

The strategic use of the labour rights discourse – revisiting the “social clause” debate in trade agreements

El uso estratégico del discurso de los derechos laborales – retomando el debate sobre la “cláusula social” en tratados comerciales

ULF THOENE

Ph.D. y LL.M en estudios socio-jurídicos (Universidad de Warwick, Reino Unido)

Docente Internacional de la Universidad de La Sabana, Escuela Internacional de Ciencias Económicas y Administrativas.
ulf.thoene@unisabana.edu.co

Para citar este artículo

Thoene, U (2014) The strategic use of the labour rights discourse – revisiting the “social clause” debate in trade agreements. *Justicia Juris*, 10(2), 59-70

Recibido: Agosto 13 de 2014

Aceptado: Septiembre 25 de 2014

ABSTRACT

This reflection article takes a fresh look at the neglected policy device of the so-called “social clause” in trade accords that seeks to tame the capitalist forces dominating contemporary globalization. In many countries deregulatory policies, and the incapacity, or in some cases unwillingness, of governments to enforce regulation to protect workers and their representatives, have undermined labour rights. Instead, recent decades have witnessed a proliferation of free trade agreements (FTAs) that tend to favour the interests of global corporations over the concerns of workers. This paper reinvigorates the debate on the “social clause” in trade agreements by tracking its historical development and analysing recent, albeit feeble, attempts that may contribute to levelling the playing field between capital and labour.

Key words: global capitalism, ILO, labour rights, social clause, trade agreements, WTO

RESUMEN

Este artículo de reflexión, retoma desde una nueva mirada el mecanismo político de la denominada “cláusula social” en los acuerdos comerciales que busca moderar las fuerzas capitalistas dominantes de la globalización contemporánea. En muchos países, las políticas de desregulación, y la incapacidad, o en algunos casos la falta de voluntad, de los gobiernos para hacer cumplir la regulación para proteger a los trabajadores y sus representantes, han socavado los derechos laborales. Por otra parte, en las décadas recientes, se ha evidenciado una proliferación de acuerdos de libre comercio (TLCs) que tienden a favorecer los intereses de las corporaciones globales sobre las preocupaciones de los trabajadores. Este documento revitaliza el debate sobre la “cláusula social” en los acuerdos comerciales al rastrear su desarrollo histórico y analizar intentos recientes, aunque débiles, que pueden contribuir a nivelar las condiciones entre el capital y el trabajo.

Palabras clave: capitalismo global, cláusula social, derechos laborales, OIT, OMC, tratados comerciales

Introduction

Efforts to protect workers labouring in specific industries based in different countries date back to the early phases of industrialization in the European colonial empires the expansion of which was accompanied by an acceleration and deepening of processes of economic integration that are nowadays generally referred to as globalization (Hepple 2005, 25-29).

Yet it has always been particularly difficult for such heavily contested protective social and labour legislation to become effective within the confines of the nation state, furthermore for binding rules to actually transcend national boundaries and be applicable and enforceable on a regional or even a global stage. On the other hand, the expansion of economic forms of exchange generally face fewer barriers, and enjoy considerable national and transnational support. It is thus imperative to analyse policy tools that promise to heighten the significance of non-trade issues in cross-border accords.

This introductory paragraph sets the stage for the following analysis. This paper discusses the evolution of international labour rights and the arguments historically put forward to justify the use of the social clause mechanism. Tracking the development of the social clause debate is vital to gaining an understanding of the changing political and economic environment of international relations and global economic governance with respect to protecting labour rights and furthering social justice. Insights into the shifting patterns of the global economy shed light upon whether a device such as the social clause can be designed and successfully implemented to meet social ends while being enforceable by either a sanctions regime or an incentive and assistance scheme in multilateral or bilateral free trade deals.

Finally, a conclusion will be drawn as to how effective a social clause can be for ensuring that work-related social issues are appropriately taken into account in the operation of 21st century international trade arrangements, and not only contribute to taming the forces unleashed by economic globalization, but also shape global capitalism so as to level the playing field that, thus far, has favoured large global enterprises over labour (Perraton 2009).

A Story of Missed Opportunities: Trade and Labour under Global Capitalism

Much ink has been spilt on globalization discourses, economic governance, and inequality.¹ Yet the: “current state of international political institutions is rather deplorable, especially when it comes to regulating the global economy” (Renner 2011, 111). Global interconnectedness highlights the nexus between trade and: “investment, competition, environment, and labour” (Barton et al. 2008, 144). Moreover, the issue of governing the social and competitive impacts of globalization remains contentious and unresolved. The themes of trade and labour generate particular controversy. Trade in goods, services, and capital has advanced steadily towards a liberal regime supported by a legal framework embedded in global, regional, or bilateral economic agreements. Progressively lower trade barriers and increasingly cross-border manufacturing and supply chains are evident manifestations of this process. Whilst the progressive nature of the global trade agenda under the auspices of the World Trade Organisation (WTO) has slowly ground to a halt for the time being, regional and bilateral preferential trade or so-called “spaghetti bowl” (Bhagwati 1995, 4) agreements prosper.

However, in stark contrast, “labour has remained relatively immobile” in spite of global economic integration (Hepple 2005, 5). At the same time it is evident that improving working conditions is an instrument that can be deployed in order to promote sustainable and more inclusive forms of economic development. Hepple refers to such benevolent developments as the “race to the top” that could take hold in certain countries, stressing that remuneration by multinational corporations (MNCs) is higher than that of local companies, while labour practices and welfare packages offered to employees: “have a spill-over effect on domestic firms [because MNCs] tend to be concentrated in industries which utilise high skills, are capital intensive and have superior managerial and organisational techniques” (2005, 272). Yet public policy, hence the state, has a clear role to play in ensuring that the so-called ‘race to the top’ eventually bears fruit because: “low wages and poor working conditions for workers may not be desirable for encouraging work, commitment, intensity and productivity” (Jomo 2007, 10).

