

3. The WTO in the global economy

This chapter examine the WTO system as well as its implications in a broader context. After a brief historic and an explanation of its *raison d'être*, some fundamental concepts of WTO law as well as the basis of its functioning will be exposed. The focus has been put on the understanding of the underlying ideas of the WTO system while their technical implementation is treated more in an introductive way. Further precisions regarding this technical implementation will be exposed in the following chapters when necessary. WTO rules will then be examined in the context of the global economy in order to determine the fairness of WTO rules as well as their capability to fulfil the aims prescribed by the Preamble of the WTO Agreement.

Preliminary Observations

The WTO can be considered as "one component in the matrix of organizations and rules which regulate the global economy".[98] This statement implies two different consequences. On the one hand, the WTO cannot be held directly responsible for actions of other actors, such as other international organisations, Multinational Corporations (MNCs) as well as bilateral or multilateral investment or trade treaties, which also determine the direction of the economic globalisation.[99] However, as international trade rules under the WTO system are contributing to shape this economic globalisation, the WTO cannot be considered in complete independence of other actors or processes of this economic globalisation. For instance, the "growing economic, institutional and legal inter-linkages between trade and foreign direct investment have been acknowledged by the WTO itself[100] and WTO rules are certainly linked in a certain extent to the development of MNCs since it has been stressed that "trade

[98] Joseph, 2011, p. 2.
[99] *Ibid.*, pp. 2-3.
[100] WTO News, Trade and foreign direct investment, Press/57, 9 October 1996, http://www.wto.org/english/news_e/pres96_e/pr057_e.htm (consulted on 2 July 2012)

negotiators will have clearly in mind benefits to the major [MNCs] when negotiating at the WTO"[101].

3.1. Origins and raison d'être of the WTO

In 1994, the WTO Agreement gave birth to the first international organisation concerned by international trade. This was however not the first attempt to create such an organisation. In 1944, representatives of Allies Powers met at Bretton Woods to decide how "to stabilise and strengthen" the post-war global economy.[102] In order to fulfil this aim, the creation of three different institutions was considered: the International Bank for Reconstruction and Development (today part of the World Bank group), the International Monetary Fund, and the International Trade Organisation.[103]

From the idea that protectionist policies had contributed to the Great Depression, the ITO aimed to "supervise international trading rules and promote free trade among nations".[104] This idea was concretised by the adoption of the Havana Charter for an International Trade Organisation (Havana Charter)[105] at an international conference held in the framework of the United Nations (UN). However, the Havana Charter never came into force, partly due to the United Stated refusal to ratify it.[106] After the failure to agree on the creation of the ITO what remain was the General Agreement on Tariffs and Trade of 1947[107], corresponding to the trade chapter of the Havana Charter.[108]

The General Agreement on Tariffs and Trade of 1947 became a forum for negotiations of international trade rules and different rounds of negotiations made trade rules evolve. The Uruguay round, started in 1986, led to the creation of the WTO and transformed thus a forum of negotiations into an international organisation.[109] The

[101] Dine, 2005, p. 127.
[102] Joseph, 2011, p. 7.
[103] *Ibid.*, p. 7.
[104] *Ibid.*, p. 8.
[105] Havana Charter for an International Trade Organisation (adopted 24 March 1948, not in force), United Nations Conference on Trade and Employment, Final Act and Related Documents, E/CONF.2/78.
[106] Kinley, 2009, pp. 39-40; Benedek, 2009, p. 139.
[107] General Agreement on Tariffs and Trade 1947, (adopted 30 October 1947, entered into forced 1 January 1948) 55 UNTS 194.
[108] Benedek, 2007, p. 139; Joseph, 2011, p. 8.
[109] Joseph, 2011, p. 8.

WTO has now 155 Member States and with the recent accession of Russia (though a domestic ratification of the accession package is still pending)[110], the international organisation now includes all the significant world economies.

The general idea underlying the WTO is the concept of free trade and the rationale behind this idea is that free trade leads to economic growth and development.[111] An expression of this rationale is contained in the preamble of the WTO Agreement, which declares that international trade relations "should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, [...]".

Those "development-oriented trade prescriptions"[112] come from an original comprehensive approach taken by the UN Charter.[113] Indeed, articles 55 and 56 of the UN Charter consider international economic cooperation in a view to promote, inter alia, "higher standards of living", "full employment" together with "universal respect for, and observance of, human rights and fundamental freedoms". Wolfgang Benedek underlines that this comprehensive approach was not completely followed by the WTO Agreement.[114] Indeed, references to 'full employment' and 'raising standards of living' are limited to the preamble of the WTO Agreement and are not the object of further provisions. On the contrary, this comprehensive approach was followed to a greater extent by the Havana Charter, which contained a chapter on "Employment and Economic Activity" [Chapter II], including an article on "Fair Labour Standards" [Article 7].[115] Full employment and fair labour standards were thus not reduced to abstract goals but were the object of substantial provisions. For instance, article 2 of the Havana Charter recommended 'concerted action' with regard to employment under the sponsorship of the Economic and Social Council of the United Nations. There is

[110] Accessions – Russian Federation, http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm consulted on 8 June 2012.
[111] About the WTO – a statement by the General Director, http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm consulted on 7 June 2012.
[112] Kinley, 2009, p. 40.
[113] Benedek, 2009, p. 139.
[114] *Ibid.*, pp. 139-142.
[115] Benedek, 2009, p. 140.

nothing to suggest that those provisions would have been sufficient to ensure that economic cooperation complies with the aims set by the UN Charter but at this stage, it is important to note that the Havana Charter had also the merit to keep economic cooperation and international trade law under the UN framework, contrary to the WTO Agreement. Indeed, the WTO is not a specialised agency of the UN, as the World Bank or the International Monetary Fund. The remaining links between the GATT 1947 and the UN were broken by the will to establish the WTO in complete independence from the UN framework.[116] Therefore, international trade law was developed in an independent sphere from other fields of international law, including international human rights law. This can appear to be quite prejudicial for a harmonious development of the two fields.[117] However, even with the failure to establish a full comprehensive approach, the preamble of the WTO Agreement shows that at a first glance, international trade law and international human rights law are not fundamentally incompatible in regard to their basic aims[118]. This compatibility will be examined more in depth in the following chapter.

3.2. Basic concepts, rules and functioning

As underlined above (Section 3.1) the key concept of the WTO system is the idea of 'free trade', understood as the reduction of obstacles to international trade. This concept is itself supported by the "theory of comparative advantage".[119] Reducing export and import barriers and increasing trading flow would allow states to specialise in what they are best at producing and increase economic efficiency. By definition, each country has indeed a comparative advantage with regard to the production of a good. It means that this country has an advantage in producing this good in comparison with other goods it could produce. Therefore even if some countries do not benefit from an absolute advantage (advantage in the production of a good in comparison to another country), "some countries would gain, and none would lose" from trade because they

[116] Benedek, 2009, p. 139.
[117] De Schutter, 2010, pp. 21-22.
[118] Joseph, 2011, p. 12.
[119] *Ibid.*, p. 13.

can specialise in the production of goods for which they have a comparative advantage.[120] Correlatively, free movement of goods would "sharpen competition, motivate innovation and breed success".[121] To "static gains" from free trade, we must then add the "dynamic gains" engendered by this competition. Indeed competition leads to lower prices, which allows trade actors to invest. Then, "investment and competition accelerate innovation, which in turn, improves efficiency, increases productivity and generates more wealth".[122]

The WTO claims that reducing obstacles to international trade is made with the idea to promote an "open, fair and undistorted competition" and that the concepts of 'free trade' and 'fair competition' are translated in substantial rules by the different WTO agreements.[123] Three main agreements can be identified, corresponding to the three trade areas covered by the WTO: the General Agreement on Tariffs and Trade of 1994 (GATT 1994)[124], the General Agreement on Trade and Services[125] and the Agreement on Trade-Related Aspects of Intellectual Properties Rights[126]. Some other agreements cover specific trade sectors, such the Agreement on Agriculture (AoA)[127] or specific topics, such the Agreement on Subsidies and Countervailing Measures[128].

