

Economic Globalisation and Human Rights

Economic globalisation is one of the guiding paradigms of the twenty-first century. The challenge it implies for human rights is fundamental, and key questions have up to now received no satisfying answers. How can human rights protect human dignity when economic globalisation has an adverse impact on local living conditions? How should human rights evolve in response to a global economy in which non-statal actors are decisive forces? *Economic Globalisation and Human Rights* sets out to assess these and other questions to ensure that, as economic globalisation intensifies, human rights take up the central and crucial position that they deserve. Using a multidisciplinary methodology, leading scholars reflect on issues such as the need for global ethics, the localisation of human rights, the role of human rights in WTO law, and efforts to make international economic organisations more accountable and multinational corporations more socially responsible.

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Globalisation and Social Rights

A DALBERTO PERULLI

Introduction: the social dimension of the global market

The growing economic interdependence between Nation-States, and the fast expansion of global trade, linked to international financial mobility, are at the origin of the extensive debate about the measures needed to protect fundamental social rights from the increased competition of markets and resulting competitive devaluation of national social policies.¹ The latest analyses of the evolving tendencies of globalisation highlight two fundamental implications for national labour law systems. One is linked to the relationship between the economy and the State, and concerns the decline of the nation-state's control of the regulation of the market. The other relates to the de-nationalisation of economic activities by companies, especially multinational ones, in large part influenced by regional differences in labour costs and social security programmes, which transplants the declining of the regulatory capacity of the nation-state and 'deconstruction' into labour law systems.²

Both tendencies risk causing a general rush towards an acceptance of a lowest common denominator level in workplace standards; standards which are anyway being threatened by what institutional economists call 'destructive competition'³ and by the resulting processes of global

¹ See P. Alston, 'Labour Rights as Human Rights: The Not So Happy State of The Art', in P. Alston (ed.), *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005), p. 3; S. Deakin, 'Social Rights in a Globalized Economy', in Alston (ed.), *Labour Rights as Human Rights*, p. 25; B. Wedderburn, 'Common Law, Labour Law, Global Law', in B. Hepple (ed.), *Social Rights in a Global Context* (Cambridge: Cambridge University Press, 2002), p. 19.

² Many scholars have argued that globalisation and new forms of production provoke an 'identity crisis of labour law': see M. D'Antona, 'Labour Law at the Century's End: An Identity Crisis', in J. Conaghan, R. Fischl and K. Klare (eds.) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002), p. 31.

³ See G. De Martino, 'L'harmonisation des normes du travail dans une perspective internationaliste', *Syndicalisme et société* (1998), 265.

delocalisation of production, phenomena which are followed by the competitive devaluation of internal social policies. The search for greater competitiveness is often carried out, even in the more advanced and consolidated economic systems, through the compromise of social rights and sweatshop-like practices instead of through re-planning of organisational models of production based on making workers responsible and involving them. Thus, these scenes generate a new type of value questions, on the one hand a question relating to the transfer of the functions of governing the market to supranational levels, which, until now, have been carried out by States in national spheres. On the other hand, a new question relates to the possibility of channelling the protection of social standards onto the global level, by placing the obligation to respect workers' minimum standards under the protection of institutions regulating international trade.

The Uruguay Round negotiations and the following Marrakech Agreement constitute a decisive achievement and signal the expansion of the world economy, but they do not provide an adequate reflection of the effects that such liberalisation could have on the labour markets of the contracting Parties. In reality, the constitutive agreement of the World Trade Organization (WTO), in facilitating access to the markets of industrialised countries, and in particular the specific imports of developing countries (DCs), creates strong tensions mainly in the low-salary sectors of the countries with higher social standards and in the higher-salary sectors in the less developed countries.⁴ Basically, as a result of the elimination or reduction of trade barriers, the developed Western systems suffer unregulated competition from the emerging countries, which have an inexhaustible 'reserve army' ready to enter the labour market with lower salaries and social standards. It fatally pushes the Western economies towards the retributive systems and conditions of exploitation of the workforce of the competing countries.⁵

These phenomena require the reiteration of globalisation into

⁴ See M. Vellano, 'Full Employment and Fair Labour Standards in the Framework of the WTO', in P. Mengozzi (ed.), *International Trade Law on the 50th Anniversary of the Multilateral Trade System* (Milano: Giuffrè, 1999), p. 390.

⁵ For an analysis on the impact of labour cost on the mobility of capital in Europe, see C. Erickson and S. Kuruwilla, 'Labor Costs and the Social Dumping Debate in the European Union', *Industrial Labour Relations Review* 48 (1994), 28; more generally on the effects of international trade on employment and salaries, see, R. E. Baldwin, *Trade Policy in a Changing World Economy* (Chicago: University of Chicago Press, 1988), p. 181; N. Gaston and D. Trefler, 'Protection, Trade and Wages: Evidence from US Manufacturing', *Industrial Labour Relations Review* 47 (1994), 574.

politically shared schemes that can legitimise the market action. In fact, as it was written by Thurow, 'if the époque of the national economic legislation has been exhausted, world economic legislation has not yet begun'.⁶ This statement remains valid. In today's context, a similar regulative perspective can be maintained only as regards supranational sources – or an interstate network maintained by interdependence – instituted to favour cooperation in wider areas than the ones defined by the singular states which regulate economic phenomena on the regional⁷ or on the global⁸ scale. It means that there are issues where two different but not conflicting *ratios* compete. One such issue relates to the planning and creation of a global economic order, that is not only reduced to the mere juridical creation and institutionalisation of markets but also introduces guarantees against the undesired social consequences of globalisation.⁹ The other one entails avoiding 'social dumping', the distorting phenomenon that prevents the optimal allocation of resources on the global scale.¹⁰

The following analysis attempts to put these two perspectives into correlation. On the one hand, the intention is to inquire about the relationships, historical, logical and functional, that link market liberalisation with labour law, whilst, on the other hand, reconsidering the regulatory options. An emphasis will be placed on a perspective which could be capable of connecting the traditional instruments of international labour law with those of economic governance (and especially with international economic law).

Trade liberalisation and labour law: the ambivalences

Trade liberalisation has a very complex relationship with labour law, indicating a hypothesis of both a virtuous link, and an indomitable

⁶ See L. C. Thurow, *The Future of Capitalism* (New York: William Morrow & Co, 1996), p. 77.

⁷ E.g., the European Union (EU), or the North American Free Trade Agreement (NAFTA).

⁸ E.g., the WTO.

⁹ J. Habermas, *Die postnationale Konstellation. Politische Essays* (Frankfurt am Main: Suhrkamp, 1998); D. Held, *Global Covenant. The Social Democratic Alternative to the Washington Consensus* (Cambridge: Polity Press, 2004).

¹⁰ See A. Lyon-Caen, 'Pérennité d'une interrogation', in *Bulletin de droit comparé du travail et de la sécurité sociale* (1996), 13–20; L. Dubin, *La protection des normes sociales dans les échanges internationaux* (Marseille: Presses Universitaires D'Aix-Marseille, 2003); this link received inputs also from the OECD study on *Trade, Employment and Labour Standards: A Study of Core Workers*, www.oecd.org.

opposition. On the basis of a historical analysis, the link between the two terms is in the very genetic code of labour law. At heart, the 'liberation' of work – and therefore the birth of the 'social question' which leads to the creation of labour law – was made possible by a process of liberalisation of exchanges (trade) that made people free to offer their own work for others: 'il sera libre à toute personne de faire tel ou tel négoce et d'exercer telle profession, art ou métier qu'elle trouvera bon' [it is permitted/free to all persons to carry out any business or practice any profession, art or job that he or she deems right. *Translation by the author*] as expressed by Article 7 of the Decree of Allarde of 1791.¹¹ The link between the dimension of exchanges, and the labour law norm, then develops on a functional analytical basis, so that labour law takes part in the 'equalisation' of free competition conditions in the economic contest of the market. This happens to the extent that, according to Lyon-Caen, labour law comes to existence as a *component* of competition law and not as its antithesis; the protection of work represents a by-product of that primary function.¹² From this perspective, labour law and trade liberalisation progress together, a process accentuated by the current context of the globalisation of the economy. The universality of labour law recalls the need for a global governance of social rights also from an economic point of view, which favours the path towards a civil society and a global policy. At last, it can be considered that trade liberalisation and market integration processes include a social dimension, as they open up new areas for comparative studies. Useful elements can be drawn from their development for the resolution of the complex practical problems brought about by the demands of harmonisation and 'alignment' of national legislations.