Thus far, the anticipated positive complementarities linking speedy “output growth, employment growth and poverty reduction have generally been weak” in most industrializing countries (Jomo 2007, 11), indicating that not only worker security but also a guaranteed level of social protection tend to function as a precondition for employment growth. Hence we may observe that, rather than a pivotal contemporary developmental challenge that highlights the contradictions of modern capitalism, thus meriting the attention of policy-makers and entrepreneurs, in the current structure of the world economy the issue of labour standards is merely viewed in the context of wider aspects of prevailing “world trade policies” (Hepple 2005, 5).

Debating whether labour relations can continue to be governed within the, jurisdiction of individual nation states operating: “under a system of free trade is not new” (Hepple 2005, 25). In fact, attempts to introduce a social clause in trade negotiations (van Liemt 1989, 434) predate the establishment of the two global economic governance institutions (Hepple 2005, 28) that are the key contemporary actors in the trade-labour link debate, the International Labour Organisation (ILO), founded in 1919, and the WTO, founded in 1995. Van Liemt defines a social clause as:

[aiming] at improving labour conditions in exporting countries by allowing sanctions to be taken against exporters who fail to observe minimum standards. A typical social clause in an international trade arrangement makes it possible to restrict or halt the importation or preferential importation of products originating in countries, industries or

¹ On the precise contours of economic globalization, see Held, David et al. (1999).

firms where labour conditions are inferior to certain minimum standards” (1989, 434).

It may seem remarkable that no progress has been made on “enforceable global labour standards to protect workers”, whilst “global rules to protect capital and intellectual property” are in place as part of multilateral or bilateral agreements seeking to liberalize global trade (Oatley 2008, 366). The economic facets of globalization have resulted in the emergence of novel points of contention, namely “the differences among domestic rules and regulatory standards. In a globalized world economy, questions of workers’ rights have increasingly been elevated to the global stage (Drezner 2007, 3). However, as opposed to the legal frameworks governing trade relations for which the “familiar notion that *territory* is the mediating category whereby people and actions are made subject to law has been deprived of much of its force” (Saussy 1996), the “territorial principle of jurisdiction” still underpins the area of labour regulation that falls chiefly into the legal domain of the nation state (Muchlinski 1999, 460). Even the European Union (EU), that is, the most institutionally developed and profound regionalism with a number of supranational governance bodies, has experienced serious and so far insurmountable obstacles in realizing the vision of adding a true “social dimension” or a “European social model” to the European project (Pissarides 2014; Segol 2013; Panagopoulos and Tsikrikas 2013).

This remains the case at a time when the factor of capital in particular has to a large extent managed to free itself from “national regulation” (O’Brien 2003, 83), facilitated by significant “recent innovations in information technology” (Scheuerman 2001, 91) and financial deregulation, which have only recently undergone arduous and highly contested efforts at re-regulation. Recent global financial turmoil from which the world has still not recovered – particularly given the dire employment data (ILO 2014) – provides clear evidence of this disjuncture. The preponderance of regulatory debates on runaway global financial capitalism and the discourse on corporate social responsibility have toned down much of the enthusiasm and hope inspired in former times by the social clause debate.

Nevertheless, regarding labour, states still exercise considerable clout in de jure, if not in de facto, regulatory terms as contemporary free trade agreements (FTAs) focus on the rights of firms rather than those of workers (Brown 2014). However, according to Hepple (2005, 1), “transnational labour regulation [is] emerging” to which states, international organisations (IOs), and MNCs contribute gradually, albeit without a clear steering authority. Those very actors have emerged as increasingly

influential; so that labour regulation is beginning to take a more “transnational and international” form (Cleveland 2003, 129). Discourses on the trade-labour link are thus also concerned with the exact quality and quantity of labour standards and rights on which a future international or bilateral consensus could be reached. The potential for the global governance of labour regulation lies in a form of harmonization of standards, entailing power shifts away from the nation state regarding legal frameworks governing labour.

Furthermore, the social clause debate mainly revolves around unease concerning the socio-economic impacts of globalization such as: “businesses shifting investment and production to countries with less stringent labour standards, and engendering a [so-called] race to the bottom” (Barton et al. 2008, 144) rather than spurring a “race to the top” (Hepple 2005, 272). As an increasing number of developing countries have gained statehood and become integrated into the global economy, first during the post-World War II (WWII) era and subsequently during the post-Cold War period, the debate touches on economic as well as moral and ethical issues, because work is central “to societal organisation” (Nichols 1997, 246) and individual livelihoods. The production of goods relies on “work [as] a defining feature of human existence the means to sustaining life and ... meeting basic needs” (ILO 2001), and labour is a human activity that not only: “gives an income [but also] yields an output [giving] a person the recognition of being engaged in something worth his while” (Sen 1975, 5; Perlman 2010, 230).

Furthermore, having conducted a unique longitudinal study of favela settlements in Rio de Janeiro, Perlman stresses the lack of “[adequate] employment” which is one of the key impediments to: “[enjoying] the full benefits of citizenship” (2010, 218-219). It is notable that some “labour rights or standards” have gained recognition as: “human rights with a universal character” (Howse y Trebilcock 1997, 194). In addition trading exportable goods is an important facet of economic activity fulfilling a welfare-generating function that is key to socio-economic development.

The social clause debate tests the very foundations of the current global system of economic exchange. It has been argued that labour, trade, and development require a wider social dimension (Blackett 1999, 1). Such critiques indicate the degree to which a number of societal actors push for changes in global economic governance. It is equally important to point out that questions arise as to whether the social clause can be “an effective means” to advance “workers’ rights” (Leary 1996, 183), as well as concerning which policy-making forum best addresses

the social clause debate. Furthermore, on the one hand, developing countries tend to treat labour as a way of gaining a comparative advantage in trade relations. On the other hand, developing countries have been criticized for using labour standards as a covert measure of economic protectionism.