General principles can be identified from those agreements[129]. The general aim of non-discrimination in trading relations is translated by two main principles. On the one hand by the principle of the 'Most-favoured-nation' provides that a Member State cannot grant a special favour to products or services in provenance of another Member

[120] Theory of David Ricardo explained by Paul, 2003, p. 291.
[121] Understanding the WTO: Basics – The case for open trade, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm , consulted on 8 June 2012.
[122] Paul, 2003, p. 291.
[123] Understanding the WTO: Basics – Principles of the Trading System, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, consulted on 8 June 2012.
[124] General Agreement on Tariffs and Trade 1994, Agreement Establishing the World Trade Organization, Annex 1A, (adopted 15 April 1994, entered into forced 1 January 1995) 1867 UNTS 187
[125] General Agreement on Trade in Services, Agreement Establishing the World Trade Organization, Annex 1B, (adopted 15 April 1994, entered into forced 1 January 1995) 1869 UNTS 183.
[126] Agreement on Trade-Related Aspects of Intellectual Properties Rights, Agreement Establishing the World Trade Organization, Annex 1C, (adopted 15 April 1994, entered into forced 1 January 1995) 1869 UNTS 299.
[127] Agreement on Agriculture, Agreement Establishing the World Trade Organization, Annex 1A, (adopted 15 April 1994, entered into forced 1 January 1995) 1867 UNTS 410
[128] Agreement on Subsidies and Countervailing Measures, Agreement Establishing the World Trade Organization, Annex 1A, (adopted 15 April 1994, entered into forced 1 January 1995) 1867 UNTS 14.
[129] Understanding the WTO: Basics – Principles of the Trading System, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, (consulted on 8 June 2012).

State without granting it for all the Members. On the other hand by the principle of 'National treatment' imposes that imported and locally-produced goods are treated equally at least once foreign goods have entered the market[130]. Another general idea is that stability and predictability will reduce obstacles to international trade. This stability and predictability are thus aimed to be attained by WTO rules. For instance, through 'binding commitments', states secure ceilings on customs tariff rates, which gives a clearer view on business opportunities and encourages trade. While those different principles aims at reducing trade barriers, some general restrictions on trade which would normally violate WTO rules are permitted under the general exceptions clauses under article XX GATT for instance.

Beside those principles constituting the basis of WTO rules, some particular measures have to be considered. Article VI of the GATT 1994 states that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty". In the name of countering 'unfair competition', anti-dumping policies are thus permitted under the conditions set by the article VI of the GATT and by the Agreement on Implementation of Article VI of the GATT 1994.[131] In this case, States are allowed to act in contradiction with the GATT principles on binding tariff and non discrimination between trading partners since anti-dumping practice often means charging extra import duty on the 'dumped' product.[132] Concerning subsidies, those "that require recipients to meet certain export targets, or to use domestic goods instead of imported goods" are prohibited while the others are 'actionable' and permitted unless they can prove to have an adverse impact on the interest of another country.[133] Sanctions can be translated in countervailing measures. However, under the AoA some subsidies are still permitted although states agreed to reduce them [Part V, Article 9].

The different functions of the WTO are enumerated in Article 3 of the WTO Agreement. Firstly, the WTO "shall facilitate the implementation, administration and

[130] *Ibid.,* consulted on 8 June 2012.
[131] Agreement on Implementation of Article VI of the GATT 1994, Agreement Establishing the World Trade Organization, Annex 1A, (adopted 15 April 1994, entered into forced 1 January 1995) 1868 UNTS 201.
[132] Understanding the WTO: The Agreements – Anti-dumping, subsidies, safeguard: contingencies, etc, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm, (consulted on 20 June 2012).
[133] *Ibid.,* (consulted on 20 June 2012).

operation, and further the objectives" of the different agreements adopted during the Uruguay round of negotiation and of the further agreements adopted under its framework. Secondly, the WTO is a forum for negotiations between states concerning their multilateral relations in the matters covered by the WTO agreements or for further negotiations regarding their multilateral trade relations. Finally, the WTO is also responsible of the administration of two mechanisms established by multilateral agreements, the Dispute Settlement Mechanism (DSM) and the Trade Review Policy Mechanism.

The DSM is a strong mechanism of enforcement established by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)[134]. States commit to use this "multilateral system of settling disputes instead of taking action unilaterally".[135] The Dispute Settlement Body (DSB) is responsible for the functioning of the DSM. It is composed of all Member States. At the first stage, the DSM consists in consultations of Member States concerned in order to find an agreement [Article 4 DSU]. In case of failure to address the case through consultations, the DSB designates a WTO Panel to deal with the case, in case of one of party requests it [Articles 4, 6 and 8 DSU]. The decision of the panel will then be adopted (or rejected but only in case of all Member States vote against the decision) by the DSB [Article 16 DSU]. After that, states parties to the case have the possibility to appeal concerning points of law to the Appellate Body of the WTO [Article 17 DSU]. The recognition of the WTO Panel and Appellate Body as judicial bodies can be discussed their legal findings are only "recommendations that need to be adopted by the DSB in order for them to become binding".[136] However, the rejection of those findings requires the unanimity of vote and it is thus unlikely to occur since the Member State favoured by the decision is unlikely to vote against it. [137] "This fact, together with the independent

[134] Understanding on Rules and Procedures Governing the Settlement of Disputes, Agreement on Agriculture, Agreement Establishing the World Trade Organization, Annex 2, (adopted 15 April 1994, entered into forced 1 January 1995) 1869 UNTS 401.
[135] Understanding the WTO – Setting disputes: A unique contribution, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (consulted on 14 June 2012).
[136] Denkers, 2008, p. 14.
[137] Joseph, 2011, p.10.

functioning of the Panels and the Appellate Body, in practice, gives them a judicial character in an international law sense".[138]

3.3. The WTO in context

3.3.1. The fairness of WTO rules

The WTO aims to promote 'free trade' and 'fair competition' between States. Yet, many advance that this is far from being the reality and that in practice, developing states are disadvantaged in different ways by the system.[139] A strong statement on the issue is made by Thomas Pogge: "The asymmetries inherent in the current global economic (WTO) regime are well documented: It allows the rich countries to favour their own companies through tariffs, quotas, anti-dumping duties, export credits and huge subsidies"[140].

The establishment of the WTO did not occur in a world that is economically "neutral". The existence of a strong unbalance between states powers, due to colonialism, slavery and "geographical disadvantages compounded by this exploitation" has been extensively forgotten by the analysis concerning 'free trade', comparative advantage and "efficient allocation of resources, labour and capital" which are claimed by the WTO.[141]

The unbalance between economic powers is for example reflected inherently in the DSM.[142] Trade sanctions by powerful Western economies such as the United States, Japan or the European Union will have a much greater impact on compliance to DSM decisions than sanctions from other countries. Some emerging developing countries, particularly China, also have the possibility to compel compliance but small developing

[138] Denkers, 2008, p. 14.
[139] Joseph, 2011, p. 160; Dine, 2005, pp. 126 and s; Gathii, 2005, pp. 378 and s.
[140] Pogge, p. 3.
[141] Dine, 2005, p. 126.
[142] Joseph, 2007, p. 391.

states are undoubtedly disadvantaged by this system of sanctions.[143] Indeed, "the narrower the economic base, the easier it is to target sanctions to really hurt".[144]

Many observe that this unbalance was also reflected in the negotiations and in their outcome during the Uruguay Round and that it is still the case in the current Doha Round, where rich countries use pressure and threats to obtain support in the negotiations.[145] As a consequence, the fairness of WTO rules can seriously be challenged. For instance, developing states have during a long time faced difficulties to access Northern markets in the sector of textiles and clothing, products from which they usually benefit of a comparative advantage. The WTO Agreement on Textiles and Clothing (ATC)[146] was restricting access to this market by the imposition of quotas but this Agreement came to an end in January 2005 and textiles and clothing are now subject to GATT rules. Furthermore, the AoA is still subject subjected to important controversies. While developed countries protect their markets from agricultural products coming from developing countries, the practice of subsidies further distorts trade in this sector and leads to unfair competition.[147] The United States and the European Union continue to subsidise in an extensive way their agricultures. While it contributes to close markets to developing countries, which cannot benefit from their comparative advantage in this sector, another alarming issue is that "excess subsidized agricultural exports have made their way to developing states undercutting local farmers and driving them out of business".[148] On the other hand, certain subsidies "such as export subsidies and import substitution subsidies, which have historically been used by successful industrialisers to kickstart industries, are now forbidden. Other subsidies, also used in the past to promote industrialization by now-developed States, may be challenged and subjected to countervailing measures".[149]

[143] Joseph, 2007, p. 392; Paul, pp. 334 – 335.
[144] Dine, 2005, p. 128.
[145] Dine, 2005, pp. 127 – 131.
[146] Agreement on Textile and Clothing, Agreement on Agriculture, Agreement Establishing the World Trade Organization, Annex 1A, (adopted 15 April 1994, entered into forced 1 January 1995) 1868 UNTS 14.
[147] Gathii, 2005, pp. 378 – 380.
[148] Joseph, 2007, p. 396.
[149] Joseph, 2011, p. 155.

