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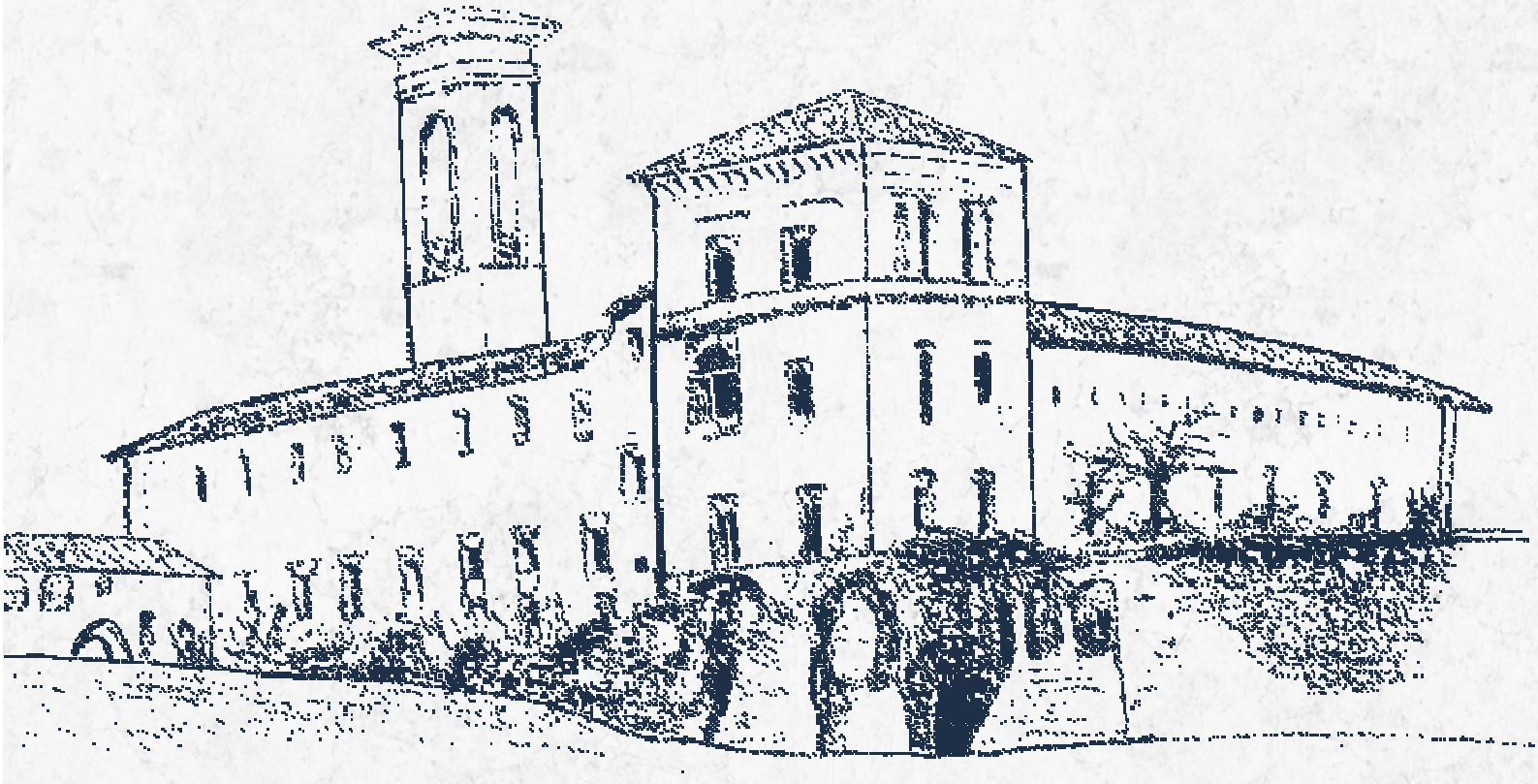

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Social Concerns in Free Trade Agreements