The opposing connotations between the two terms appear similarly radical. Trade liberalisation is a term of the classical doctrine of economics. It favours freedom of entrepreneurship, free competition, and 'playing the game' of individual initiatives. Shortly, trade liberalisation finds itself in an economic paradigm, contrasted with the idea of the market as a result of a spontaneous confrontation between economic actors.

Labour law, however, adheres to a different rationality that perceives regulation as a necessity that allows for the economic actors to regulate their interaction. It is like saying – to recall the idea of Hayek, one of the greatest

¹¹ The so-called 'décret d'Allarde', decreed by the French National Assembly on 2 March 1791.

¹² G. Lyon-Caen, 'L'infiltration du Droit du travail par le droit de la concurrence', *Droit Ouvrier* (1992), 313.

representatives of the liberal doctrine – that labour law is composed of organisation rules backed up by public law pursuing the 'mirage of social justice'.¹³ It is an opposing relationship, once again, since trade liberalisation is a vector of the neo-liberal strategy aiming at reducing the economic power of the State, and of the public sector, for the benefit of private actors and market mechanisms. Labour law, on the other hand, is closely linked to the idea of the Nation-State and its historical function of mediation and conciliation between mercantilist values of the economy and extra-economic values of solidarity. It is an opposition; ultimately, because trade liberalisation in so far as it takes part in the economic sphere is rooted in the idea of *oïkos* and *oïkonomia*. It is the organisation of the national economy, which started to develop in the Middle Ages, from the commencement of trade with the outside world to the birth of the capitalistic company. Labour law, however, is rather linked to the idea of *koïnon*, represented by civil society, and a political community of noble values, since it participates to the realisation of social, economic and cultural rights indispensable for the dignity of human beings. It is the *moral space* where the multiplicity of private interests is rationalised in the general interest.

The linkage hypothesis

Trade liberalisation and labour law have a single *trait d'union* in the ambit of international trade regulation.¹⁴ This historical link is underlined in the current context of globalisation of the economy, under which the expansion of trade along with the renewed push for economic regionalism represents a fundamental component; an impulse which implies the creation of free trade zones, customs unions and common markets with forms of economic integration that go beyond the trade sector and touch upon areas such as services and investment.

This link between trade liberalisation and labour law, however, constitutes a founding element of international labour law as regards both the construction of normative policy of the International Labour Organisation (ILO), and the relationship between the ILO and international economic organisations. As for the normative policy in particular, it was evident from

¹³ F. A. Hayek, *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy*, vol. II (London: Routledge & Kegan, 1976), p. 10.

¹⁴ A theory of trade linkage has been developed by D. W. Leebron, 'Linkages', *AJIL* 96, (2002), 5; see also P. Alston, 'Linking Trade and Human Rights', *German YIL* 23 (1980), 126, noting that the potential costs of linking trade and human rights may be considerable and calling for a careful weighing process.

the very beginning that the function of international labour law was to contrast the opportunism of those States which would have placed – or were actually placing – the protection of workers below their companies' economic and competition interests. Thus, the Preamble of the Constitution of the ILO states that 'the failure of any nation to adopt human conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries. On the one hand, this meant the recognition that under the burden of international competition social progress of one State depended to a great extent on the behaviour of others. On the other hand, it also meant that labour law norms, by nature, had an impact on competition.'

The recurrent dialectic that links labour law norms with international exchanges later reappeared with greater clarity and accuracy in the wording of the Havana Charter,¹⁵ progenitor of the yet to be created (but at the end never established) International Trade Organisation. It not only expressly stated the obligation of respecting fair labour conditions but it went much further by outlining the need for an institutional link between the International Trade Organisation and the ILO towards a profitable integration of trade law and social standards.

The linkage between trade liberalisation and labour law cannot but reappear with more power under the processes of globalisation, leading to a growing interdependence between economies, favoured by a strong expansion of flows of capital and transnational companies in international trade. In fact, trade liberalisation is the primary component of globalisation, along with other vectors and factors such as the deregulation of capital markets, growth of foreign trade and investment, the enormous reduction of transport and telecommunications costs, the intensification of international competition, the extension of production systems on a global scale, and the unification of financial markets in the framework of a 'financialisation' of the capital system. However, the link between trade liberalisation and labour law in the present form of globalisation should be analysed in light of a fundamental transformation of the national and international system of balance and distribution of power, which until the present day has been mastered by nation-states.¹⁶

¹⁵ The United Nations Conference on Trade and Employment, held in Havana, Cuba, in 1947 adopted the Havana Charter for an International Trade Organisation which was meant to establish a multilateral trade organization. For various reasons, the Charter never came into force. See, for more information, www.wto.org.

¹⁶ U. Beck, *Macht und Gegenmacht im globalen Zeitalter* (Frankfurt am Main: Suhrkamp Verlag, 2002).

In the absence of any multilateral coordination, and prior to a process of internalisation of trade governed by the General Agreement on Tariffs and Trade (GATT),¹⁷ which reinforced competition between social systems and capital mobility of the different countries, the idea of normatively structuring the original relationship between trade liberalisation and labour law on a national and international level, tends to fade away or even disappear in the cry of neo-mercantilism. The global economy, in particular, has developed a meta-power that has been permitted to free itself from the national and territorial power game of which it was prisoner. Two related phenomena emerge: the denationalisation of the economy and the declining of the regulatory capacity of the Nation-State.

The hallmark of the first phenomenon is the growing importance of the 'network company', possessing a complex structure and transnational dimension, and enjoying the consequent phenomena of self-regulation. This powerful non-State actor, present on the global scene, on the one hand compromises the utility and the efficiency of the international legal norms, since the production strategies and activities of the undertakings are not structured according to the boundaries of national law. On the other hand, it forces upon States a greater opening-up of their markets to facilitate trade, attract foreign capital, and benefit from the presence of these actors on their own territory. The geographical dispersion allows transnational companies to take advantage of the fragmentation of state competences, and to make national states compete by manipulating national norms regarding the conflict of laws, in order to fall under that national law which is most favourable to their interests.

The creation of autonomous systems of spontaneous transnational norms by economic actors is a typical manifestation of the second phenomenon. This is the case with international exchanges between companies, which form the basis of the new *lex mercatoria*; that is, a law organised by companies that extends the radius of their economic action and at the same time opportunistically structures their legal space through uniform contractual models. However, the internationalisation of the sources of production of this post-national law pertain to other fast-spreading experiences and practices, such as international codes of conduct and standard rules of ethical normalisation, which imply self-referential normative powers.

¹⁷ See www.wto.org.