Some developed States present a paradoxical position with regard to 'free trade'. While they advocate clearly on the international stage for the opening of the markets, they are not ready to accept all the consequences of what they stand for openly. Using the example of the U.S. Steel Tariffs, this hypocrisy can be expressed in the following way: "The United States found itself in the awkward position of preaching free-trade as the painful-but-necessary answer to the economic crisis in the Third World while being unwilling to bear any such pain itself. If the United States, with its strong, diverse economy could not accept the obvious financial implications of global competition with lower-cost steel suppliers, why should economically weaker states be expected to do the same"?150 It has also been exposed that the complexity of WTO dumping rules favours developed states which possess a better technical expertise. Moreover, hypocrisy is observed again from the part of developed states while the United States applies different dumping standards to foreign products that those followed at the domestic level. It thus has been argued that "US dumping law is abused to target international competition rather than to target unfair competition".[151]

Consequently, it has been argued that even if 'free trade' and 'fair competition' constitute in theory the general ideas behind the WTO, "in reality, it is an institution that enables countries to bargain about market access" and that "'free trade' is not the typical outcome of this process"[152]. At the very least, one must acknowledge the maintenance of important barriers that certainly undermine the "fairness" of the competition claimed under the WTO banner.

3.3.2. The WTO and standards of living

As underlined above (Section 3.1), even in the WTO discourse, 'free trade' is not an end in itself. The idea is that 'free trade' will lead to economic growth, produce global wealth and improve standards of living. Yet, those are actually just assumptions

[150] Wood and Lewis, 2005, p. 386.
[151] Joseph, 2011, p. 156.
[152] Rodrik, 2001, p. 34.

that should not be taken for granted and that will be challenged in the following paragraphs.

3.3.2.1. 'Free trade' and economic growth

The idea that 'free trade' will lead to economic growth relies on the theory of comparative advantage (Section 3.2). Yet, this theory rests on the assumption, "that both importing and exporting countries have perfectly competitive markets".[153] 'Perfect market' allow prices to be adjusted to the real cost of production and then determine the 'real' comparative advantage of a State. In this manner, comparative advantage permits to allocate resources in an optimal way. Yet, "neo-liberal economists readily acknowledge that there is a gap between the compelling logic of the comparative advantage and real market conditions. In actuality, most goods and services are not traded in perfect conditions".[154] The preach for trade liberalisation as a path to economic growth has to be seriously nuanced by the fact that in the real world, the market does not work independently of any other factors and the theory of comparative advantage has to be applied with reserve.

3.3.2.2. 'Free trade', economic growth and standards of living

More fundamentally, one can question the assumption that free trade will lead to the improvement of standards of living. It is believed that 'free trade' will improve the life of people around the world by the creation of global wealth. It is true that as we have seen, 'available resources' is an essential component to the realisation of economic, social and cultural rights. However, the dangerous part of the assumption is the belief (or the pretention) that this global wealth will improve standards of living automatically and in an equal manner for everybody. One can easily imagine that this is not the case. "In fact, there is substantial evidence that growth of international trade has

[153] Paul, 2003, p. 292.
[154] *Ibid.*, p. 292.

increase global income inequality".[155] Thomas Pogge also underlines by the support of statistics that "there is a clear pattern: the global poor are not participating proportionately in global economic growth".[156]

Sarah Joseph stresses that: "The theory of comparative advantage holds that the removal of trade barriers is beneficial for all States by improving aggregate wealth, but it has little to say about distributional outcomes. From a human rights point of view, it is the effect of free trade on human beings that is important".[157] In the same line, Koen De Feyter highlights that "the difficulty with the market-friendly approach to human rights is that it accepts the logic of the exclusiveness of the market" and that "social justice is at best a long-term objective that can be delayed indefinitely as long as the creation of growth remains the priority". [158] This is indeed an important gap of the 'free trade' theory. The WTO rules do not provide any kind concrete guarantees that economic growth will actually benefit to the whole range of society. It is thus necessary to ask whether it is legitimate to pursue the aim of economic growth without linking it with its supposedly desirable impacts.

Furthermore, we can say that the concept of 'free trade' and the theory of comparative advantage acknowledge inherently that they will be winners and losers of the process of trade liberalisation.[159] "The "reshuffling" of production factors necessary to exploit comparative advantage can in real life take the form of companies' closure and job losses in some part of the economy".[160] But positive effects, such as the "start-ups of new firms, investment in increased production and vacancy announcement in other part of the economy"[161] are supposed to generate more gains than those lost due to the negative effects and this in reason of the greater efficiency in the allocation of resources. Consequently, 'winners' of the positive effects could compensate 'losers' of

[155] *Ibid.*, p. 308.
[156] Pogge, p. 2.
[157] Joseph, 2011, p. 40.
[158] De Feyter, 2005, p. 30.
[159] Paul, 2003, p. 301.
[160] WTO – ILO, 2007, p. 19.
[161] *Ibid.*, p. 19.

the negative effects.[162] As this compensation rarely happens in the real world, trade liberalisation might let losers in a difficult socio-economic situation.

It can be conclude from this examination of WTO rules in context that those rules have in some extent opposite effects that those claimed by the institution. The technical implementation of the ideas of 'free trade' and 'fair competition' has sometimes resulted in a greater distortion of competition and reducing trade barriers is a policy which is not always applied uniformly. It thus acknowledging this reality that the potential impact of WTO rules on the realisation of labour rights will be determined.

[162] Paul, 2003, p. 301.

4. Labour rights and the WTO in conflict

This chapter examine how WTO rules can impact on the realisation of labour rights as defined above. The first part identifies four main issues in regard to the interaction between WTO rules and labour rights. The first issue concern the potential adverse effect of trade liberalisation on employment. The second issue consider the claim that trade liberalisation lead to a race to the bottom in regard to wages and working conditions. The third issue analyse how international trade is linked to the phenomenon of outsourcing and whether this phenomenon undermine the protection of labour rights. The fourth issue is related to MNCs and labour rights and determine how international trade impact on this relation. A second part then analyse where a conflict could arise from a legal point of view. Finally, some debated solutions to the conflict are considered, such the interpretation of treaties under the rules of international law or the incorporation of a social clause into the WTO.

4.1. Where the conflict can take place

Preliminary observations

First, the WTO is an institution which conveys the economic model dominating today's world: capitalism. General economic principles, while not specific to the WTO system, might enter into conflict with labour rights. Indeed, the main underlying concept of our economic model is the private ownership of the means of production. The protection of the right to property, coupled with the idea of profitability is a fundamental idea of the system as well. Yet, labour is a productive factor. Limitation of working hours, imposition of minimum wages is reducing productivity to a certain extent. Therefore, labour rights can be seen as diminishing the profitability of the right to property.[163] Moreover, unemployment can also become a "very productive device".

[163] Branco, 2009, pp. 34-35.