Vincenzo Ferrante *

Abstract. There is no doubt that we live in a world in which national economies are increasingly interdependent. This implies that non-compliance with labour standards in one country can have repercussions for other countries, in the form of shifting investments and weakening regulations. When in the 19th century, for the first time, the idea to limit working hours was launched, it was clear from the beginning that this could be done only at an international level, because otherwise any reduction effected in only one country would be to the advantage of the others. To put it briefly, in a non-protectionist economy, labour standards cannot be guaranteed only in one country. This is because mutual recognition of labour standards makes countries more self-confident, reduces customs duties, breaks down barriers and makes for fairer competition between companies of different countries

Keywords: *Free Trade, ILO, WTO, International Labour Standards.*

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1. Free Trade and Labour Standards

There is no doubt that we live in a world, in which national economies are increasingly interdependent. This implies that the non-compliance with labour standards in one country can have repercussions for other countries, in the form of shifting investments and weakening regulations. When in the 19th century, for the first time, the idea to limit working hours was launched, it was clear from the beginning that only at an international level this could be done, because otherwise any reduction effected in only one country would be to the advantage of the others[1].

Not surprisingly, a few years ago in Italy in the early years of this century, when the international trade with China underwent rapid development, the head of the association of industries pressed for strengthening of labour rights: it took just a couple of seconds to understand that the issue was Chinese workers, not Italian ones.

Working time limits, health and safety regulations, a ban on child labour, equal pay for men and women: all these items have an impact on labour costs and, consequently, on production costs. Of course, constraints on labour regulations come not only from statutes but also from collective bargaining: this is the reason why freedom of speech, the right to organize collectively and plant level workers' representatives are all important factors in ensuring that labour legislation is applied correctly, countering the endemic lack of public enforcement mechanisms[2].

To put it briefly, in a non-protectionist economy, labour standards cannot be guaranteed only in one country. According to Valticos and Von Potobsky, this is the main reason why the ILO has been created: "from

[1] See N. Valticos, *Droit international du travail*, Paris: Dalloz, 1970 (II edit. 1983 *non vidi*); P. Léon, *Storia economica e sociale del mondo*, Roma e Bari: Laterza, 1979-1981; from a different point of view, see also D. Roediger, Ph. Forner, *Our own time: a history of American labor and the working day*, London and NY: Verso, 1989; on more recent developments, Ph. Askenazy, *Working time regulation in France from 1996 to 2012*, in *Cambr. Jour. Econ.*, 2013, 37, 323-347.

[2] It is easy to recognize in the items mentioned the main ILO conventions (on Forced Labour, n. 29 and 105, on collective rights, n. 87 and 98; on Equal Pay and Discriminations, n. 100 e 111; on Child Labour, n. 138 and 182); with regard to core labor standards and decent work agenda, see J.-M. Thouvenin et A. Trebilcock (eds.), *Droit international social: droits économiques, sociaux et culturels*, Bruxelles: Bruylant; Paris: CEDIN, 2013; S. Hughes and N. Haworth, *The ILO: coming in from the cold*, London & New York: Routledge, 2011; J.-M. Servais, *Normes internationales du travail*, Paris: LGDJ, 2004; see also R. Blanpain, M. Colucci (eds.), *L'organizzazione internazio-nale del lavoro: diritti fondamentali dei lavoratori e politiche sociali*, Napoli: Jovene, 2007.

the outset, it was felt that national legislation on labour matters could not be solidly established in individual countries if not supported by parallel standards adopted internationally"[3].

Mutual recognition of labour standards makes countries more self-confident, reduces customs duties, breaks down barriers and makes for fairer competition between companies of different countries. It is well known that also in the Rome Treaty the main concern on labour matters was to guarantee equal treatment in salary, irrespective of gender, and established paid holidays, mainly to avoid textile products made in Italy being able to invade the French market[4].

A common market requires no boundaries and urges people to move: so the second step is represented by free movement of workers and mutual recognition of professional qualifications.

It is important to stress that, from this point of view, it is in the interest of workers to boost labour standards: the ILO is the only tripartite International organization, and also the EU recognizes and fulfils the social dialogue in various ways. Conversely the WTO knows no collective action or bodies, and primarily limits its scope to consumer goods and services.

Nevertheless, it seems to me that there is no better way to promote freedom than through commerce. The ancient inhabitants of Athens were mainly sailors and dealers: they regularly discussed whether it was better to have good relationships with the other peoples of the Aegean Sea or to wage war against them. Democracy was a contagious disease, because everyone could adopt, for example, the Athenian practices. It was no different during the dark times of the Middle Ages, when slavery was banned just on the very day on which the market was held. In the same way, frankly speaking and without prejudice, it could be said that colonialism is not a good example for approaching the need to develop commercial relationships and to internationalize trade, but we have to recognize that in the last few centuries it has (also) been a way to do this.