The effects of trade liberalisation on labour law

In view of the dismantling of territories by the action of a transnational economic network, and vis-à-vis both what Teubner calls 'self-destruction' of the law in its national dimension,¹⁸ and the creation of an autonomous, transnational law (whose function is to permit the economy its self-legitimation), the fullness and exclusiveness of State sovereignty is by now almost unreal. Naturally, the question is of a greater importance and concerns the very idea of law as a unitary (*Ordnung, Order, Ordre*) and localised system (*Ortung*), imposingly represented by Schmitt in his work on *Nomos der Erde*;¹⁹ that is, the original and immediate form in which the organisation of a people becomes visible. This deconstruction seems to be closely linked to the questioning of the traditional role of the regulatory State in the economic and social sphere. The processes of globalisation impose a general retreat of state institutions, accompanied by the creation of new institutions, which are equivalent to the already existing ones, to operate on the transnational and local level. Moreover, globalisation favours the progressive shift of regulation to the top (towards new extra-state decision-makers) and to the bottom (levels of regional, local, and company governances) where one witnesses the combination of – without implying a contradiction – mixed processes of deregulation and over-regulation in the framework of the multiplication of actors and levels of regulation within and outside of the territories of the Nation-State. What are the consequences of these processes on labour law?

The answer is evident; as it is considered that the norms of national labour law systems were conceived in function of employment relationships within state boundaries between legal persons actually put under the juridical authority of the State and exposed to its coercive power. Internationalisation, financial globalisation of the economy erode the institutional configuration of labour law inherited from the past, whilst in the new context, new models of regulation emerge based on very different regulatory instruments and techniques from the traditionally *étatiste* ones. We encounter the first effect of globalisation on the national systems of labour law: the deconstruction of the system. As for labour law systems, in the way they evolved during the last century in most Western countries, the assumption of this deconstruction is to question the social

and political 'Fordist' compromise, under the pressure of a liberalism aimed at the deregulation and competition of social systems. The argument of an exacerbated international competition exercises, in this way, a downward pressure and functions as a discourse on the flexibilisation of the norms capable of redefining consolidated policies and legislative orientations. The risk run by the systems which follow the rule of deconstruction is to fall into a practically unstoppable race to the bottom. Indeed, in the face of the intensification of the competition, companies follow strategies of delocalisation to countries with ever-lower social costs, whilst the levels of productivity of developing (or newly industrialising) countries tends to adjust to those of Western countries, thanks to formidable technological developments. In this strategy of making more flexible the deconstruction of social standards, liberalisation of trade, and foreign direct investment seem to be decisive, since they provide for the normative and material bases of global economic rationality. Production from those companies which have delocalised in order to save on social costs is not for the local market, but for exportation to third countries. Prior to a significant drop of customs rights and the elimination of quantitative restrictions, multinational companies obtain favourable measures for their import of products from branches or suppliers in developing countries. On the one hand, it leads to Generalised Systems of Preferences, thanks to which a quota of customs-free exports is given to developing countries in certain sectors. On the other hand, thanks to outward processing arrangements, the limitation of customs rights to added value is realised for the importation of products with raw materials and components previously exported to developing countries.

This interdependence in the global integration of production, which means the different elements of the national productive system and the development of international exchanges, take us to the second effect of globalisation: competition/concurrence between social systems. Globalisation induces macro-economic policies where the weakness of social protection systems becomes an element of competitiveness: in the absence of internationally-enforced labour standards, employers will resort to a 'sweatshop' business strategy in order to meet international competition;²⁰ the non-application of social rights becomes an element of generating competition between social systems. In a competitive

¹⁸ G. Teubner, 'Contracting Worlds: The Many Autonomies of Private Law', in *Social and Legal Studies* (2000), p. 402.

¹⁹ C. Schmitt, *Der Nomos der Erde* (Berlin: Duncker & Humblot, 1997), p. 15.

²⁰ See, e.g., M. J. Piore, 'Labor Standards and Business Strategies', in A. Herzenberg and J. F. Pérez-Lopez (eds.), *Labor Standards and Development in the Global Economy* (Washington: US Department of Labor Bureau of International Labor Affairs, 1990), p. 35.

relationship between national systems, markets are free to evade local 'rigidities' acting therefore as progressive weakening factors of labour law's rationality and of its structural organisations (welfare state, trade union dimension of employment, etc.). In the face of these phenomena, the traditional regulative prospective looks for remedies in supranational sources, whether they refer to international law (e.g., ILO Conventions with their limited efficiency and effectiveness) or to single macro-regional contexts (e.g., the European Community's social dimension, which now seems to be 'constitutionalised'; and the North-American interstate cooperation within the framework of the North-American Agreement on Labor Cooperation (NAALC),²¹ the 'Andean Pact',²² and the Mercado Común del Sur (Common Market of the South, MERCOSUR)²³).

The regulation between the global and the local: the Social Clause and fundamental social rights

The convergence of these phenomena (deconstruction and competition between systems) raises the question of regulation in order to find a possible conciliation between the sphere of global economy and the strengthening of social rights. As we will see, the question of regulation requires a differentiated treatment which is global and local at the same time. Its elements cannot be provided for by national law; the crisis of sovereignty is evident from the internationalisation of the sources of law by the activity of globalisation actors. Nor can they be provided for by international law, based on the principle of sovereignty of states and affected by structural deficiencies in respect of the efficiency of the ILO's normative action.²⁴

Given that globalisation diminishes the efficiency of classical instruments of social regulation, one can envisage two responses. The first is neo-liberal in nature, aimed at deregulating in order to suppress the rigidities of labour markets, which should converge towards the optimum regulated by the 'invisible hand' of the market. In this vision, the spontaneous allocations that take place on the global market are by definition efficient and fair since everyone is paid according to his or her contribution to the overall richness. The promise is rather tempting:

²¹ See, for more information, see www.naalc.org.

²² The trade bloc today is known as the Andean Community. Its member states are Bolivia, Colombia, Ecuador, Peru and Venezuela. See, for more information, www.comunidadandina.org.

²³ For more information, see www.mercosur.int.
²⁴ See ILO report, *Travail décent et économie informelle* (2002), www.ilo.org.

everyone will become rich, and even the poor will end up by benefiting from it.

The other response, of an institutional character, is based on the assumption that all market relations are social constructions and they do not derive from the spontaneous confrontation of economic agents. Social and labour rights are presented as a necessary component of efficient and competitive markets. From this perspective, regulatory factors should be mobilised to substitute market rationality with a rationality based upon normative, axiologically-oriented constructions. This institutionalist approach takes us back to the heart of the problem: the question of the integration of social provisions into the system of regulation of international trade and in particular the problem of rational and moral justification of such integration. In this respect, there are two sets of justifications which can be re-conducted, in line with Weber's logic, to a rational justification as regards scope and value.

The first justification stresses the economic interest of trade, a typically mercantilist interest, and the instruments of regulation in order to overcome market failures, and the limits of rationality of an unregulated market. This operative and instrumental justification of regulation looks into the harmonious development of the market and is based on the idea of fair trade.²⁵ The protection of the fundamental social norms guaranteed in the framework of international trade is justified when the sense of violation of those standards by the exporting States is likely to damage the economy of those countries which respect the standard of the supra-national 'level playing field'. Thus, the notion of fair trade can be considered as a means to complete the game of free trade, guaranteeing to the State and economic actors that none of the global players will take advantage of the unfair benefits that result from the non-application of the national (such as the model of the North American Agreement on Labour Cooperation (NAALC))²⁶ which does not establish any supra-national minimum threshold²⁷ or international (as provided for by international labour law: it is the EC's external approach²⁸) or 'internationally recognised' social norms (like the model unilaterally applied by the USA). Social standards therefore penetrate in the regulative sphere of

²⁵ See C. McCrudden and A. Davies, 'A Perspective on Trade and Labour Rights', in F. Francioni (ed.), *Environment, Human Rights and International Trade* (Oxford: Hart, 2001), p. 179, suggesting that labour rights that serve to increase freedom of choice and contract are theoretically consistent with the ideology of free trade and may be required by it.

²⁶ www.naalc.org.