International Labour Rights throughout History

While the ILO and the WTO are central to the social clause debate, since 1945 the link between trade and labour has also become subject to other economic agreements including unilateral measures, bilateral trade treaties and regionalisms such as NAFTA (North American Free Trade Agreement), and most importantly the EU (Leary 1996, 179). However, the ILO remains the key international organisation (IO) that defines and oversees labour standards as it has been concerned with labour-related issues ever since its inception. These facts, and the existence of the ILO's technical assistance programme (ILO 2008), should, at least theoretically, render the organisation a natural forum for the trade-labour link debate.

Leary dates the beginning of the social clause debate to "the middle" of the 19th century but emphasizes that it was only in the mid-1990s that the issue gained prominence as a central theme at the ILO and the WTO in the form of IOs with wide memberships (Leary 1996, 177, 179). Kaufmann supports making this distinction by stating that: "the debate about a possible link between free trade and labour rights [...] can be traced to the time of the establishment of the WTO" (2007, 169). Especially prior to World War I (WWI), attempts to bring about "international standards" had advanced slowly (Hepple 2005, 29), although the link "between the condition of workers and international competitiveness" was already being acknowledged (Leary 1996, 183). It is noteworthy at this stage that European and North American policy-makers were already conscious of the issue of competitiveness just as competition is central to public policies formulated by developing countries in our current era (Leary 1996, 183).

Moreover, it may be argued that the inter-war period (1918-1939) and the Cold War did not lend themselves to global agreements on social issues that were mainly due to the fierce ideological stand-off between capitalism and communism. Thus when locating the starting point of the social clause debate in the post Cold War era, Leary seems to suggest that in today's discourse the term 'social clause' tends to be more closely connected with debates in the multiple fora of the ILO and the WTO, but also in bilateral trade agreements, and in the private sector and

non-governmental organisations (NGOs). The issue can hence be said to "have gone global" (Drezner 2007, 3). Furthermore, the 20th century experienced a massive expansion of statehood, resulting in more states participating in IOs turning decision-making processes more prone to delay and factious political contestation.

The analysis now focuses on the foundation of the ILO in 1919. Governments in the industrialized world were deeply concerned about the maintenance of social peace in their respective societies following the end of hostilities in Europe. Whilst the process of industrialization had brought about rising living standards, new social tensions had emerged. The idea that stable relations between capital and labour in the national arena would translate into more favourable international relations found wide support (Kaufmann 2007, 49). Furthermore, the Russian Revolution (1917) was about to implement a socio-economic model that threatened the societal consensus in the capitalist countries. Blackett et al. claim that the ILO was: "the West's answer to Bolshevism" (2008, 389).

The 1919 ILO constitution was based on the premise that: "universal and lasting peace can be established only if it is based upon social justice" (ILO 1919). In 1944 the ILO Declaration of Philadelphia complemented the ILO constitutional framework and made this claim more specific, that is, related to poverty alleviation and the maintenance of peace, stating that:

- "Labour is not a commodity;
- freedom of expression and of association are essential to sustained progress; and
- poverty anywhere constitutes a danger to prosperity everywhere" (ILO 1944).

Reflecting on these three claims, one can argue that the second point in particular would bring some ILO member states into conflict with the organisation's legal structure. The issues raised in point two ought to be the political consensus in democratic societies, but even member countries such as the United States have not yet ratified Conventions 87 and 98, although being bound to do so by the constitution as an ILO member state. Indeed, the International Trade Union Confederation recently observed that a: "country's level of development proved to be a poor indicator of whether it respected basic rights to bargain collectively, strike for decent conditions, or simply join a union at all" (ITUC 2014). Furthermore, it can be argued that the views expressed in the three points of the ILO Philadelphia Declaration have an intrinsically western bias regarding the ways in which a society should be organized and the rights to which an individual should reasonably be entitled.

Other societies might reach different conclusions as to an individual's rights. That may be due to cultural factors, as well as varying stages of economic and political development. The issues raised here are important for the social clause debate and the universal applicability of the device. This is because the trade-labour link is supposed to establish global standards that must rely on global support by states, companies, and workers' organisations for their acceptance and enforcement. A case in point for the salience of global reach is the debate on cultural relativism that will be discussed briefly below.

Article 7 of the constitution stipulates that the ILO was founded as an institution with a tripartite membership; i.e. member governments as well as workers' and employers' representatives drawn from the member states (ILO 1999). Thinking in terms of the global economic governance debate, and in particular bearing in mind a comparative view of the institutional set-up of the WTO, the ILO structure encompasses a wider range of constituents in its membership and decision-making procedures. Decision-making power in the WTO rests with member state governments, and "in no other field has globalization led to such a well-structured governance system" (Pianta 2014, 214). From the outset, the ILO did not intend to burden member states with considerable responsibilities but aimed at arriving at an institutional design that would: "[define] precise standards and enforcement measures" (Kaufmann 2007, 49). The common wisdom has been that the legal tool of labour standard-setting would provide for the solution of disputes among a variety of actors involved in industrial relations (Kaufmann 2007, 49). ILO conventions are part of international law and hence nation states that are among the membership of the ILO and are signatories of a particular convention are legally bound to enforce the spirit and the letter of ILO legislation.

Having established itself as an IO, the ILO ran into difficulties following WWII as the state of international relations did not allow for wide-ranging global co-operation. Furthermore, a broader range of IOs and international agreements was created in which at least the Western capitalist countries hoped to make arrangements for post-war reconstruction, balance of payments problems, and trade. The World Bank (WB) and the International Monetary Fund (IMF) subsequently came into being. The ILO's capacity to employ its "broad mandate" (Blackett 1999, 4), representing a membership holding different ideological views, was hence limited.