It is a matter of fact that, despite the great diplomatic ability of permanent Bureau in Geneva and the efforts made by the Committee of Experts, the ILO decent work agenda does not work by itself, if not at small steps, but

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[3] V. Valticos and G. Von Potobsky, *International labour law*, Deventer, Boston: Kluwer,1995, 2nd rev. ed.

[4] See M. Roccella e T. Treu, *Diritto del lavoro dell'Unione europea*, 6th ed., Padova: Cedam, 2012; C. Barnard, *The substantive law of the EU: the four freedoms*, 3rd ed., New York: Oxford U.P., 2010; R. Blanpain, *European labour law*, 12th rev. ed., Alphen aan den Rijn: Kluwer Law International, 2010.

needs a stimulus or a penalty to make sure that its standards are respected[5].
About core labour standards, it has been written that: "all over the world states are violating the basic principles embodied in the various declarations, but this has almost never had repercussions for relations among states. This might change if these principles, or rights, were enforceable through trade measures"[6]. Not surprisingly there is only weak coordination between ILO concerns and WTO matters, despite all the attempts to have the two organizations linked via social clauses[7].

2. WTO and international labour standards

At the very beginning, under the Havana Charter, adopted by 56 countries at the first World Trade Conference in 1948, member States "recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit".
The Conference also decided to establish an international organization to promote international trade. But it never appeared, mainly because the Congress of the United States refused to ratify it. The transitional agreement, born from the ashes of this failure, the GATT, lasted 47 years and completed eight rounds of trade negotiations, the latest of which concluded with the signing of an agreement that provided for the establishment of the World Trade Organization (WTO).
During the final part of the negotiations, the so-called Uruguay Round, the USA and France made an attempt to insert core labour standards into an article within the WTO Agreements, to oblige a member states to respect them; any violation of the social clause, consequently, could represent a breach of contract and could become subject to WTO scrutiny through the usual WTO dispute settlement provisions.

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[5] *Les normes internationales du travail: un patrimoine pour l'avenir*, Mélanges en l'honneur de Nicolas Valticos, Geneva: BIT, 2004.
[6] G. Van Roozendaal, *Trade Unions and Global Governance. The Debate on a Social Clause*, Continuum, London & N.Y., 2002, 46.
[7] See G. Altintzis, E. Busser, *The Lesson from trade agreements for just transitional policies*, in *Int. Jour. Lab. Research*, 2014, vol. 6, 270-294: L. Compa, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, "Comp. Lab. Law. & Pol. Journ.", 22 (2001), 199-238.

When the Round was out the question still remained on the table and was left to further developments. At the first Ministerial Conference of the newly created WTO in Singapore considerable attention was paid to the question.
A compromise on the issue resulted in a paragraph on labour standards in the final Declaration of the Conference, the first time that a reference to such standards was included in a WTO official document. The declaration is as follows:

> We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organisation (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. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration[8].

The declaration was a very ambiguous one: it was the consequence of different points of view, which nobody was able to synthesize: on the one hand there was the attempt of the US Government, strongly supported by American union bodies, to avoid social dumping and relocation of business via widespread minimum wage protection, on the other, the fear of a new colonialism by imposing on Southern countries standards they are not able to respect, as it would make the price of their goods higher.
Indeed, the point is most problematic. On both sides of the Atlantic, a substantial proportion of public opinion opposes further trade liberalization on the grounds of competition from countries with low wages and low social protection. According to this idea free trade truly applies only within relatively homogenous entities, and worldwide trade liberalization will exacerbate social inequalities and erode the wages of unskilled European workers. The social clause, however, has hardly any supporters also in Africa or in India, where the unionists often think that labour standards are "luxury goods" that cannot be afforded at a certain stage of development[9].

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[8] World Trade Organization, Singapore Ministerial Declaration, § 4. WT/MIN(96)/DEC/W. 13 December 1996.
[9] See A. Vandaele, *International labour rights and the social clause: friends or foes*, London: Cameron May, 2005.