²⁷ www.naalc.org.
²⁸ For more information, see: www.europa.eu.int/pol/comm/index_en.htm.

competition law as an instrument of implementation of a principle of fair competition at the international level, aimed at limiting the phenomena of social dumping.

The main instrument of this conditionality is the social clause to be introduced in the international trade agreements, and through which the linkage between work standards and trade liberalisation can be realised. The term 'social clause' indicates peculiar norms having as their object internationally recognised social rights that States (in their productive activity and application of law) and consequently the companies (in their quality of employers) have to respect to be able to enjoy certain benefits induced by liberalisation of international trade, that is to avoid running into economic sanctions.²⁹ From this perspective, apart from the protestations expressed by developing countries which, until now, have blocked attempts to introduce the issue of labour standards in the WTO agreements, the problem is the very definition of 'social standards'. It is about what minimum rules should be respected so that the *ceteris paribus* clause is fully applied in the framework of fair trade rules. This definition requires an agreement, the adoption of which is more difficult than that of multilateral conventions of the ILO. Similar difficulties arise with the creation of eventual mechanisms put in place of the sanctions in the WTO. It is sufficient to recall that distorting commercial measures authorised by the WTO's Dispute Settlement Body are considered as compensation for commercial prejudices suffered, and not as real sanctions as proposed by the supporters of the social clause.³⁰

The problem is open, even if the preferable approach seems to set up a linkage with regard to the formulation of fundamental social rights solemnly declared by the ILO, which asks for the respect of fundamental rights conventions such as the 1998 Declaration of Geneva,³¹ regardless of their ratification by all members of the Organisation.³²

By remaining on a strictly legal basis, a careful analysis of the sources of international law allows for the identification of a hard core of 'unconditional' social rights, which do not depend upon the different economic and cultural situations. Beyond the ILO Conventions, these rights already considered by the Universal Declaration of Human Rights and UN

Covenants of 1966 on civil and political, and on economic, social and cultural rights were recognised as fundamental by the Declaration of Copenhagen on Social Development³³ and finally endorsed by the historical declaration adopted by the 86th session of the International Labour Conference (Geneva, 18 July 1998).³⁴ These rights are freedom of association, the right to collective bargaining, the elimination of forced and compulsory labour, the abolition of child labour and the elimination of discrimination in the workplace.³⁵ This set of core labour standards has to be considered of universal application; the ILO requires their respect by the member states by the mere fact of belonging to the organisation.³⁶

It is for the very reason of the constitutional value of the fundamental conventions that the Conference declared that 'all Member States, even if they not have ratified the convention in question, are obliged by the mere fact of belonging to the organisation, to respect, to promote and to realise in good faith and in line with the Constitution the principles relating to fundamental rights which are part of the respective conventions'.³⁷ These are workers' rights which basically 'behave' as internationally recognised human rights, for which there must most probably be an *opinio iuris* by which the international community is obliged to respect these rights. For instance, the use of child labour in employment relationships threatens – by its nature, and because of the conditions in which it is carried out – the physical and moral health of minors; an activity that should fall under the notion of 'cruel, inhumane and degrading treatment' (Arts 1 and 56 of the UN Charter) and it has without any doubt reference to *jus cogens* (under which it can be sanctioned).³⁸ It is a way of saying that the social clause has a codifying function for the principles which already apply under general international law: trade agreements containing them should therefore be interpreted so as to confirm, enlarge and specify the

³³ www.un.org/esa/socdev/wssd/index.html (accessed: 15 March 2006).

³⁴ ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 86th Session, Geneva, June 1998. The Declaration is subdivided into a preamble, a provision, and an original control mechanism (*mécanisme de suivi; follow-up mechanism*), for a description, see H. Kellerson, 'La Déclaration de 1998 de l'Oit sur les principes et droits fondamentaux: un défi pour l'avenir?', *Revue internationale du Travail*, (1999), 244.

³⁵ For an analysis of these fundamental rights, see L. Betten, *International Labour Law* (Boston: Deventer, 1993).

³⁶ See F. Maupain, 'Is the ILO Effective in Upholding Workers' Rights? Reflections on the Myanmar Experience', in Alston (ed.), *Labour Rights as Human Rights*, p. 131.

³⁷ Article 2 of the Declaration on Fundamental Principles and Rights at Work.

³⁸ See, J. Diller and D. Levy, 'Child Labor, Trade and Investment: Toward the Harmonization of International Law', *American Journal of International Labour* (1997), 673.

²⁹ A. Perulli, *Diritto del lavoro e globalizzazione* (Padova: Cedam, 1999).

³⁰ www.wto.org.

³¹ ILO Declaration on Fundamental Principles and Rights at Work, www.ilo.org.

³² www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN (accessed: 15 March 2006).

already existing customary norms. It is evident that a similar analysis is not universally accepted; for instance, one may think with a certain embarrassment about the views of one author, Bhagwati, who recently wrote:

[T]his very day, in the field of trade union matters, for example, we can agree on declaring the killing of trade union leaders illegal but not on an agreement on the question of the recruitment of blacklegs or on the dismissal of workers for economic or disciplinary reasons.³⁹

The second type of justification privileges the axiological dimension of fundamental social rights.⁴⁰ The demand to link trade agreements with social agenda objectives recalls once again the use of general trade sanctions towards violating countries, the use of such strategies as the suspension or prohibition of market access for those products which violate rules or agreements, for example, if they have been produced by using child labour, or prison work. Inasmuch as they are founded on a postulated value, socially fair production and trade not tarnished by the failure to apply core labour standards, highlight the moral dimension of fundamental rights. The approach of putting mercantilist justifications aside and penetrating extra-economic ethics into the *societas mercatorum* – thus limiting the economic freedom of the actors⁴¹ seems homogenous with the one offered by the international public order. It is surprisingly not considered a structuring factor of the *lex mercatoria*, yet it is capable of nullifying the validity of contracts with regard to the immoral character of certain transactions, not only as to corruption but also as to human rights and enslaving practices at arbitral courts.⁴² An expansion of these *boni mores* towards imperatives to protect human rights, in their complex notion of civil, economic, social rights consequently requires a careful reflection upon the identification of labour law principles of the *lex mercatoria*, which cannot be modified by different economic and cultural situations and which bear effects similar to *jus cogens*.

³⁹ J. Bhagwati, *In Defence of Globalisation* (Oxford: Oxford University Press, 2004), p. 55.

⁴⁰ See M. J. Trebilcock, 'The Fair Trade Debate: Protection of Labour Standards and International Economic Law', in S. Griller (ed.), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order* (New York: Springer, 2003), p. 299.

⁴¹ J. B. Racine, *L'arbitrage commercial international et l'ordre public* (Paris: LGD, 1999), p. 368.

⁴² P. Lalive, 'Ordre public international (ou réellement international) et arbitrage international', *Revue de l'arbitrage* (1986), 329.

Levels and subjects of regulation

At this point, the discourse develops according to the different levels and subjects of regulation. First of all, it is necessary to consider the economic forms of trade organised at a global level, which includes multiple or 'multidimensional' juridical areas, meeting and overlapping. Each of these areas should be analysed in accordance with the measure to which it can or does guarantee the operative realisation of a link between trade liberalisation and respect of social norms, each in its own way.