Having failed to conclude negotiations on the establishment of the International Trade Organisation (ITO) (UN, 1948), the General Agreement on Tariffs and Trade

(GATT) was established to oversee the trade regime and to ensure the principle of non-discrimination in trade until GATT finally evolved into the WTO in 1995. Interestingly, in the section on "Fair Labour Standards", Article 7 of the United Nations Havana Charter for the ITO urges member states to abolish: "unfair labour conditions [as they] create difficulties in international trade" (UN, 1948). It is crucial to note that, in the 21st century, the WTO is an IO equipped with a scheme to settle disputes and enforcement powers. Such instruments could in theory also be used for a labour standards regime. In a nutshell, the WTO is "a more legalized and expansive institution" than the GATT (Barton et al. 2008, 210). Moreover, an institutionalized trade-labour link would only directly benefit an economy's workers in the exportables and formal sectors. High and persistent levels of informal employment in the Global South, as well as rising informality in the Western world as a result of the recent and profound global financial crisis (ILO 2014), thus limit the scope of the social clause mechanism.

However, the ILO lacks the institutional tools to impose economic sanctions on violators of the organisation's constitutionally binding standards (Charnovitz 1987, 575-576). As part of the dispute settlement procedure (DSP) of the WTO, a social clause could also entail political risks. How can a small economy actually "enforce its 'victory'" before the DSP against a considerably larger WTO member (Winters 2003, 312)? If the smaller country imposed bilateral "trade sanctions" on the larger country as a means to enforce the DSP judgement, the former would most probably not gain much due to its lack of economic and political clout (Winters 2003, 312-313).

Advocates of labour standards-related WTO sanctions generally argue for an extension of GATT article XX (Hepple 2005, 148), the so-called General Exceptions article (GATT 1947). Moreover, whilst the ILO might prove to be an inappropriate forum for the enforcement of standards, organisations such as the Organisation for Economic Co-operation and Development (OECD) conditioned South Korea's entry into the OECD in 1996 on "the recognition of labour rights", for instance (Salzman 2000, 781).

The debate surrounding cultural relativism and labour standards deals with perceived cultural differences and has been influenced primarily by East Asian political leaders. The debate is of particular relevance in the post Cold War world where the universality of human rights has become especially contentious and widely debated (Kaufmann 2007, 78). Amartya Sen stresses the link between human rights and development and argues in favour of the notion of universal human rights, claiming that endorsement of so-called "Western values" is evi-

dent in the works of both: “Western classical authors [as well as] in Asian traditions” (1999, 227, 233).

Furthermore, Rodrik also stresses the universality of human rights while pointing out that one should be clear about the fact that developing and developed countries alike possess a different set of requirements in the fields of labour standards (Rodrik 2007, 228). Regarding the governance of labour and trade, the “[imposition]” of standards and “harmonization” would weaken global economic governance (Rodrik 2007, 228). At the same time, Rodrik supports so-called core labour rights, an issue I will turn to at a later stage in this article (Rodrik 2007, 229). After all: “not all labour rights [...] are protectionist” (Cleveland 2003, 151).

In a similar vein, Bhagwati criticizes the “export protectionism [inherent in] the inclusion of labour standards” in bilateral trade treaties burdened by power asymmetries between a developed country with political and administrative-bureaucratic clout and a smaller, lesser-developed country (2008, 76, 78). One explanation for the insistence on imposing labour standards similar to those in developed nations could reside in concerns about a race to the bottom, which would, according to this strand of thought, eventually entail a lowering of “their more stringent labour standards” and wage levels (Trebilcock 2004, 172). In this context, the actions of successive United States administrations towards some form of harmonization appear almost cynical insofar as core standards as defined by the ILO are required in such trade deals, while as the most powerful economic and political power, the US: “has not ratified many critical ILO conventions” (Bhagwati 2008, 79).

As a matter of fact, the abundant labour supply of developing countries and the “demographic dividend” (Fengler 2013) that many such countries can potentially reap almost naturally enables them to compete on wages, which – perhaps somewhat paradoxically – does not necessarily result in workers facing severe working conditions (Servais 1989, 427). Servais cautions against focusing solely on wage costs as a whole range of other costs determine: “the final price of a product” (1989, 427). Thus, industrializing countries can trade products that have a high input of the labour factor for superior technology from developed countries. Developed countries can, on the other hand, utilize their advantages in higher capital stocks and a considerably more advanced knowledge base for the production of export products (Servais 1989, 428). MNCs that spin global production networks could actually contribute to a race to the top, as they tend to “provide better [...] conditions of work” than offered by “domestic firms” (Hepple 2005, 20). Hepple sees the potential for: “new opportunities for solidarity of workers

in different countries” (2005, 20). Labour standards can also benefit an economy by, for instance, decreasing the likelihood of injuries at the work place (Servais 1989, 428).

Furthermore, an argument may be made for drawing a distinction between democratic and dysfunctional or non-democratic states seeking to deviate from (non-core) international labour standards (Rodrik 2007, 229). The former are able to “legitimately” propose the case that policy choices are consonant with the freely expressed will of the electorate, while the latter do not pass the same test and might hence profit from illegitimate comparative advantages (Rodrik 2007, 229). Thus, democracies in developing countries should be given the space to exploit their: “trade advantages” (Rodrik 2007, 229). At the same time, Rodrik urges countries at the developing stage not to be overly concerned with “market access abroad”, but to make use of trade solely if “broader developmental and social goals” can be said to benefit (2007, 227).

Returning to the role of the ILO in the social clause debate, it can be argued that, since the 1990s, there has been renewed activity to promote the social clause (Charnovitz 2002, 272-273), and to boost the ILO’s voice in the discourse on global economic governance (O’Brien 2003, 102). Moreover, the ILO sensed the need to strengthen its relatively weak position vis-à-vis other IOs (Helfer 2006, 652), and to: “categorize certain ILO principles as fundamental and find a way to improve the ILO’s oversight over national implementation” (Charnovitz 2002, 273). The result of such considerations was a new legal instrument, the 1998 Declaration on Fundamental Principles and Rights at Work.² The declaration laid down the following four issue areas, also known as “core labour standards” (Cleveland 2003, 130), based on eight already existing conventions: “that are binding on all member governments” (Charnovitz 2002, 273):

- 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 (ILO 1998).