3. Unilateral Measures Implementing International Labour Law Standards

The increasingly popular idea of an institutional link between labour standards and fair trade left room for a different kind of social clause, in an area hitherto dominated by multilateral efforts, emphasizing the system set up by the United States, which is comprehensive, referring specifically to social rights, and very widespread because the United States, with its 10 per cent share of international trade, is the world's premier trading nation.
According to Section 301 of the 1974 Trade Act, as amended by the 1988 Trade and Competitiveness Act, United States Trade Representatives are authorized to withdraw or suspend trade benefits extended to a foreign country, or to impose duties or other restrictions on imports from it, if it fails to comply with a trade agreement, if it unjustifiably restricts imports from the United States, or if its trade legislation, policy or practices are deemed unreasonable or discriminatory towards the United States.
Such practices include export subsidies, support to activities constituting an obstacle to imports, inadequate protection of intellectual property rights and a persistent pattern of conduct that denies enjoyment of certain key labour rights[10].
The same criteria are applied under the generalized system of preferences. (GSP), a program designed to provide preferential duty-free treatment for products from a wide range of designated beneficiary countries, granting to them the "most-favoured-nation" status.
According to US laws a GSP beneficiary must have taken or be taking steps to afford internationally recognized worker rights, including 1) the right of association, 2) the right to organize and bargain collectively, 3) a prohibition on the use of any form of forced or compulsory labour, 4) a minimum age for the employment of children, and a prohibition on the worst forms of child labour, and 5) acceptable conditions of work with respect to minimum wages, working hours and occupational safety and health.
A GSP beneficiary must take all steps in order to eliminate the worst forms of child labour. The recognized status is subject to an investigation into respect for human rights: an investigation can be initiated on submission of a petition by any interested party, such as a trade union.

[10] See C. Breton, *Traités de commerce et actes unilatéraux*, in Thouvenin-Trebilcock, *Droit international social*, cit., t. I, 203-220.

Some states bound by specific international agreements are treated as one country for GSP rule-of-origin: so Member Countries of the Cartagena Agreement (Andean Group)[11]; some Member Countries of the Southern Africa Development Community (SADC)[12]; Member Countries of the West African Economic and Monetary Union (WAEMU)[13]; Member Countries of the South Asian Association for Regional Cooperation (SAARC)[14]; some Member Countries of the Association of South East Asian Nations (ASEAN)[15]; Member Countries of the Caribbean Common Market (CARICOM):

This system has often been criticized for its unilateral – not to say discretionary – nature. Obviously, a multilateral arrangement would silence the critics, and so when the North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico entered into force on 1 January 1994 it looked like it might have been only the first step towards the establishment of a vast common market creating a new path to follow.

The North American Agreement on Labor Cooperation (NAALC), which supplements NAFTA, provides a mechanism whereby trade barriers can be restored if a state party fails to observe its own labour legislation. It also provides that national labour standards cannot be revised "downwards". Such mechanisms are in the nature of a social clause.

To be honest, the *ad hoc* body created to manage labour claims arising from everyone, the Commission for Labor Cooperation (CLC), has dealt with less than 30 complaints and only a few have not been rejected[16].

The EU also has its own scheme of generalised tariff preferences, laid down by Regulation No 978/2012 of 25 October 2012, with the primary aim of eradicating poverty and fostering the sustainable economic, social and environmental development of third world countries. Alongside to a general arrangement, a special system (GSP+) is provided for partners which have ratified all the conventions listed in a special annex[17]. Art. 9(b) of the Regulations obliges beneficiary States until 2024 to comply with the

[11] Bolivia, Ecuador, Venezuela.

[12] Botswana, Mauritius, Tanzania.

[13] Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, Togo.

[14] Benin Afghanistan Bhutan India Nepal Pakistan Sri Lanka.

[15] Philippines, Thailand, Indonesia, Cambodia.

[16] In addition, its website looks like it has not been updated for years: see http://www.naalc.org/naalc.htm (visited September 20 2015).

[17] Annex VIII includes OIL Conventions 29 (1930), 105 (1957), 87 (1948), 98 (1949), 100 (1951), 111 (1958); 138 (1973) and 182 (1999).

latest conclusions of the ILO monitoring bodies, which has not to identify a serious failure to effectively implement the relevant conventions.