Companies can strengthen employees' loyalty by proposing higher wages than competitive wages but in case of high level unemployment, companies will be able to "lower their efficiency wages" and their productivity will then increase. [164] In general terms, the threat of unemployment can be used against workers to impose those overtime working hours or bad working conditions in order to increase productivity and unemployment can thus be seen in a paradox way profitable to our economy. Pursuing greater productivity, an inherent component of our economic model, is thus putting labour rights under pressure.

Second, the WTO is also an institution which contributes to economic globalisation, understood as "a process aimed at breaking down States borders in order to allow free flow of finance, trade, production and, at least in theory, labour".[165] Before analysing the concrete impact of the WTO and the economic globalisation on labour rights, it is worth to make a general comment about the impact of economic globalisation on the capacity of the state to ensure their human rights obligations. Indeed, as highlighted by Koen De Feyter, "in human rights law, the state is the principal duty holder" but "in the law of economic globalisation, the state's role is primarily to facilitate the operation of market forces".[166] The latter leads thus the State to lose control in a certain extent on profit of the market forces. If it does not diminish their legal human rights obligations, in practice States might encounter greater difficulties to ensure them while they face greater and greater external influence on their economy and policies. As examined later in this chapter, States might also have difficulties to observe their human rights obligations from a legal point of view if those require the adoption of policies banned under WTO rules.

Third, following article 2 of the ICESCR, the realisation of economic, social and cultural, including labour rights, is function of the "available resources" of the States. While determining the "available resources" it is important to consider its fiscal dimension.[167] Trade liberalisation and the lowering of tariffs could undermine the capacity of the states to generate resources in order to fulfil their obligations in regard to

[164] *Ibid.*, p. 35.
[165] De Feyter, 2009, p. 51.
[166] De Feyter, 2007, p. 6.
[167] Steiner, Alston and Goodman, 2007, p. 305 – 307.

labour rights.[168] The Center for Economic and Social Rights considers that there is a "need to hold the state accountable for its efforts to generate and manage resources equitably and in accordance with its human rights obligations"[169] and engagement into WTO could also be considered from this perspective.

4.1.1. Trade liberalisation and employment

While the preamble of the WTO refers to the aim of "full employment" one can fear that opening markets to greater competition will increase foreign imports or process such as off shoring, or subcontracting which would lead to raise unemployment in some countries. In developed states, the concern is that trade liberalisation, by the increase of imports and the relocation of some productions, would lead to job losses due to the closure of different firms, especially in the industries sector.[170] There is no agreement concerning the role of international trade in the rise of unemployment and the important decline in manufacturing jobs in developed countries. Some argue that "there is a clear inverse correlation across developed countries between rising import penetration ratio and falling shares of manufacturing in employment, which is hard to interpret in anyway other than the forming causing the latter".[171] But others consider that "a closer look at the evidence shows that the growth of North-South trade does not provide a convincing explanation of the labour market problems in the industrial countries".[172]

This is not the space to propose new economic analysis and conclusions on the global influence of international trade on unemployment and decline of manufacturing industries. However, without drawing conclusive conclusions on the global effect of trade liberalisation, the theory of comparative advantage acknowledges by itself that trade liberalisation will lead to some restructuring in the economy and that some will lose in the process (Section 3.3.2.2). This situation is difficult to assess in term of obligations in regard to the right to work. As exposed above, the right to work does not

[168] De Schutter, 2010, pp. 21-22.
[169] Center for Economic and Social Rights, 2012, p. 2.
[170] Lee, 1996, p. 486.
[171] Wood, 1998, p. 1468.
[172] UNCTAD, 2001, pp. 2; see also Lee, 1996, pp. 486-488.

imply an unconditional right to have a job. Nevertheless, States have the obligation to make policies in order to ensure full employment and retrogressive steps constitute a violation of this obligation. It is however difficult to affirm that the losses of jobs due to the closure of a company constitute a retrogressive step due to a policy of trade liberalisation. In one hand, the causal effect of trade liberalisation might be difficult to prove and on the other hand, a classical economic argument is that the global effect of this policy can actually be positive in regard to employment and not limited to this closure. But this positive effect of trade liberalisation should not be taken for granted. States cannot justify the adverse and retrogressive effect of a policy on the right to work by the abstract affirmation that this policy will lead to the creation of further jobs. The fact simple that the international community agreed through the WTO agreement that trade liberalisation will contribute to the goal of full employment does not ascertain the actual links between both. If trade liberalisation is a policy completely independent of job creation, there is no point to assess its contribution to this aim, although its potential adverse effect could be assessed. But if trade liberalisation is claimed to be part of the states policies to ensure full employment, its efficiency can be questioned in regard to the full realisation of the right to work. Yet, this policy presents an important gap which can lead to doubt of efficiency. This gap is that the policy rests on assumptions that are highly challenged in theory and in practice, especially the link between economic growth and full employment. To emphasise this point, we can quote Manuel Branco which states that "it seems quite clear that an economy, which does not aim at full employment can only expect to reach it through the art of magic, in other words by some sort of supernatural trickle-down effect which takes full-employment as by-product of the attainment of higher ranked goals, such as perfect markets".[173] Therefore, even if the impact of trade liberalisation on the right to work in developed states is unclear, it would be interesting to analyse the relation between trade liberalisation and the right to work in terms of efficiency of trade liberalisation as supposedly oriented policy to realisation of the right.

It seems that the impact of trade liberalisation on employment is greater in some developing states. According to the United Nations Conference on Trade and

[173] Branco, 2009, p. 48.

Development, it is "hardly contentious" that lowering tariff and non-tariff barriers could impact negatively the employment rate in developing countries. Empirical studies from South-America and Sub-Saharan Africa show that trade liberalisation has been accompanied by an increase of unemployment[174]. While local industries cannot resist the 'introduction by trade liberalisation of 'well-financed offshore competitors'[175], new firms might take some time to settle/emerge due to the structure or capacity of the State. According to Sarah Joseph "the introduction of liberalizing measures which squeeze out local industries by opening up economies to well-financed offshore competitors leading to unemployment in many underdeveloped States because there are few alternative industries for workers to migrate to" is as regressive measure in the sense of the definition of CESCR.[176] The 'losers' in the South are found to be in more vulnerable situations than 'losers' in the North because developing states have a weaker capacity to ensure an effective social security and to provide adjustments programs. Pranab Bardhan argues that "international organisations that preach the benefits of free trade should take responsibility of funding and facilitating such adjustments assistance programs in poor countries that can help workers in coping with job losses and getting retained and redeployed".[177]

In some countries, the vulnerability of export-oriented industries to international market fluctuations might threaten the right to work of people employed in these industries. In this case, it is the unpredictable restrictions on trade by developed countries, allowed by technical WTO rules than can undermine the right to work.[178] This can be illustrated by the garment and footwear industry in Viet Nam. In this sector, increased competition "could increase the risk of employment" while "for instance, many workers were at risk of losing their jobs following the announcement of the EC on 23 February 2006 that it would apply an anti-dumping duty to leather shoes from Viet Nam and China".[179] Yet, the right to work cannot be secured without a certain element of stability. If it is inevitable is our current economic models to constrain the right to

[174] UNCTAD, 2001, p. 14.
[175] Joseph, 2011, p. 179.
[176] *Ibid.*, p. 179.
[177] Bardhan, 2010, p. 99.
[178] *Ibid.*, p. 96.
[179] Kinley and Nguyen, 2008, p. 24.

work to a certain dependence of the market, increasing market flexibility in a way that diminishes the stability of work in a permanent way might constitute a violation of the state's obligation of protection under the ICESR, as explained above (Section 2.1.3).