Furthermore, proponents of the trade-labour link have begun to leave their mark at official summits on international trade. For example, the 1994 Marrakesh GATT conference experienced fierce debates around the social

² For an in-depth and multi-faceted debate on the declaration and its ramifications for the issues of core labour standards and the trade – labour link, see Alston (2004); Alston (2005); Langille (2005); Mau-pain (2005).

clause (Charnovitz 2005, 277). Yet only at the 1996 Singapore WTO summit did trade ministers agree to insert into the meeting's declaration a: "commitment to the observance of internationally recognized core labour standards [and the belief that] the [ILO] is the competent body to set and deal with these standards, and [the affirmation of] our support for its work in promoting them" (WTO 1996).

The 1998 declaration is open to two very different readings. On the one hand, it might suggest that the WTO member states were actually willing to consider the idea of a social clause and to: "respect the ILO core labour standards" (Cleveland 2003, 149). On the other hand, however, one could interpret the declaration as a covert attempt by the WTO to deny a trade-labour link and hence to shift political responsibility utterly into the hands of the ILO. Nevertheless, since receiving the Nobel Peace Prize in 1969, the "ILO has failed to come to terms with the Global Transformation" (Standing 2008, 355), which to a large extent is due to the "ILO's tripartite structure [and] a highly politicised environment" within the organisation undermining political will and decision-making power (Burchell et al. 2014, 473).

On a more positive note, it may be argued that the ILO managed to seize the opportunity to strengthen its role as an IO by, for instance, devising such a legal tool as the 1998 declaration two years after the WTO statement. In an attempt to reinvent itself and to more purposefully address the plight of the world's workers, the ILO introduced the concept of "decent work" in 1999, but the jury is still out as to whether the notion is a mere slogan or a serious new vision (Ghai 2003, 113; Standing 2008, 370). Conversely having an institutional framework that is more homogeneous when compared to the ILO, and thus perhaps less conflictual with respect to the policy goals individual players pursue, the WTO is composed of trade ministers pursuing a more liberal trade regime rather than "labour rights" (Hepple 2005, 150). Cleveland claims that the tone of the social clause debate has been exacerbated since Singapore (2003, 150).

This brings me to the final part of this section before concluding this article by looking at the future of the social clause mechanism. As mentioned, bilateral FTAs between individual nation states or between a regional integration scheme (e.g. the EU) and a state have proliferated recently owing mainly to slow and cumbersome process in the multilateral forum of the WTO, as well as, less crucially, the absence of progress made on the social clause on a global level. The Colombia-US FTA, which came into force in May 2012, is a significant recent example of a bilateral trade deal that focuses on the non-trade theme of labour in addition to traditional pure trade issues. Simi-

lar to the Colombia/Peru-EU FTA that is a product of the same era, Colombia's accord with the USA poses possible rifts between the FTA's stipulations and fundamental rights as enshrined in the 1991 Colombian Constitution (Rettberg et al. 2014, 170).

But while the two agreements pay homage: "to the respect of human rights in general, [...] the Colombia-US FTA gives more importance to labour rights than the Colombia/Peru-EU FTA" (Rettberg et al. 2014, 169). Upon closer inspection, it appears that the historically weak Colombian labour movement was a less powerful influence on the trade negotiations than the United States trade unions that are closely linked to Democratic members of the US Congress, so that the discourse over the FTA in North America featured debates on labour within the United States as well as assaults on Colombian trade unionists; whereas in the Colombian arena of public deliberations the focus rested mainly on access to medications and the ramifications for agriculture (Rettberg et al. 2014, 170). Yet collaboration with their North American counterparts enabled the Colombian labour movement to somewhat punch above its weight, as it were, and thus affect the outcome of the trade negotiations (Rettberg et al. 2014, 170, 171).

As a result, a tripartite agreement was set up as an integral part of the Colombia-US FTA that requires the ILO: "to foster [...] the goal of ensuring the full protection of labour rights" (USTR 2011: 5). According to the agreement, Colombia seeks to protect trade unionists, to more efficiently sanction employers who infringe employees' freedom of association, and to augment the number of labour inspectors to a total of 900 by 2014 (Celedón 2012; Presidencia de la República 2012). Colombia had previously been branded as: "once again the most dangerous country in the world for trade unionists" (ITUC 2012). However, in early August 2012 the ILO commented that the Colombian state had managed to significantly reduce threats against union activists over the preceding decade, although continuous efforts and vigilance were still required (El Espectador 2012).

The exact effects of the specific social clause that Colombia and the USA agreed to insert into the FTA will need to be monitored and analysed in the months and years to come. It is noteworthy that, despite the positive rhetoric, the starting position of the labour rights component may not look particularly promising as the most recent International Trade Union Confederation assessment considers Colombia to be a country with "no guarantee of [labour] rights", and the USA ranks as allowing the "systematic violation of [labour] rights" (ITUC 2014) which has seen the "drastic decline of union density to less than 8 percent in the private sector" (Estlund 2013, 2).

Whither Social Clause?

This analysis has shown that the social clause debate is still a very timely, multi-faceted, and much discussed issue. The debate spans from the beginnings of industrialization and the subsequent increase in trade volume until the present day. During that period, the face of the world economy and of world politics has changed markedly, becoming an increasingly globalized economy in which many state as well as non-state actors such as businesses and increasingly NGOs participate (Pianta 2014, 216). Moreover, many interests collide in the trade-labour link discourse as it touches on issues of law, economic development, politics, competitiveness, and ethics. The complex nature of the contemporary multi-layered and conflicting world order of global, regional and national legislative governance structures has become increasingly evident.