4. Bilateral Trade Agreements and Jurisdiction: CETA AND TTIP

In the light of the experiences analysed above, two treaties involving the EU have to be evaluated. The first one is not far from final signature and will bind the EU and Canada, with the acronym CETA. The second one is at an early stage of negotiations, but it has attracted the most attention of all: of course, the reference goes to the Transatlantic Trade and Investments Partnership (TTIP), planned to join USA and EU.
While we know little about the latter, the contents of the first are already known: there is a long chapter on the temporary entry and stay of natural persons for business purposes and on contractual services, suppliers, and independent professionals. A special Chapter is devoted to labour regulations, but these provisions are mostly procedural.
At the very beginning of Chapter X of Template CETA (art. 1, § 2), Canada and EU recognize "the beneficial role that decent work, encompassing core labour standards, and high levels of labour protection, coupled with effective enforcement, can have on economic efficiency, innovation and productivity".
Nevertheless, article 2, in proclaiming "the right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its relevant laws and policies" oblige the Parties to act only "in a manner compatible with its international labour commitments, including those in this Chapter", so binding every modification of internal legislation to the compliance of a special dispute resolution procedure laid down by the last article of the Chapter.
It has little importance that each Party reaffirms its commitment under the ILO Declaration on Fundamental Principles and Rights at Work 1998 and its Follow-up, to reach the objectives included in the Decent Work Agenda, and in the 2008 ILO Declaration on Social Justice for a Fair Globalisation, if in the meantime art. 11 provides that "for any matter arising under this Chapter where there is disagreement between the Parties, the Parties shall only have recourse" to an arbitration body, without the possibility to access the national jurisdiction.

It has been discussed[18] whether the TTIP has to embody a similar clause or a special social clause to prevent European workers from unemployment and to protect against unfair commercial practices. Obviously the point is only partially about free trade of goods, because European customs charges are all in all very low (around 4%). On this side, the concern is about overseas quality standards, for instance in agricultural products, to protect European farmers and producers against low prices, due to the use of products banned elsewhere. In the same light are well known environmental fears, because of US energy policy.

On the other side, there is concern about the possibilities that multinational enterprises can conquer the old continent by installing manufacturing plants not obliged to follow European legislation on minimum wages and social security burdens or to respect the traditional collective relationship at plant level. It means that, due to the posted workers directive and private international law, production costs would be significantly lower than those charged by European based companies, forced to guarantee their respect by territoriality principle.

Of course, the insertion in the TTIP of an investor-to-state dispute settlement (ISDS) clause will protect investors from the risk of expropriation due to the nationalisation of plants and against the weakness of hetero-dominated judicial systems but it is obvious that such private arbitration would allow companies to sue governments and limit their ability to regulate in the public interest[19].

In the light of European history of institutions, such a clause is very difficult to accept: it is normal that, via diplomatic channels, foreign governments can make a complaint against discrimination because, and even nowadays, diplomacy has always dealt with business interests. In case of failure, the use of the legal system has always been very common for a large number of American multinational companies already installed in the European territory too, without anyone ever having accused the courts of bias. Europeans do not have the "process clause" of the 5th amendment of the American Constitution, but the European convention on human

[18] See C. Scherrer (ed.), *The Transatlantic Trade and Investments Partnership (TTIP): Implications for Labor*, Rainer Hampp Verlag: München, 2014; T. Treu, *Postfazione*, «Economia & Lavoro», XLIX (2015), 143-155, special issue on "*TTIP: Widening the Market and Narrowing the Competion?*".

[19] See particularly European Parliament, *The TTIP and Parliamentary Dimension of regulatory Cooperation*, Brussels: 2014; L. Compa, *Labor Rights and Labor Standards in Transatlantic Trade and Investments Negotiations: a US Perspective*, «Economia & Lavoro», XLIX (2015), 87-102.

rights in art. 6 ensures everyone the "right to a fair trial" and EU court systems are largely seen as reliable in business communities, whereas in many third world countries they are viewed as politicised or erratic. In other words and conclusively, politicians and scholars have to make an attempt to find new legal institutions and to abandon solutions that have already been tested, when America and Europe are planning to walk along an unexplored road.

ADAPT International Network

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