Another sector where trade liberalisation can have adverse consequences on the right to work, at least in the short term, is the sector of agriculture. For instance, when it acceded to the WTO, Viet Nam had an approximate of 60 per cent of its work force employs by the agriculture sector but this sector has a great lack of competitiveness in comparison with international actors. The self-employed farmers face indeed many constraints such as "credit, storage, marketing and insurance, access to new technology, extension service, and to infrastructures [...] and government regulations" that prevent them to be competitive.[180] People working in small-scale farms with a low rate of productivity are in position to be affected in many ways by the opening of the markets and risk of drop of employment in the sector is high. Workers are particularly affected by the Viet Nam agreement "to eliminate all agricultural export subsidies immediately upon its accession, in response to pressure from developed country members of the Working Party"[181]. While accession to world markets could potentially constitute an opportunity for the agricultural sector in the long term, adverse consequences on the right to work in the short term have to be taken into account from a human right perspective.

4.1.2. Labour as a productive factor and the race to the bottom

As preliminarily observed, labour is a productive factor which can be put under pressure by the will to increase productivity. Yet, trade liberalisation, through the theory of comparative advantage, is supposed to increase productivity by an efficient allocation of resources. But what if an efficient allocation of resources means to produce goods by workers who do not earn a living wages? At the Singapore Conference of 1996, WTO Members States agreed "that the comparative advantage of countries, particularly low-

[180] Bardhan, 2010, p. 96.
[181] Kinley and Nguyen, 2008, p. 27.

wage developing countries, must in no way be put into question".[182] Yet, this statement has to be questioned in regard to labour rights. If wages are low because the living costs of a given state are low in comparison to other states, then it could indeed be legitimate to consider low wages as part of the comparative advantage of a state[183]. But what if wages are low because States fail to adopt legislation guaranteeing a living wage or because they fail to enforce existing legislations? Is it then justified to consider wages as a factor of production which can be pressured in order to increase competitiveness? From a human rights point of view, this question has to be answered negatively. Wages which do not ensure the living of the worker and its family cannot be justified in the name of comparative advantage. The theory of comparative advantage does not induce directly production in working conditions violating human rights and WTO rules do not prevent expressly states to ensure living wages to workers. But to understand the effect of WTO rules on labour rights, it is needed once again to go further than the a priori contradictions. Indeed, an increased competition and a higher number of workers participating in the global market raises the fear that working conditions would be constantly subject to a race to the bottom. According to Eddy Lee, this race to bottom "is expected to happen through three interrelated channels"[184]. First, increasing competition would lead national and multinational companies to seek reducing costs by pressuring wages and workings conditions, notably through the relocation of some operations. Second, bargaining power would be weakened for the underlying reason "that the demand curve for labour becomes more elastic when the labour market becomes more exposed to foreign competition" [185]. Third, as already highlighted before, states might have a diminished regulatory capacity due to economic globalisation. Indeed, "the need to compete for export markets and foreign direct investment leads to respond favourably to the demand of domestic and transnational enterprises"[186]. However, according to Eddy Lee, there are no clear empirical evidences "on the strength of those forces".[187] While the exact impact of those phenomena might be

[182] WTO – Singapore Ministerial Declaration, adopted 13 December 1996, WT/MIN(96)/DEC, par. 4.
[183] Joseph, 2007, p. 414.
[184] Lee, 1996, p. 492.
[185] *Ibid.*, p. 492.
[186] *Ibid.*, p. 492.
[187] *Ibid.*, p. 492.

difficult to assess, their accuracy is underlined by different authors.[188] For instance, Pranab Bardhan recognises the weakening effect of globalisation on trade unions. According to him, "as foreign competition (or even the threat of it) lowers profit margins, the old rent-arrangement between employers and unionised workers come under pressure. Rents decline both for capital and labour, but labour may have to take a larger cut as internationally less mobile labour faces more mobile capital, or as companies can more credibly threaten substitution of foreign factors of production, including intermediate inputs, for domestic factors".[189] The bargaining power of trade unions is of fundamental importance for the insurance of living wages and decent working conditions, especially when the inability or unwillingness of some states to guarantee labour rights is proved.

Furthermore, it is necessary to examine what can happen if a state has a comparative advantage relying essentially on low wages and poor working conditions. The instauration of labour rights and the taking away of this comparative advantage, even if totally legitimate from a human rights perspective, could have adverse impacts in those countries, including on other aspects of labour rights such as the right to work with a decrease in employment.[190] This is reinforced by the fact that developing states have less capacity to resist to the social impacts of globalisation[191]. Developing States claim that this comparative advantage is legitimate since developed States also relied on poor labour conditions in order to develop their economy and their industry in the past[192]. This claim doesn't resist to a human right perspective. Robert Howse underlined that "aside from the monumental empirical assumption that lack of protection of workers' rights accelerated rather that menaced the industrial development of the West, its moral implications are very troubling. These become especially evident if we apply the same structure of argument to genocide – the developing world must have its fair opportunity to try out genocide before it arrives at the solution of multicultural liberal democracy"[193] and it is moreover interesting to compare developing States position with

[188] Oxfam, 2002, p. 82; Joseph, 2007, p. 407.
[189] Bardhan, 2010, p. 99.
[190] Joseph, 2011, p. 97.
[191] Bardhan, 2010, p. 99.
[192] Howse, 1999, p. 14.
[193] *Ibid.*, p. 14

the position of other southern actors. Indeed, some studies reveal that there is a strong support among trade unions in the South in favour of linking trade with labour standards.[194] But a fundamental question remained: if some developing States rely need to rely on low wages in order to be competitive and to survive in a global economy, then 'free trade' and theory of comparative advantage as defended by the WTO have to be seriously challenged. The historical unbalanced between power and the remaining distortions in the trade system show here one part of their consequences and have to be considered to fully understand the issue. An undermining of labour rights cannot constitute the solution to redress the balance and it is why WTO rules should acknowledge better that "we coexist within a single global economic order that has a strong tendency to perpetuate and even to aggravate global economic equality"[195] and that economic globalisation can only be justified if its social consequence are solved in a cooperative way by States.

4.1.3. International trade, outsourcing and labour rights

Furthermore, some important impacts of WTO rules on working conditions can only be understood by acknowledging the link between trade liberalisation and disintegration of production or outsourcing. Indeed, Robert Feenstra underlines that: "The rising integration of world markets has brought with it a disintegration of the production process, in which manufacturing or services done abroad are combined with those performed at home. Companies are now finding profitable to outsource increasing amount of the production process, a process which can happen either domestically or abroad".[196] Yet the phenomenon of outsourcing has considerable impacts on labour rights. The first issue concern the bargaining power of workers. For instance, Jamie McCallum underlines that "widespread outsourcing and subcontracting throughout the zones [...] provide difficult terrain for trade unions and for a coherent social dialogue system to take hold"[197]. In the same perspective, Mark Anner argues that the

[194] Griffin, Nyland and O'Rourke, 2003, p. 472.
[195] Pogge, 2001, p. 15.
[196] Feenstra, 1998, p. 31.
[197] McCallum, 2011, p. 12.

segmentation of the production has a negative influence on unionisation: "the horizontal dispersion of production facilities weakens labour's positional power in the manufacturing sector, further hindering its ability to push for better wages"[198]. Indeed, "apparel workers striking at one factory are unable to significantly interrupt the flow of products to large apparel retailers since these retailers have many other places to turn for additional and identical products".[199] While the lowering of bargaining power undermines indirectly working conditions in general through the incapacity to bargain for their improvement, outsourcing also impact directly on wages. Mark Anner indeed argues that "segmentation also increases labour costs as a percentage of total costs in the subcontractors while reducing sunk investment costs".[200] Increasing wages would then represent a greater cost for the subcontractors in comparison with companies functioning in integrated production and therefore subcontractors tend to keep wages low[201].