In this regard, four pertinent levels of analysis can be distinguished:

- i) The global level, governed by the criteria of decision-making centralisation and a multilateral framework (WTO); at this level, the aggregate and regulative processes typical of social rights are generally absent, or else are very weak and fragmented.
- ii) Regional level, governed by multilateral and diversified criteria, which depend on the intensity of forms of integration (according to the usual internationalist model: integrated markets, free trade zones, customs union, etc.). They follow the model of the EC or of the North American Free Trade Agreement (NAFTA) or other forms of regional integrations such as Mercado Común del Sur (MERCOSUR – Common Market of the South) or Association of Southeast Asian Nations (ASEAN) etc., and vary as to whether there are supranational organs with normative and/or judiciary powers having a direct effect on the Member States. At this level, integration ordains labour norms of differing standards, and which are protected by means that are expected to accompany the enlargement, integration and opening up of markets.
- iii) Levels unilaterally governed by States or economic aggregations of States; labour issues are often present at this level as the social condition for trade liberalisation
- iv) Levels governed autonomously by economic operators. Intra-firm commercial exchanges have allowed for the appearance of non-state norms, calling into being transnational mercantilist spheres. They include the *lex mercatoria*, a network of extra-territorial relations organised by transnational companies; and the Codes of Conduct of specific companies, which are considered to be part of the corpus of *lex mercatoria* and an expression of international customs or general principles recognised by the international community. The social dimension of these Codes of Conduct adopted by multinational companies is also well-known.

If this multidimensional scheme is capable of representing the complexity of the scenarios of the transnational regulation of trade and labour, there are two key words: diversity and interdependence (or inter-relatedness).

One can talk about the diversity of juridical spheres that govern the development of trade, the diversity of actors and the relevant regulation, the diversity of legal techniques that determine the production of norms, the diversity with regard to the modalities governing the link between trade liberalisation and social norms; and, finally, the diversity with regard to the force and the effectiveness of the rules formalising this link. Interdependence, or if one prefers, connection, of the economies and trade actors, interdependence of the logic and justifications at the basis of the norms that govern the functional relation between liberalisation and the promotion of social norms. How to govern, therefore, this pluralism and interrelatedness? By applying the four-level scheme, it is possible to combine the integration experiences on the basis of a mixture of relevant references both under the geographic profile and from a political-institutional point of view.

The multilateral global dimension: the General Agreement on Trade and Tariffs – World Trade Organisation

The first level refers to global multilateral coordination in the framework of the General Agreement on Trade and Tariffs-World Trade Organization (GATT-WTO).⁴³ This powerful idea, promoted for a period by the doctrine and intergovernmental practices, suggests the insertion of a social clause into the law of WTO, through which the integration of social rights into the level that is supposed to regulate international trade could take place.

As is known, this perspective has not yet brought about concrete results. The reason for the difficulties encountered by the idea of a social clause at the multilateral global level is due to the lack of institutional capability of the international organisations, and largely to the politico-structural factor. It concerns the concept of international division of work suggested by the WTO, strongly based on Ricardo's classical theory of comparative advantages. In the First WTO Ministerial Declaration⁴⁴ the parties 'renew their commitment to the observance of internationally

recognized core labour standards' and 'reject the use of labour standards for protectionist purposes, and agree that the comparative advantages of countries, particularly low-wage developing countries, must in no way be put into question.'⁴⁵ The principle of comparative advantage is based on the idea of an interpretation of national economies in the international division of labour according to the competences and richness of natural resources, labour force and capital. The WTO therefore inherited – and up till now has jealously maintained – the concept of the safeguarding the application of trade rules, and is consequently unable to remedy trade distortions caused by the diversity of national legislation, in particular by labour cost factors.

Despite the unfruitful results of the debate on the social clause, the pressure coming from the industrialised countries and the critiques by consumers' organisations, trade unions and non-governmental organisations interested in the 'social' failures of trade liberalisation represent a guarantee for the re-launching of the social clause at the WTO. In the meantime, it is also useful to verify the *current* compatibility of a social clause with the GATT principles in force, ensuring the eventual practicability of the restrictive trade measures adopted by individual states against social dumping. In this respect, there is a set of significant dispositions whose analysis produces results which are problematic but possible.

The first problematic aspect derives from the fact that the concept of 'social dumping' cannot be traced back to the notion of 'dumping' as it is meant under Article VI of the GATT. International trade law, indeed, does not recognise the differential cost between producers as a potential cause for dumping, whereas in a market economy system the decrease in the price of a product falls under the classical objectives of free competition. What is relevant, instead, in this respect is that the producer sells the same product at different prices in the domestic market and in the foreign market. If the price of the goods represents the cost of production *in both markets*, there is no dumping. Since dumping does not depend on the difference between the sales price on the domestic market and the sales price of the importing market – because the price is equally low in the first one also – one has to conclude that as a principle, it does not constitute an unfair trade practice under GATT.⁴⁶

⁴⁵ See, generally, V. A. Leary, 'The WTO and the Social Clause: Post-Singapore', *EJIL* 8 (1997), 118.

⁴⁶ See, WTO Appellate Body, *Japan: Taxes on Alcoholic Beverages*, Report of 4 October 1996, Doc. WTO/OSS/ABIR, and *Ganada: Certain Measures Concerning Periodicals*, Report of 30 June 1997, Doc. WTO/OSS1/ABIR.

⁴³ www.wto.org.

⁴⁴ Art. 4 of the Singapore Ministerial Declaration, adopted on 13 December 1996 during the Singapore WTO Ministerial 1996: Ministerial Declaration WT/MIN/(96)/DEC, Art. 4.

The notion of export subsidies is closer to the practice of social dumping; it is characterised by the fact that the price, which is less than the normal price, results from aids provided directly or indirectly from States to companies. In addition to allowing the disadvantaged States to react by imposing 'compensative' customs duties in such cases, the GATT regulates this phenomenon by limiting or prohibiting the concession of subventions.⁴⁷ The question is whether the State that allows national companies to violate social norms by doing so does not concede *de facto* a subvention? It is a suggestive interpretative hypothesis; a similar one has been envisaged in the case of environmental dumping. However, this hypothesis still suffers from some drafting difficulties, since the requirements of a subsidy described in the agreement drafted at the Uruguay Round such as the *financial contribution* from the government and the specificity of the subsidy, are absent. Indeed, an *undifferentiated* aid to companies is not considered a subsidy.

Furthermore, the mechanism of the social clause cannot be compared to the so-called safeguard clauses, conventional dispositions that in certain situations foresee the possibility of temporary derogation from the norms of interstate economic cooperation with the adoption of protective measures such as the increase of customs tariffs, quantitative restrictions or subventions to domestic companies. For example, all GATT countries can temporarily limit their own imports if the national production is susceptible to an influence from low price imports (Art. XIX of the GATT). A perspective that considers the safeguard clause as an instrument to react with protective measures to unfair trade practices for the failure to respect social standards cannot therefore be excluded, given the generic nature of the circumstances that can cause disturbances to the market which can be qualified as 'economic and social differences'. On the other hand, in order to avoid the risk of activating a similar measure provided by the agreement on the European Economic Area, the signatory parties foresaw the modality of harmonisation not only in economic aspects, but also in the social and the environmental field, and in matters such as workers' safety and health, prohibition of retributive discrimination and social dialogue between social partners.

The only norm in the GATT that can be compared to a social clause is established in Article XX, relating to a system of derogations called 'general exceptions' aimed at creating a reservation of domestic

⁴⁷ Article VI.

jurisdiction in favour individual states, which are authorised to give priority to certain interests of national policy against trade liberalisation. In particular, this norm allows for the parties to adopt justified restrictive trade measures for the protection of public morals, the life and health of humans, animals and plants, the environment and natural resources, the safeguarding of the cultural heritage, the protection of consumers, and for reasons linked to the commercialisation of products made in prisons (Article XX, (e)).