The overarching question, however, seems to concern the scope for the global economic governance of labour and trade, as well as the search for a basic level of protection for the world's workers that cannot be undermined. The above analysis has highlighted the difficulty of finding a global solution that is supported by countries at different stages of economic development, and that is simultaneously enforceable. In order to respond to global challenges, IOs have been created and in fact the ILO has a longer historic tradition and a wider membership as a governance institution than the WTO.

International trade has become an increasingly significant issue for all actors in the world economy. The increasing levels of global economic interconnectedness have contributed to growing discourses about political, economic, and legal governance. Equally, the issue of economic development and the means to narrow the income gap between and within developing and industrial countries appears ever more crucial. In fact, the social clause debate can be seen as part of the discourse over the social dimension of globalization as it links trade, i.e. the international economic sphere, and labour.

The latter is still heavily influenced by national regulation mainly due to the lesser advances made on the global governance of migration and divergent national priorities on social policy. On the other hand, free trade agreements have progressed much further in terms of depth and political commitment, which becomes evident in the institutionalization of the WTO, as well as mushrooming regional and bilateral trade schemes. However, as goods are increasingly produced in global manufacturing and supply chains, the theme of the governance of labour is gaining ground at the global level. The regulation of an

entire supply chain is clearly laden with complications, so that the engagement of a diverse set of actors, in particular local government bodies, can be expected to strengthen regulatory effectiveness (Brown 2007, 243, 254). Thus, transnational labour regulation above and below the level of nation states is emerging. In this context, ever since its creation, the ILO has played a pivotal part in defining and overseeing labour standards. Moreover, the ILO has provided valuable technical assistance in the implementation of labour standards to country governments, enterprises, and union representatives.

By comparison with the WTO and its trade liberalisation agenda, the ILO has generally received less support from national governments that rank highly the expansion of formal economic exchange relations and are thus willing to invest political capital in trade negotiations. The ILO has encountered difficulties in making progress towards binding agreements on labour standards. This is partly due to the structure of post WWII international relations. However, Capitalist countries have dominated trade negotiations in the GATT and then the WTO. The fact that the WTO is an IO equipped with a DSP can be seen as evidence of the political consensus backing up the institution's policies.

Furthermore, poor countries see trade as a means to advance their economic development. Their comparative advantage lies in relatively low labour costs owing to less stringent social standards and a high supply of labour. Advanced countries are critical of labour conditions in developing countries and seek to reach an understanding on binding labour standards in a global economic agreement. Yet, in a tragic twist, consumers in advanced countries also benefit economically from poor working conditions, especially regarding the production of textiles in such countries as Bangladesh, for example (Chhibber 2013).

Conclusions

This article has expressed doubts about the practicality of mandating the WTO with the oversight and enforcement of labour standards as part of such as an agreement. The power asymmetries within the organisation and among its diverse membership, as well as the limitations of the WTO DSP, are reasons for scepticism. Many bilateral trade deals also tend to be fraught with similar disequilibrium of political and economic leverage between the two contracting parties.

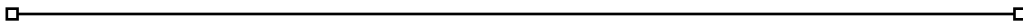
It has been argued that developed countries have a tendency to impose certain labour standards on the developing world for protectionist reasons, even though the former have an unconvincing record of implementing ILO conventions. The United States serves as a particu-

larly pertinent example in this respect. That is, whilst apparently favouring a social clause modern, industrialised societies fear competition given the abundance of labour and current socio-economic conditions of developing countries. One must add that some developing countries fail to see the advantages that at least certain labour standards offer regarding their social development policies that would make a substantially positive contribution to societal peace and social cohesion. Furthermore, transnational labour legislation already forms part of trade activity in the EU, for instance, amounting to a regionalism composed of mainly highly industrialised countries.

Advances have been made in the definition of labour standards in that the 1998 ILO declaration clearly sets out core labour standards which are shared by many analysts due to

a considerable extent to the standards mirroring universal human rights. The future trajectory of the ILO decent work agenda remains subject to future research efforts. Using this agenda, the debate can advance to ascertain whether labour standards can be used as a hook to facilitate a more inclusive development strategy that moves away from its strong focus on trade, or whether there can be a consensus on a truly binding floor of labour standards that is embedded in a global economic agreement.

Nevertheless, the results of this research article highlight the renewed and intensified efforts that academics, policy-makers, labour leaders, and business representatives have to undertake in order to level the playing field between the power of MNCs on the one hand, and labourers and employees on the other.



References

- Alston, Philip. "Facing up to the Complexities of the ILO's Core Labour Standards Agenda", *European Journal of International Law*, Vol. 16, No. 3, mayo de 2005: 467-480.
- Alston, Philip. "Core Labour Standards" and the Transformation of the International Labour Rights Regime", *European Journal of International Law*, Vol. 15, No. 3, mayo de 2004: 457-521.
- Barton, John, y Judith Goldstein, y Timothy Josling, y Richard Steinberg. *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO*. Woodstock: Princeton University Press, 2008.
- Bhagwati, Jagdish. *Termites in the Trading System. How Preferential Agreements undermine Free Trade*. Oxford: Oxford University Press, 2008.
- Bhagwati, Jagdish. "US trade policy – the infatuation with FTAs". *Columbia University Discussion Paper Series*, No. 726, 1995: 1-20.
- Blackett, Adelle, y Laurence Helfer, y Brian Langille, y Virginia Leary. "Panel Discussion: The Future of International Labor Law", *American Society of International Law Proceedings of the 101st Meeting*, 2008, 389-402.
- Blackett, Adelle. "Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation", *Columbia Human Rights Law Review*, Vol. 31, No. 1, enero de 1999: 1-80.
- Brown, Dana. "Self – Regulation in a World of States". En *Making Global Self – Regulation Effective in Developing Countries*, editado por Dana Brown, y Ngaire Woods, 227-258. Oxford: Oxford University Press, 2007.
- Brown, Larry. *TTIP: "Aushöhlung demokratischer Rechte" Was lehren uns NAFTA und CETA? Ein Gespräch mit Larry Brown*. 2014. 24 de junio de 2014, <http://www.ipg-journal.de/kurzinterview/artikel/ttip-aushoehlung-demokratischer-rechte-480/>.
- Burchell, Brendan, y Kirsten Sehnbruch, y Agnieszka Piasna, y Nurjk Agloni. "The Quality of Employment and Decent Work – Definitions, Methodologies, and Ongoing Debates", *Cambridge Journal of Economics*, Vol. 38, No. 2, marzo de 2014: 459-477.
- Celedón, Johanna. *El Convenio con la OIT y EE.UU Busca Garantizar los Derechos Laborales del TLC*. Agosto de 2012. 06 de agosto de 2012, <http://www.larepublica.co/node/17441>.
- Charnovitz, Steve. *Trade Law and Global Governance*. London: Cameron May, 2002.
- Charnovitz, Steve. "The Influence of International Labour Standards on the World Trading Regime. A Historical Overview", *International Labour Review*, Vol. 126, No. 5, noviembre de 1987: 565-584.