Another important issue concerning the phenomenon of outsourcing is the question of EPZs, defined as "industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being exported again".[202] The essence of activities occurring in EPZs, which is mostly assembly and processing performances is clearly linked to the phenomenon of outsourcing and is a perfect illustration of an internationally segmented industry.[203] Many human rights abuses regarding labour issues in EPZs have been reported.[204] Indeed, one way to attract investors in EPZs is to propose a weak regulatory framework regarding labour rights. Concretely, this can be translated by the non-application of some labour laws in the zone or more generally, by the non enforcement of such laws.[205] This weak regulatory environment is quite often translated in low labour standards for the workers of the zone. In some cases, low labour conditions are common to the whole State. However, the non-application and the non-enforcement of some

[198] Anner, 2011, pp. 318 - 319
[199] *Ibid.*, p. 310.
[200] Anner, 2011, pp. 318 – 319.
[201] *Ibid.*, p. 308.
[202] ILO, 1998, p. 3.
[203] Anner, 2011, p. 309.
[204] Lang, 2010, p. 18; Milberg and Amengual, 2008, p. 38.
[205] Perman, 2004, p. 7.

labour laws can also contribute to weaken labour conditions compared to rest of the country.[206] Again, the ban of trade unions and the non existence of the right to freedom of association, reality in a large number of zones, is an important factor in regard of the working conditions in EPZs.[207] The increased mobility of plants also contributes to lower bargaining power. The closure of the company in case of union success is indeed a risk that organisations of workers have to face. For instance, in 1998 in Guatemala, the company Philips-Van Heusen closed one of its firms because of the success of workers to form a trade union.[208]

4.1.4. International trade, MNCs and labour rights

If economic globalisation acknowledges the existence of winners and losers (who should be theoretically compensated), an important question is who are the winners and who are the losers? Sarah Joseph underlines that: "The winners have generally been MNCs, which conduct most of the world's international trade, and persons with high skills levels, who are likely to be more educated than lower skilled workers. Generally these winners are in the wealthier sectors of the society."[209] Indeed, globalisation "tends to privilege large companies who can capture new markets quickly and easily to the disadvantage of small and micro entrepreneurs who face difficulties gaining knowledge of - much less access to emerging markets"[210]. If the link between MNCs and international trade is examined further, it can also be asked whether international trade influence the creation itself of MNCs. On this issue, an empirical study on the case of Japan indicates "that engagement in international trade is an important factor for a firm to be multinational".[211] What is certain is that most of international trade is conducted by MNCs and that the WTO "undoubtedly enhances the power of MNCs".[212] If MNCs might not be directly in confrontation with labour rights,

[206] Perman, 2004, p. 7.
[207] Perman, 2004, p. 7-8.
[208] Klein, 2001, p. 260; Perman, 2004, p. 10-11.
[209] Joseph, 2007, p. 409.
[210] Carr and Chen, 2001, p. 2.
[211] Kiyota and Uruta, 2005, p. 13.
[212] Joseph, 2011, p. 3.

it is important to underline that "as firms have become more international, they have also become ever more independent of government control. Many of the largest [MNCs] have headquarters in one state, shareholders in others, and operations worldwide. If the host state fails to regulate the acts of the company, other states, including the state of the corporation's nationality, may well choose to abstain from regulation based on the extraterritorial nature of the acts at issue".[213]

This process is accentuated by the disintegration of trade since the process of outsourcing can make it more difficult to hold multinationals accountable. Indeed, the internationally segmented industry means that a significant number of MNCs are not in charge themselves of their production. This raises an important problem of responsibility. While sub-contractors present in the zones are directly responsible of the non-respect of human rights obligations, it should not mean that MNCs contracting with them should be exempted of all responsibilities in regard to human rights. Indeed, those MNCs often put a great pressure regarding cost and productivity on their contractors acting in the zones. This pressure is often at the origin of human rights violations, especially concerning wages and overtime hours. The UN Guiding Principles for Business and Human Rights state that the respect of human rights by Business Enterprises requires that they "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts".[214] However, if those operations constitute extra-territorial activities, the existence of states obligations to translate this responsibility into legal obligations for MCNs is controversial. Following the UN Guiding Principles for Business and Human Rights, "States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction"[215]. A different position is held by CESCR and by the Special Rapporteur on the Right to Food[216]. No matter what, the complexity of attributing responsibilities in the sub-contracting process is making

[213] Ratner, 2001, p. 463
[214] A/HRC/17/31, 21 March 2011, II, A, 13 (b)
[215] A/HRC/17/31, 21 March 2011, I, A, 2, Commentary.
[216] Coomans, 2011, p. 29.

the task of establishing legal responsibilities more complicated, which is not going to facilitate the accountability process.[217]

This lack of legal accountability has lead MNCs to some production practices entering badly in contradiction with labour rights, such as "whipsawing, union busting and union suppression" that are "used to keep labour costs low and workers quiet".[218] While some practices might not be specific to MNCs, this lack of accountability is alarming from a human rights point of view and "there is also some evidence that some MNCs not only depress wages and abuses core labour standards on a global level but often influence competitors to follow suit".[219]

4.2. Legal issues

After examining how the WTO rules can undermine the realisation of labour rights directly or through the lowering of the de facto state capacity to ensure their enjoyment, it is now time to examine whether the two set of rules can be found to be in conflict on a legal level.

4.2.1. Conflicting obligations

The first issue is to determine in which extent a legal conflict could arise between domestic regulation adopted by states in order to fulfil their labour rights obligations and the WTO legal system. In other words, could some domestic law protecting labour rights be considered incompatible with WTO law? For instance, such conflict could arise if some regulatory laws are considered to prevent market penetration.[220] According to Robert Howse and Ruti Teitel, while "many adjustment policies such as funding for generally available vocational training are entirely consistent with WTO rules", there is a risk that policies "targeted at specific sectors or

[217] Ratner, pp. 518 – 522.
[218] Royle, 2005, p. 253.
[219] *Ibid.*, p. 254.
[220] McCrudden and Davies, 2000, p. 52

firms with adjustment needs" would be considered as impermissible subsidies.[221] Indeed, providing that the policy enters in the definition of subsidies, this policy will be susceptible of actionability since "there are no subsidy programs that are explicitly protected as non-actionable".[222] Potentially, the WTO rules concerning subsidies could then undermine the legal capacity of States to ensure their obligation in regard to the right to work. As recognised by the ILO and by the WTO itself, "active labour market policies may also be a useful tool to facilitate adjustment to changes in the structure of production brought about by trade liberalisation. Measures to provide retraining for displaced workers and job search assistance to facilitate labour mobility will be important in this connection".[223] Such policies, and especially those provided by the article 6 (2) of the ICESCR, should then be protected and be considered as non-actionable subsidies.[224] Otherwise, there is a risk to States would be found in a situation of non-compliance with their obligation under the ICESCR if they are forced to comply with their obligations under the WTO agreements.

4.2.2. Measures promoting labour rights by market access restrictions

Another important legal issue is whether certain market access restrictive measures used by States to ensure the protection labour rights could enter in conflict with WTO rules?[225] The clearer example of those measures is of course trade sanctions adopted against States violating human rights but other measures than sanctions aim at restricting market access to products produced in violation of labour rights. For instance, Christopher McCrudden has discussed the legality under WTO law, and more particularly of the Agreement on Government Procurement[226], of the use of "selective purchasing" by States and local governments of the United States. States can also use

[221] Howse and Teitel, 2009, p. 51
[222] *Ibid.*, 2009, p. 52.
[223] WTO – ILO, 2007, 64 quoted by Howse and Teitel, 2009, p. 53.
[224] Howse and Teitel, 2009, p. 53.
[225] McCrudden, 2000, p. 52.
[226] Agreement on Government Procurement, Agreement on Agriculture, Agreement Establishing the World Trade Organization, Annex 4B, (adopted 15 April 1994, entered into forced 1 January 1995) 1869 UNTS 508

mandatory certification schemes in order to ban the import of products made in certain conditions.[227]

This legal issue has however to be framed differently from the previous one. Indeed, those measures are often aimed at promoting labour rights transnationally and it is not established that the adoption of those measures constitute States obligations in regard to labour rights. The imposition of general human rights sanctions, i.e. economic sanction imposed to a State because it has a poor human rights record, never constitute an obligation for States under human rights law[228]. Moreover, CESCR considers that "while the impact of sanctions varies from a case to another, the Committee is aware that they almost always have a dramatic impact on the rights recognised by the Covenant".[229] The adoption of measures aimed at restricting access to product made in violations of labour rights do not likely constitute a human rights obligation neither. Indeed, those measures are most of the time outward and the consideration of extraterritorial obligation of States would probably fail to include such coercitive measures since extraterritorial obligations are mostly cooperative[230]. Therefore, in a general way, we can affirm that this legal issue is not a conflict between two antagonist States obligations. The question is then simply whether those measures, which do not constitute labour rights obligations but which could enhance the protection and promotion of those rights, are compatible with WTO law. Before analysing this legal compatibility, it is necessary to examine if those measure do actually protect and promote labour rights and whether they could have an adverse impact on other labour/human rights.