Based on the above, states could adopt restrictive measures of international trade in order to protect their markets from the import of manufactured goods produced at a low labour cost. It is a norm that has not yet been invoked by any country to justify such restrictions but it is theoretically very significant because it authorises states to adopt protectionist measures based on the evaluation of *processes of production* of foreign goods. On the other hand, it is known that Article XX is in principle applicable as regards the intrinsic quality of a certain product and not on the basis of productive processes used for its creation. *De iure condendo*, the main way should lead to the reformulation of Article XX by inserting new exceptions on the failure to respect such fundamental social rights, even if an extensive interpretation of the measures 'necessary to protect the health and the life of persons' could already include at least the prohibition of child labour and minimum norms regarding safety at work, allowing states which suffer social dumping to adopt restrictive measures on imports.⁴⁸

It is worth mentioning Article XXIII of the GATT as it has been widened by the WTO Dispute Settlement Rules. The norm on the 'Protection of concessions and advantages' provides that when a contracting party considers that an advantage resulting from the Agreement is 'nullified or compromised', or the realisation of one of the objectives of the Agreement is compromised because of the behaviour of another party, or if 'there exists another situation' such to nullify or to compromise the said advantages, the party is justified in asking for the activation of an inquiry that could lead to the suspension of concessions or other obligations deriving from the General Agreement. An official document of the United States has declared that 'trade problems stemming from unfair labour standards were

⁴⁸ Some commentators have suggested that Article XX could be interpreted broadly to allow for the protection of human rights, including collective labour rights. An evolutive interpretation of Article XX GATT on general exceptions could be of relevance, which allows addressing conditions of production violating human rights'; see the contribution by Benedek in this volume.

already actionable under Article XXIII⁴⁹, and the same opinion was supported by the Congress of English Trade Unions (TUC) which mentioned the recourse to Article XXIII to impose commercial sanctions on countries which violate international labour standards.⁵⁰ This perspective can be easily updated. In fact, on a strictly juridical basis, the reference to the existence of 'another situation', such as to 'nullify or to compromise' the advantage resulting from the GATT seems so undefined as to create a sort of general clause in which a social clause could be inserted, but it does not seem that Article XXIII has ever been invoked for this purpose.

The European dimension

If the operative justification – on which the social clause is based – appears for the moment impracticable on the global multilateral level, it appears however functional to the development of regional integration. We find important examples of this functional vision in the European construction and framework of the North American integration. The European experience is well-known. Social harmonisation was perceived for a long time as being useful to avoid forms of dumping and competition distortions based on the normative disparities in social issues, and the issue of employment considered inappropriate in the project which aimed to guarantee the harmonious development of the internal market.⁵¹ For this reason, European social law witnessed an instrumental rationality in the service of the common market. In a functionalist vision of the integration,⁵² the goal of the founders of the common market was

to avoid a 'race to the bottom' competition in the application of social standards by contrasting the possibility of deregulation – which have laid always in ambush – due to the structural weaknesses and the absence of a common reference to a minimum threshold of fundamental social rights.⁵³ Today the functionalist vision of the integration is definitely being abandoned thanks to the treaty-based references – especially after the Treaty of Amsterdam – and constitutionalisation of fundamental social rights. Their domain has been progressively widened and emerging from their original ancillary position in the economic construction of Europe, they have acquired the same position as the basic principles of the economic integration (free movement and competition). In this situation, the Charter of Fundamental Rights approved at Nice, and its Chapter on 'solidarity', reconfirm the autonomy of the European social model and strengthens it, developing an axiological system whose function is to organise differing social representations and logics and integrate them around a common purpose.⁵⁴

Being forced to penetrate into the community legal order through the activity of the Court of Justice, fundamental rights are deemed to become common constitutional references as regards social matters. In this way, the EU's apparently schizophrenic stance, in obliging the respect of fundamental social rights in its external relations without their formal internal recognition, can be avoided.

Certain ambiguous elements, however, are present; in particular, two issues are worthy of being mentioned even if only briefly. The first one concerns the structure of the Treaty establishing a Constitution⁵⁵ which confirms the distinction between principles and rights in its Articles II-51 and II-52.

If the aim is to limit the application of the principles of social law, this approach should be strongly criticised, both under the light of the achieved equality between fundamental human rights and economic liberties and on the basis of the principle of the indivisibility of human

⁴⁹ U.S Commission on Foreign Economic Policy: Staff Papers, February 1954, 437. On this point see, S. Charnowitz, 'L'influence des normes internationales du travail sur le système du commerce mondial', *Revue internationale du travail* (1987), 646; J. Perez-Lopez, 'Conditioning Trade on Foreign Labor Law: The US Approach', *Comparative Labour Law* 9 (1988), 257.

⁵⁰ See, L. Murray, 'Standard syndicaux équitables en matière de commerce international', *Monde du Travail libre* (1961), 102.

⁵¹ G. F. Mancini, 'Effect of EC Law on Member States' Employment Law', in G. F. Mancini (ed.), *Democracy and Constitutionalism in the European Union* (Oxford: Oxford University Press, 2000), p. 114; G. and A. Lyon-Caen, *Droit social international et européen* (Paris: Dalloz, 1993); S. Deakin, 'Labour Law as a Market Regulation: The Economic Foundations of European Social Policy', in P. Davies et al. (eds.), *European Community Labour Law: Principles and Perspectives* (Oxford: Oxford University Press, 1996), pp. 63–94.

⁵² On the market as 'the principle vehicle of harmony' see S. Simitis and A. Lyon-Caen, 'Community Labour Law: A Critical Introduction to its History', in P. Davies et al., (eds.), *European Community Labour Law*, p. 5; see also S. Sciarra, 'Market Freedom and Fundamental Social Rights', in B. Hepple (ed.), *Social and Labour Rights in a Global Context* (Cambridge: Cambridge University Press, 2002), p. 95.

⁵³ See S. Sciarra, 'La constitutionnalisation de l'Europe sociale, entre droits sociaux fondamentaux et soft law', in O. De Schutter and P. Nihoul (eds.), *Une constitution pour l'Europe. Réflexions sur les transformations du droit de l'Union européenne* (Brussels: Bruylant, 2004).

⁵⁴ A. Lyon-Caen, 'The Legal Efficacy and Significance of Fundamental Social Rights: Lesson from the European experience', in B. Hepple (ed.), *Social and Labour Rights in a Global Context*, p. 190; M. Weiss, 'The Politics of the EU Charter of Fundamental Rights', in B. Hepple (ed.), *Social and Labour Rights in a Global Context*, p. 73.

⁵⁵ Treaty Establishing a Constitution for Europe, OJ 2004 C310/1.

rights. This ambiguity is strong and casts a shadow on the constitutional feasibility of Europe as it re-launches the opposition between rights and programmatic rules, with the imminent risk of de-legitimising some of the rights of the Charter of Nice.

The second ambiguity relates to the use of soft law regimes under the Open Method of Coordination – now preferred to legislation as the means of giving effect to policy – and the pointlessness of harmonisation in face of the enlargement.⁵⁶ Will the 'EU-25'⁵⁷ be both able and willing to use the new regulatory techniques and governance in a progressive manner by consolidating the acquired rights and widening the social sphere of the market in order to realise new and more advanced levels of integration between trade liberalisation and social and labour law? Or will soft law represent the instrument for a regulatory competition in which the link between the economic dimension, and the instances of social protection, will impose the *raison*s of the first to the detriment of the second without breaking into pieces? For these very reasons, as others have noted, there is still a need for a core of protection based on fundamental rights.⁵⁸

The North American Agreement on Labor Cooperation

Under the North American Agreement on Labor Cooperation (NAALC),⁵⁹ negotiated parallel with NAFTA, the functionalist logic similar to the

primitive European community experience is reaffirmed in an ambit characterised by a weak type of integration limited to economic matters. However, the technique and objectives of supranational social regulation vary in the North-American Agreement on Labor Cooperation. The NAALC objective is a procedure of supervision and cooperation between the partner countries, which can lead to real economic and financial sanctions when the failure to respect agreed obligations effectively prejudices competition. This mechanism can therefore be considered a social clause, which does not take into account respect for uniform minimum supranational standards, but has regard instead to the safeguard of effective application of the national social standards of each country, rather than the usual provisions of international trade agreements, and the European integration experience (as well as the normative tradition of international labour law).