- Chhibber, Ajay. *Bangladesh Exposes Flaws in World Bank's Doing Business Index*. Mayo de 2013. 02 de junio de 2013, <http://blogs.ft.com/beyond-brics/2013/05/16/guest-post-bangladesh-shows-its-time-to-revamp-world-banks-doing-business-index-hold/>.
- Cleveland, Sarah. "Why International Labor Standards?". En *International Labor Standards – Globalization, Trade, and Public Policy*, editado por Robert Flanagan, y William Gould, 129-178. Stanford, CA: Stanford University Press, 2003.
- Drezner, Daniel. *All Politics is Global – Explaining International Regulatory Regimes*. Woodstock/Oxon: Princeton University Press, 2007.
- El Espectador. *OIT Destaca "Significativa Reducción" de Violencia contra Sindicalistas en Colombia*. Agosto de 2012. 03 de agosto de 2012, <http://www.elespectador.com/noticias/politica/articulo-364720-oit-destaca-significativa-reduccion-de-violencia-contra-sindical>.
- Estlund, Cynthia. "Citizens of the Corporation? Workplace Democracy in a Post-Union Era". *New York University School of Law – Public Law & Legal Theory Research Paper Series Working Paper*, No. 13-84, diciembre de 2013: 1-20.
- Fengler, Wolfgang. *The Global Demographic Dividend and How to Make the Most of It*. Septiembre de 2013. 02 de junio de 2014, <http://blogs.worldbank.org/futuredevelopment/global-demographic-dividend-and-how-make-most-it>.
- General Agreement on Tariffs and Trade (GATT). *Articles XVIII-XXXVIII, Article XX, General Exceptions*. 1947. 02 de diciembre de 2013, http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm.
- Ghai, Dharam. "Decent Work – Concept and Indicators", *International Labour Review*, Vol. 142, No. 2, abril de 2003: 113-145.
- Held, David, y Anthony McGrew, y David Goldblatt, y Jonathan Perraton. *Global Transformations – Politics, Economics and Culture*. Stanford: Stanford University Press, 1999.
- Helfer, Laurence. "Understanding Change in International Organizations: Globalization and Innovation in the ILO", *Vanderbilt Law Review*, Vol. 59, No. 3, abril de 2006: 649-726.
- Hepple, Bob. *Labour Laws and Global Trade*. Oxford: Hart, 2005.
- Howse, Richard, y Michael Trebilcock. "The Free Trade – Fair Trade Debate: Trade, Labor, and the Environment". En *Economic Dimensions in International Law – Comparative and Empirical Perspectives*, editado por Jagdeep Bhandari, y Alan Sykes, 186-234. Cambridge: Cambridge University Press, 1997.
- International Labour Organisation (ILO). *Global Employment Trends – Executive Summary*. 2014. 12 de junio de 2014, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_234107.pdf.
- International Labour Organisation (ILO). *ILOLEX, Database of International Labour Standards*. 2008. 13 de octubre de 2013, <http://www.ilo.org/ilolex/english/convdisp1.htm>.
- International Labour Organisation (ILO). *Technical Assistance and Training*. 2008. 01 de octubre de 2013, http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/Technicalassistance/lang--en/index.htm.
- International Labour Organisation (ILO). "Reducing the Decent Work Deficit – A Global Challenge", *Report of the Director General to the International Labour Conference, 89th Session, Geneva, International Labour Office*. Junio de 2001. 02 de diciembre 2013, <http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-i-a.htm#7>.
- International Labour Organisation (ILO). *Text of the Constitution, Declaration of Philadelphia*. 1944. 04 de septiembre de 2013, <http://www.ilo.org/ilolex/english/constq.htm>.
- International Labour Organisation (ILO). *Text of the Constitution, Preamble*. 1919. 15 de diciembre de 2013, <http://www.ilo.org/ilolex/english/constq.htm>.
- International Trade Union Confederation (ITUC). *New ITUC Global Rights Index – The World's Worst Countries for Workers*. Mayo de 2014. 04 de junio de 2014, <http://www.ituc-csi.org/new-ituc-global-rights-index-the>.
- International Trade Union Confederation (ITUC). *News – Annual Survey of Violations of Trade Union Rights*. Junio de 2012. 15 de junio de 2012, <http://www.ituc-csi.org/annual-survey-of-violations-of-11418.html>.