Preliminarily, outward measures aimed at ensuring labour rights have been questioned by "one version of the anti-paternalism argument draws on the notion of cultural-relativism or cultural autonomy".[231] Jagdish Bhagwati indeed argued that "equation between specific labour standards and universal human rights cannot survive deeper scrutiny".[232] However, Robert Howse criticises this "very selective kind of

[227] Denkers, 2008, p. 54.
[228] Joseph, 2011, p. 96.
[229] E/C.12/1997/8, 12 December 1997 , par. 3.
[230] Joseph, 2011, p. 98.
[231] Howse, 1999, p. 13.
[232] Bhagwati, 1994, p. 57., quoted by Howse, 1999, p. 13

argument for cultural autonomy because it entails an admission that some rights are genuinely universal, just not labour rights" and underlines that "for instance, the idea that minimum wages are appropriately set to a country's level of wealth and economic development has nothing to do with cultural specificity; it emanates from a perspective on economic regulation that is purportedly universal".[233] This selective cultural relativism is indeed inappropriate and the recognition of the universality of human rights includes the universality of labour rights as recognised by human rights instruments. This does not mean that any measure adopted on the behalves of labour rights is appropriate to this objective. In this regard, some developing countries fear that developed countries hide under the claim of labour rights protection, some protectionist purposes. Clyde Summer has responded to this fear by arguing that "if only specific imports could be barred on proof that they were produced in violation of these rights, the ability to use the core labour rights for protectionist purposes would seem to be minimised".[234] If in absolute human rights terms, it is always legitimate to restrict market access to product made in violation of labour rights, it might be important to assess the actual impact of those market restrictions on labour rights. In practice, market restrictions can fail to improve labour rights by failing to change state policies. In this case, the measures are likely to have negative impact in targeted country, such economic collapses and losses of jobs, bringing other human rights into the balance. When imposing trade sanctions or other market restrictions it is thus primordial to assess whether those measures will effectively lead to a policy change. In case of positive assessment, measures can then constitute an important opportunity to improve labour rights, at least punctually. For this reason, it is worthwhile to examine the lawfulness of such measures under WTO law.

In order to determine the lawfulness of market restrictions based on violations of labour rights in the production process, a key concept is whether products made in respect of labour rights and products made in violations of labour rights can be considered as 'like' products. If they are, then market restrictions could be considered as violating the principle of non-discrimination, including the 'most-favoured nation'

[233] Howse, 1999, p. 13.
[234] Summer, 2001, p. 69.

principle and 'national treatment principle' enshrined in article I and article III of the GATT. Article I prohibits a *de jure* as well as *de facto* discrimination between goods from different countries. It means that even "a measure that does not explicitly distinguish between goods from different countries, and then seems origin neutral, may violate article I if the effect of the ban is discriminatory".[235] As discrimination occurs between two 'like' products, it has to be determined whether two products can be considered as 'unlike' because of their production process. Another relevant question is whether measures restricting market access to foreign goods could fall under the scope of application of article III of the GATT in case of similar measures also apply to domestic products. The measures could thus be seen as a domestic regulation applying indistinctively to domestic and foreign products. However, it has often be concluded in regard to the US – Tuna GATT panel decision[236], that "domestic measures based on (detectable) product characteristics fall within the scope of article III of the GATT whereas those based on production processes (which is only exceptionally detectable) fall outside its scope".[237] Moreover, it stems from the US – Tuna case and from the WTO-GATT case-law that two products cannot be distinguished by their production process since this process does not affect the characteristics of the products and that those products have to be consider as 'like product'.[238] Therefore, difference of treatment between those products can be considered as discriminatory and incompatible with article III.[239] If this jurisprudence on 'likeliness' under article III is applied to 'likeliness' under article I then any difference of treatment between products based on the way they are produced is also susceptible to constitute a de facto discrimination under this article.

If measures aimed at restricting market access are found to be violating Article I or Article III of the GATT, those measures could still be legal through the GATT exceptions clause. Article XX of the GATT provides that: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of

[235] Denkers, 2008, p. 20
[236] Panel Report, United States – Restrictions on Imports of Tuna, GATT DS21/R, 3 September 1991 and Panel Report, United States – Restrictions on Imports of Tuna, GATT DS29/R, 16 June 1994.
[237] Denkers, 2008, p. 28
[238] *Ibid.*, p. 38 ; Joseph, 2011, p. 99
[239] Denkers, 2008, p. 38

arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; [...]". While this article enumerates different admitted exceptions, there is no explicit human rights exception.[240] But outward measures aimed at ending violations of labour rights could be analyse under Article XX (a) or Article XX (b).[241] Indeed, even in the absence of explicit reference to labour rights, Howse declares that "there is an argument that the interpretation of public morals should not be frozen in time and that with the evolution of human rights as a core element in public morality in many post-war societies, the content of public morals extends to include disapprobation of labour practices that violates universal human rights".[242] The Appellate Body has confirmed this evolutionary approach in the US Shrimp case[243], interpreting Article XX (g)[244]. If the Appellate Body follows this approach in interpreting Article XX (a), the "global moral purpose" of combating violations of labour rights could be invoked to justify some outward measures.[245] "Alternatively, the use of public morals may transform outward measures into inward measures. That is, the morals being protected are those of the State's own population, who may not wish to be exposed to goods tainted by human rights abuses".[246] A broad interpretation of Article XX (b) would also permit to include measures aimed at eliminating some labour practices which might threaten the life or the health of workers.[247] It seems however obvious that some violations of labour rights, such as forced labour or child labour are more susceptible to be considered as justifying an exception than others, such as the non-earning of living wages which is more controversial on the international plane. It seems then likely that

[240] Joseph, 2011, p. 118.
[241] *Ibid.*, 2011, p. 109; Howse, 1999, pp. 7-9.
[242] Howse, 1999, p. 7.
[243] Appellate Body report, United States – Import Prohibition of Certain Shrimp and Shrimp products, WT/DS58/AB/R, adopted 6 November 1998.
[244] Howse, 1999, pp. 7-8.
[245] Joseph, 2011, p. 109.
[246] *Ibid.*, p. 109.
[247] Howse, 1999, p. 9; Joseph, 2011, p. 110.

measures aimed at protecting labour rights that benefit from a weaker international recognition would be found violating WTO law.

4.3. Labour rights ant the WTO: possibilities for a new relationship?

4.3.1. International rules of interpretation of treaties

The question of conflicting obligations under WTO law and human rights treaties recognising labour right could arise in front of the DSM if States invoke their human rights obligations in order to justify a breach of WTO law. Sarah Joseph underlined that: "From a human rights point of view, it is troubling that an explicit human rights exception is not included within Articles XX and XIV. [...] After all, 'adherence to free trade obligations' is not a recognized limitation to any human right, and international human rights bodies have never indicated that they accept WTO compliance as an excuse for limiting a human rights obligation".[248] When two conflicting States obligations deriving from treaties apply to the same issue, international law provides that those obligations should be interpreted, to the extent of possible, as being compatible.[249] The Vienna Convention on the Law of Treaties (Vienna Convention)[250] stipulates that to interpret a treaty, "there shall be taken into account [...] any relevant rule of international law applicable in the relations between the parties" [Article 31, 3(c)]. The preamble of the Vienna Convention also recognises "that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law", including "universal respect for, and observance of, human rights and fundamental freedoms for all".[251] The Vienna Convention is applicable to interpretations made in the context of the DSM since the DSU recognises that the mechanism is there to "clarify the

[248] Joseph, 2011, p. 118.
[249] De Schutter, 2010, p. 24.
[250] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[251] Petersmann, 2010, p. 78.

existing provisions of those agreements in accordance with customary rules of interpretation of public international law" [Article 3, 2]. Moreover, as Member States of the WTO have the authoritative interpretation of the agreements throughout the Ministerial Conference or the General Council, they should not admit an interpretation contrary to their other international obligations.[252] Some conflicts between WTO law and labour rights recognised by human rights instruments could then be solved by those rules of interpretation. However, it has been argued in the precedent sections that WTO rules and labour rights are susceptible to enter in conflict in different situations which do not always confront States obligations in legal terms and it seems that relevant interpretations by the DSM could provide only very limited solution to the negative impact of WTO rules on the realisation of labour rights. We will now examine if the introduction of a social clause in the WTO could represent further solutions for this issue.