In the logic of the agreement, the basis of the social clause is essentially economic: it deals with the regulation of competition and the preservation of comparative advantages at the same time. Indeed, the condition for the application of a sanction is the evidence of a competitive advantage deriving from the failed application of the internal labour legislation of a given country. Article 3 of NAALC expresses the intention of the Parties to promote the 'respect and the effective application of their own labour laws through appropriate government actions'. There is no aim of harmonisation or of achieving uniformity of the levels of social protection, aims which are left to the discretion of the national legislator.

It is true that the agreement identifies some principles in the Annex on Labor Principles, which forms an integral part of the Agreement. However, these principles do not represent supranational social standards, but they do indicate 'guiding values'⁶⁰ of labour law, and 'areas of interest',⁶¹ in which each country has established its own level of regulation. The original nature, and weakness of the North American social clause lies, therefore, in the fact that it does not set the limits of fair trade on the basis of respect of international fundamental social rights recognised by international labour law, nor on the harmonisation of norms (as happened in the creation of the social dimension of the EC), nor on the obligation of guaranteeing a standard level of protection (perhaps flexible due to *souplesse* clauses) according to the tradition of ILO Conventions.

The NAALC represents a peculiar case of a social clause adopted in the context of the multilateral free trade agreement between the USA,

⁵⁶ The open method of coordination (OMC), which emerged from the proceedings of the Lisbon European Council in 2000, involves 'fixing guidelines for the Union, establishing quantitative and qualitative indicators and benchmarks as a means of comparing best practice, translating these European guidelines into national and regional policies by setting specific targets, and periodic monitoring, evaluation and peer review organised as 'mutual learning processes' (Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, para. 37). See S. Sciarra, 'Fundamental Labour Rights after the Lisbon Agenda', in G. De Burca and B. De Witte (eds.), *Social Rights in Europe* (Oxford: Oxford University Press, 2005), p. 212, where the author suggests that 'the OMC, by insinuating flexible measures into the regulation of employment contracts, may create a potentially less stable environment for the guarantee of fundamental rights'; but see, on the growth of soft law and the lack of effective procedures and sanction for the enforcement of social rights, B. Hepple (ed.), *Enforcement: The Law and Politics of Cooperation and Compliance*, in B. Hepple, *Social and Labour Rights in a Global Context* (Cambridge: Cambridge University Press, 2002), at p. 238; see also the Introduction to the same volume.

⁵⁷ This common abbreviation refers to the 25 Member-States of the European Union as of 2006.

⁵⁸ See C. Barnard and S. Deakin, 'Corporate Governance, European Governance and Social Rights', in Hepple (ed.), *Social and Labour Rights in a Global Context*, p. 147.

⁵⁹ See www.naalc.org.

⁶⁰ Preamble of NAALC's Annex 1.

⁶¹ *Ibid.*

Canada and Mexico (NAFTA).⁶² It is the first free trade agreement that provides for a specific normative instrument aimed at encouraging labour protection by a procedural mechanism, permitting the striking of a balance between trade liberalisation and the respect of fundamental social rights. By incorporating objectives which differ from those of trade liberalisation, the so-called NAFTA Labour Side Agreement presents itself as a model for the interpretation of social values in supranational processes that regulate economic globalisation.⁶³

An area of concern is the different protection ensured by the eleven Labor Principles of the NAALC. The agreement excludes trade union rights (freedom of organisation, the right to strike and to collective bargaining from the stronger level of protection afforded to other rights, allowing only for the activation of ministerial consultations and not the imposition of economic sanctions. Only the violation of some labour standards on health and safety at work, child labour and minimum wage would entail the initiation of the complex review procedure which begins at the level of inter-ministerial consultations, and culminates in the creation of an Arbitral Panel, with the power to impose financial sanctions. The field of application of the sanctions is therefore rigorously delimited: they apply only if the violation of the agreement, as well as being persistent, proves to be 'trade-related' and 'covered by mutually recognized labor laws'.⁶⁴ In other words, not all violations can be prohibited, but only the ones that are relevant for the economic and trade integration targeted by NAFTA; that is, the respective legal orders fail to act upon the infractions committed by singular economic subjects in order to attain an unfair comparative advantage. Moreover, the failed application should concern labour law provisions which have been recognised by the contracting parties as actionable.

Paradoxically, however, the procedures of infraction have been all initiated against the violation of trade union rights, whereas the review

procedure has produced important results thanks in particular to the intervention of those groups involved in the raising of public awareness and the resulting 'media' sanctions.⁶⁵ The international cooperation between trade unions organisations is also of relevance, in an area where the prevailing factors do not facilitate international solidarity between trade unions. Such cooperation is stimulated by the the NAALC's requirement that a submission procedure on a country be introduced at an administrative structure (National Administrative Offices) of a country by a foreign organisation.⁶⁶ It is important to remember in this regard the link that exists now between independent Mexican,⁶⁷ Canadian, and US trade union organisations.

Despite the narrow margins of application, the existence of a social clause, accompanied by a real sanction mechanism (that goes much beyond the 'moral pressure' and 'mobilisation of shame', as essentially happens with ILO sanctions) in a multilateral free trade agreement is without any precedent.⁶⁸ It shows, on the one hand, a slight break-away from the past experiences of international regulation of the economy and trade, especially from the GATT. On the other hand, it changes the unilateral approach that has dominated US trade policy until now, by making it more in line with the principles of international law and the multilateral discipline of trade relations.

The Central-American Free Trade Agreement (CAFTA)

The Central-American Free Trade Agreement (CAFTA),⁶⁹ signed on 27 July 2005 between Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the United States of America, has to be added to the not-too-long list of free trade agreements that address

⁶⁵ The obligation of the NAO's to make public reports became an important source of public pressure, identifying official culpability, thereby inducing governments and businesses involved to improve their standards and performance: see R. Adam and P. Singh, 'Early Experience with NAFTA's Labour Side Accord', *Comparative Labour Law Journal* 18 (1997), 161. More detailed information on such dispute resolution processes can be found in A. Perulli, *Diritto del lavoro e globalizzazione*.

⁶⁶ See Article 4 and Articles 15, 16 of Section C of the NAALC

⁶⁷ Such as *Frente autentico del trabajo and Sindicato de Telefonistas de la República Mexicana*.

⁶⁸ See J. Garvey, 'Trade Law and Quality of Life: Dispute Resolution under the NAFTA Side Accords on Labor and the Environment', *AJIL* 89 (1995), 453, which qualified NAALC as 'revolutionary' under this profile.

⁶⁹ www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/Section_Index.html (accessed: 15 March 2006).

⁶² North-American Free Trade Agreement, www.nafta-sec-alena.org.

⁶³ J. Cowie and J. French, 'NAFTA's Labor Side Accord: A Textual Analysis', *Latin American Labor News* (1994), 30; M. A. Moreau, 'La clause sociale dans les traités internationaux: Bilan et Perspectives', *Séminaires de la Maison des Sciences de l'Homme, Ange Guépin* (Nantes), 20 mars 1995; M. A. Moreau and G. Trudeau, 'La clause sociale dans l'accord de libre-échange nord-américain', *Revue Internationale de Droit Économique* (1995), 395; P. Staelens, 'Les conséquences sociales de l'intégration nord-Américaine sur le Mexique', *Syndicalisme et société* (1998), 97. No consensus exists about the value of the NAALC; references can be found in S. Charnovitz, 'The Labor Dimension of the Emerging Free Trade Area of the Americas', in P. Alston (ed.), *Labour Rights as Human Rights*, p. 155.