- Jomo, Kwame Sundaram "Towards Full Employment and Decent Work – An Introduction". En *Towards Full and Decent Employment*, 1-21, editado por José Antonio Ocampo, y Kwame Sundaram Jomo. London: Zed Books, 2007.
- Kaufmann, Christine. *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law*. Oxford: Hart 2007.
- Langille, Brian. "Core Labour Rights – The True Story (Reply to Alston)", *European Journal of International Law*, Vol. 16, No. 3, mayo de 2005: 409-437.
- Leary, Virginia. "Workers' Rights and International Trade – The Social Clause (GATT, ILO, NAFTA, U.S. Laws)". En *Fair Trade and Harmonization: Prerequisites for Free Trade? Vol. 2 Legal Analysis*, editado por Jagdish Bhagwati, y Robert Hudec, 177-230. Cambridge: Massachusetts Institute of Technology Press, 1996.
- Maupain, Francis. "Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights", *European Journal of International Law*, Vol. 16, No. 3, junio de 2005: 439-465.
- Muchlinski, Peter. *Multinational Enterprises and the Law*. Oxford: Blackwell, 1999.
- Nichols, Philip. "Comments on Chapter 5". En *Economic Dimensions in International Law – Comparative and Empirical Perspectives*, editado por Jagdeep Bhandari, y Alan Sykes, 235-247. Cambridge: Cambridge University Press, 1997.
- Oatley, Thomas. *International Political Economy: Interests and Institutions in the Global Economy*. London: Pearson Longman, 2008.
- O'Brien, Robert. "The World Trade Organization and Labour". En *Contesting Global Governance – Multilateral Economic Institutions and Global Social Movements*, editado por Robert O'Brien, y Anne Marie Goetz, y Jan Aart Scholte, y Marc Williams, 67-108. Cambridge: Cambridge University Press, 2003.
- Panagopoulos, Yannis, y Kostas Tsirikas. *Austerity Destroys the European Social Model*. Junio de 2013. 23 de junio de 2014, <http://www.social-europe.eu/2013/06/austerity-destroys-the-european-social-model/>.
- Perlman, Janet. *Favela: Four Decades of Living on the Edge in Rio de Janeiro*. Oxford: Oxford University Press, 2010.
- Perraton, Jonathan. "Changes in Developed Countries' Economic Systems since the 1980s – Implication for Developing Countries", *Economy and Society*, Vol. 38, No. 1: 177-201.
- Pianta, Mario. "Slowing Trade – Global Activism against Trade Liberalization", *Global Policy*, Vol. 5, No. 2: 214-221.
- Pissarides, Christopher. *Social Europe in a Climate of Austerity*. Junio de 2014. 23 de junio de 2014, <http://www.social-europe.eu/2014/06/social-europe-austerity/>.
- Presidencia de la República. *Palabras del Presidente Santos durante la Firma del Convenio entre la OIT, el Departamento del Trabajo de Estados Unidos y el Gobierno de Colombia*. Agosto de 2012. 06 de agosto de 2012, <http://wsp.presidencia.gov.co/Banco/2012/Documents/Agosto/voz1960.swf>.
- Renner, Moritz. "Death by Complexity – The Financial Crisis and the Crisis of Law in World Society". En *The Financial Crisis in Constitutional Perspective – The Dark Side of Functional Differentiation*, editado por Poul Kjaer, y Gunther Teubner, y Alberto Febbrajo, 93-111. Oxford: Hart, 2011.
- Rettberg, Angelika, y Philippe De Lombaerde, y Diana Lizarazo Rodríguez, y Juan Felipe Ortiz-Riomalo. "Trading Rights? Analyzing the Role of a Rights Discourse in Free Trade Agreements (FTAs) in Colombia", *Iberoamericana*, Vol. 14, No. 53, enero de 2014: 167-172.
- Rodrik, Dani. *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth*. Woodstock: Princeton University Press, 2007.
- Salzman, James. "Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development", *Michigan Journal of International Law*, Vol. 21, febrero de 2000: 769-848.
- Saussy, Haun. *In the Workshop of Equivalences – Seventeenth-Century Globalism and the Comparative Pursuit*. Noviembre de 1996. 23 de junio 2014, <http://web.stanford.edu/dept/HPS/WritingScience/etexts/Saussy/Workshop.html>.
- Scheuerman, William. "Reflexive Law and the Challenges of Globalization", *Journal of Political Philosophy*, Vol. 9, No. 1, enero de 2001: 81-102.

- Segol, Bernadette. *High Noon for Social Europe*. Junio de 2013. 23 de junio de 2014, <http://www.social-europe.eu/2013/06/high-noon-for-social-europe/>.
- Sen, Amartya. *Development as Freedom*. Oxford: Oxford University Press, 1999.
- Sen, Amartya. *Employment, Technology and Development*. Oxford: Clarendon Press, 1975.
- Servais, Jean-Michel. "The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?", *International Labour Review*, Vol. 128, No. 4, septiembre de 1989: 423-432.
- Standing, Guy. "The ILO – An Agency for Globalization", *Development and Change*, Vol. 39, No. 4, septiembre de 2008: 355-384.
- Trebilcock, Michael. "Trade Policy and Labour Standards: Objectives, Instruments, and Institutions". En *Hard Choices, Soft Law – Voluntary Standards in Global Trade, Environment and Social Governance*, editado por John Kirton, y Michael Trebilcock, 170-185. Aldershot: Ashgate, 2004.
- United Nations (UN). *Havana Charter for an International Trade Organisation (ITO), Article 7*. 1948. 02 de diciembre de 2013, http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.
- United States Trade Representative (USTR). *Colombian Action Plan Related to Labor Rights*. 2012. 06 de agosto de 2012, http://www.ustr.gov/webfm_send/2787.
- van Liemt, Gijsbert. "Minimum Labour Standards and International Trade: Would a Social Clause work?", *International Labour Review*, Vol. 128, No. 4, septiembre de 1989: 433-448.
- Winters, L. Alan. "Commentary 4.1. Trade and Labor Standards – To Link or Not to Link?". En *International Labor Standards*, editado por Kaushik Basu, y Henrik Horn, y Lisa Román, y Judith Shapiro, 309-313. Oxford: Blackwell, 2003.
- World Trade Organisation (WTO). *Singapore Ministerial Declaration*. 1996. 02 de diciembre de 2013, http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.