4.3.2. Incorporation of a social clause in the WTO

The question of linkage between the WTO and labour rights is a debate which has been running for many years.[253] As explained above, the ITO contained an article on fair labour standards but the Uruguay round failed to follow the same approach in the WTO agreement and decided to postpone the issue. In 1996, the strategy of linkage was rejected by the Singapore Conference in those terms: "The ILO is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question".[254] This position was reaffirmed in 2001 by the Doha Ministerial Declaration.[255] The position of developing states in the debate is a major factor in the

[252] De Schutter, 2010, p. 24.
[253] Arnold, 2005, p. 85.
[254] WTO – Singapore Ministerial Declaration, adopted 13 December 1996, WT/MIN(96)/DEC, par. 4.
[255] WTO – Doha Ministerial Declaration, adopted 14 November 2001, WT/MIN(01)/DEC/1, par. 8.

rejection of the linkage strategy. As explained and criticised above, the fear of losing their comparative advantage and the accusation of disguise protectionism from developed states are the main arguments advanced for justifying their position (Sections 4.1.2 and 4.2.2).

However, we have discussed many ways in which WTO rules and labour rights interact and therefore, the question of linkage seems to conserve all its relevance. Different arguments can be advanced for the inclusion of a social clause in the WTO. First, the strong enforcement capacity of the DSM could lead to increase the unbalance between the enforcement of WTO rules and the realisation of human rights if labour rights are not taken into account in the process. Moreover, an increasing number of non-trade issues are brought in front of the DSM and different case laws show a shift "towards a nuanced view that accepts the validity of linkage as it meets certain formal parameters".[256] Therefore, there are some claims that a legislative approach, through political discussions would be, constitutes a more 'democratic' approach.[257] This legislative approach would consist in the incorporation of labour standards in the WTO.

The content and the form of such a 'social clause' raise a number of questions. Concerning the content, if the incorporation of a social clause into the WTO law means the incorporation of "fundamental labour rights" corresponding in many discourses to the ILO "core labour standards", it would then exclude some labour rights recognised by the ICESCR and number of ILO Conventions that are also affected by the WTO system. Yet WTO rules also impact on those rights and the content of the clause would then be of primordial importance in regard to its efficiency. Concerning its form, it seems quite clear that a social clause could solve the issue regarding the legality of measures restricting market access to product produced in violations of labour rights. The reserves concerning the efficiency of those clauses would however remain. Less clear is how the incorporation of a social clause could enhance further the protection of labour rights. The DSM is indeed not familiar with the concept of individual rights and victims of violations could not bring a complaint in front of the WTO bodies. Only States are entitle seeking to solve a dispute through the DSM and it is States which

[256] Thomas, 2010, p. 259.
[257] *Ibid.,* p. 259.

"would have to challenge the practice" resulting in a violation of labour rights. In any case, further enforcement of labour rights by the inclusion of a social clause should not mean that there is no need to restructure the WTO system in order to reinforce the capacity of all the Member States to ensure their obligations in regard to labour rights and other human rights. It has indeed been exposed that the non enforcement of labour rights is partly due to the fact that WTO rules undermine the *de facto* capacity of the states to ensure their labour rights obligations. Moreover, phenomena linked to international trade directly impact on labour rights, such as the increase of outsourcing or the difficulty to hold MNCs accountable and two phenomena could hardly be stop by the only inclusion of a social clause in the WTO. Furthermore, the unfairness of WTO prevents states to benefit from trade liberalisation in an equal way and the enforcement of labour rights in this context might constitute an unrealisable objective.

5. Conclusion

To answer simply to main interrogation of this paper, it can be concluded that in a certain extent, the WTO rules undermine the realisation of labour rights. This affirmation has to be considered in relation with the conception of the different notions involved. On the one hand, the paper adopts a strong perception on labour rights, emphasising their recognition as *human rights*. The definition of the labour rights encompasses some rights of which the recognition on the international plane is somewhat controversial but is justify by important rationales. The economic and social dimensions of the right to work underline the importance of the recognition of the right to have a job. While it might be difficult to assess employment policies in relation to this right, this difficulty is common to other economic, social and cultural rights and should not imply the absence of any assessment. To fulfil this economic and social dimension, the right to work has to be associated with certain characteristics and to be considered in its interrelation and interdependence with the rights at the work, including the right to a living wage, and with its collective dimension. On the other hand, the WTO as actor of the economic globalisation is considered beyond the objectives of its rules to understand their practical effect. It has been demonstrated that the concept of 'free trade' and the theory of comparative advantage cannot be examined in the abstract and that their success in the real economic world are limited and unbalanced. It is with those conceptions in mind that the effects of WTO rules on the realisation of labour rights are established.

A conflict appear on the legal level, where in some cases states obligations concerning labour rights might be found incompatible with their obligations under WTO rules. However, the conflict seems relatively limited and should be solved by the international rules of interpretation of treaties. Another legal issue concerns the measures aimed at restricting market access to products produced in violations of labour rights that might be considered as being in violation of WTO rules. While the concrete effect of those measures on labour rights is mitigate, some of them could have a positive impact on these rights and they should be interpreted as compatible with WTO rules and

objectives. The incorporation of a social clause in the WTO could solve the issue in an explicit and democratic way.

However, it is on another level that the conflict really takes place. WTO rules undermine *de facto* capacity of states to fulfil their labour rights obligations while they adopt weak regulatory policies aimed at surviving in the global economy. The right to a living wages and to just and fair working conditions are particularly threatened by this weakened capacity. This phenomenon is reinforced by a weakening of the bargaining power of trade unions. The right to work is also threatened by trade liberalisation due to the increase of market flexibility and to the incapacity of states to provide adequate adjustments policies. Furthermore, two phenomena associate to trade liberalisation conducted by the WTO rules also undermine the realisation of labour rights. The disintegration of trade and the difficulty to hold MNCs accountable can have an important impact on labour. Those adverse impacts of WTO on labour rights could only be solved by a deep restructuring of the system with an aim to balance economic power between states and to put in place guarantees which would ensure a fair repartition of profits. It is maybe where the conflict is the deepest and the most dangerous. There is a blinded emphasis on economic growth as way to ensure adequate standards of living to people around this world. This idea has gone so far that sometimes it seems that labour rights should be recognised and ensured only if they serve this economic growth. Yet, it should be the other way around. Labour rights as well as other human rights should be considered as prior objectives and economic growth should be considered only in the extent that it serves those objectives. Until WTO Member States take their responsibility to design international trade keeping in mind that their human rights obligations constitute a priority, WTO rules will amount to a threat for the realisation of those rights.

To conclude, the words of Arundhati Roy reflect perfectly the broad underlying idea in which this paper aims to take place.

"The first step towards reimagining a world gone terribly wrong would be to stop the annihilation of those who have a different imagination – an imagination that is outside of capitalism as well as Communism. An imagination that has an altogether different

understanding of what constitutes happiness and fulfilment. To gain this philosophical space, it is necessary to concede some physical space for the survival of those who may look like the keepers of our past but who may really be the guides to our future. To do this, we have to ask out rulers: Can you leave the bauxite in the mountain? If they say they cannot, then perhaps they should stop preaching morality to the victims of their wars."[258]

[258] Roy, 2010

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2012

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Lambert, Loica