⁶⁴ NAALC, Article 49, Definitions.

the question of workers' rights and conditions of employment, beside the primary aim of trade liberalisation. The Preamble of the Agreement states that the Parties are obliged not only to promote the integration understood in strict economic terms, but also to create new opportunities for social and economic development in the respective territories and to protect and reinforce workers' rights and cooperation in labour issues between the interested institutions, in order to create new employment opportunities and to improve life and employment conditions.

By examining the Chapter dedicated to labour issues in particular,⁷⁰ it can be useful, primarily, to note that the CAFTA takes after the model proposed by NAALC and other recent free trade agreements with Australia, Morocco, Chile and Singapore.⁷¹ In this view, there is a line of continuity with former experiences, even if important signs, in the sense of gradual recognition of social rights accompanying economic rationality, are present. The Agreement can ideally be divided into two parts. Whilst the first part contains references to recognised structures of protection for workers, and to functional instruments guaranteeing their effectiveness, the second one aims at emphasising and promoting a participative and collaborative model between the different actors represented in the Agreement.

After an initial reference to the ILO principles expressed in the Declaration of 1998, with the clarification that the Parties oblige themselves to respect the principles as much as in applying internal legislation in order to comply with international labour norms,⁷² the text imposes on the participant States the task of not encouraging trade practices through the weakening of protection prescribed by their internal law. In the same way, it prohibits States from allowing work conditions inferior to those guaranteed by the principles of international labour laws, in their efforts to promote trade or encourage investments in their territory, and to therefore become more competitive in the globalised market. In concrete terms, as explained by Article 16(8), when the Agreement refers to 'labour laws' it means norms introduced by the participating countries, directly linked to internationally recognised labour principles such as freedom of association, the right to organise and collective bargaining, the prohibition of all forms of forced labour, minimum age for employment, the prohibition and the elimination of forms of exploitation of child labour, and the right to acceptable work conditions (in particular as

regards the minimum wage, work hours, and health and safety at the workplace).

Article 16(2) introduces a real obligation for the contracting parties:

'The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in Article 16.8 as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.'

If it is not respected, a procedure foreseen by the Agreement should be activated, which provides for appropriate trade sanctions *vis-à-vis* the concerned party. As for the instruments introduced to make the provisions on the respect for the ILO principles effective, and the need to strengthen internal legislation to ensure the improvement of the social and professional status of workers, the Agreement provides for a safeguarding procedure, and for the responsibility of the State in guaranteeing an impartial access to the judicial authorities for the full exercise of rights.⁷³ This procedure must be fair, free and transparent. The signatories of the Agreement have to ensure that a person with a legally recognised interest can turn to the judicial authorities in the country of citizenship to make their claim.

The second part of the Chapter reflects the intention of enhancing, as much as possible, the cooperation between participating countries in monitoring the implementation of the agreement and the eventual problematic issues which may emerge in its application. The creation of a Labour Affairs Council (LAC),⁷⁴ and the provision of the Capacity Building Mechanism, aimed at promoting and strengthening cooperation, improving work standards and favouring consultations and encounters between the parties,⁷⁵ can be seen in this light. For instance, LAC has the task of verifying periodically the status of implementation of the agreement, consultation, and coordination between the signatories.

If we were to draw some conclusions about the impact of the Agreement, we of course cannot ignore the fact that the provisions on labour issues

⁷⁰ Chapter 16 of CAFTA.

⁷¹ For more information, see www.ustr.gov.

⁷² Article 16.1 of Chapter Sixteen of CAFTA.

⁷³ Article 16.3 of Chapter Sixteen of CAFTA.

⁷⁴ Article 16.4 of Chapter Sixteen of CAFTA.

⁷⁵ Article 16.4 Chapter Sixteen of CAFTA.

fall completely under the Free Trade Agreement. It is not a simple attachment, but an enumeration of Principles, which constitute an integral part of the Agreement. The attention given to labour issues shows, therefore, its importance, even if it has to be linked to the exigencies dictated by the market. Secondly, the Agreement tries to focus on the instruments by which the effectiveness of the safeguards can be ensured. The problem is the concrete application of the norms on the protection of workers, a problem which has become apparent with every previous free trade agreement; although now, as shown in the ILO Report of June 2005, the provisions recognising and promoting the respect of core labour standards are present in the legislation of Central-American countries as well as in the Dominican Republic.⁷⁶ It is a problem which provokes an interest in including instruments into trade agreements that could provide additional ways of enforcing social rights.⁷⁷

Unilateral regulation and the generalised system of preferences

The level of unilateral regulation on the basis of an agreement aimed at linking enlargement, trade liberalisation and values and social rights is illustrated by the European and US experience. Legislatively mandated measures, designed to protect labour rights in foreign countries, constitute an important dimension of US human rights policy.⁷⁷ The methods experimented in the US domestic policy are based upon the notion of fairness applied to commercial exchanges; on the other hand, the notion of fairness in the American legal tradition appears to be a key concept in both competition and labour law. In the same way as competition law seeks to achieve the regulation and protection of the national market, by aiming to prohibit companies from having recourse to economically unfair practices and behaviours, so labour law seeks to achieve the protection of the national market against socially incorrect practices carried out by companies. In this regard, Section 301 of the 1974 Trade Act⁷⁸ consented to the widening the *champs d'opérativité* of fair trade by including unfair internal practices of States with which the United States has trade

⁷⁶ For more information, see: www.ilo.org.

⁷⁷ See P. Alston, 'Labor Rights Provisions in US Trade Law: Aggressive Unilateralism?', in L. A. Compa and S. F. Diamond (eds.), *Human Rights, Labor Rights, and International Trade* (Philadelphia: University of Pennsylvania Press, 1996), p. 71; J. F. Pérez-Lopez, 'Conditioning Trade on Foreign Labor Law: The US Approach', *Comparative Labor Law Journal* 9 (1988), 253.

⁷⁸ www.osec.gov/ogc/occc/301.html (accessed: 15 March 2006).

relations. These are trade practices categorised by the American legislation as being 'unjustifiable', 'discriminatory' and 'unreasonable'. This last category may include the violation of internationally recognised workers' rights, a notion that does not coincide with fundamental social rights as identified by the ILO.⁷⁹ It raises the question of knowing the legal nature of these rights, probably identifiable with an eclectic methodology from the human rights contained in the Universal Declaration and the general principles of international law (e.g. prohibition of degrading and inhuman treatment, etc.).

As for unilateral action, the EU external relations and the use of the conditionality in trade are worthy of mention.⁸⁰ By 1994, the Council was advocating EU promotion of core labour standards not only within, but also outside the Union, using for this objective the Generalised System of Preferences (GSP),⁸¹ the EU's main unilateral measure on trade. The preferential and non-reciprocal treatment in international trade that the industrialised countries were asked to concede to the developing ones represent a mechanism of distributive justice. It is an important derogation to the GATT rules in international trade.⁸² Beginning in 1971, the EEC has given generalised tariff preferences for completed and semi-fabricated industrial products from developing countries by authorising a more advantageous customs treatment than the one normally applied, and entailing the total or partial abolishment of import customs duties. The Council, by adopting a new GSP on 19 December 1994,⁸³ ratified for the first time a link between trade and the respect of fundamental social rights, concretising this principle by a trade instrument of the European Community.

The GSP scheme contains incentives as well as sanctions. Previously, under the EU GSP Regulation of 1998,⁸⁴ there were two types of

⁷⁹ See P. Alston, 'Labor Rights Provisions in US Trade Law', *HRQ* 15/1 (1993), 8; Dubin, *La protection des normes sociales dans les échanges internationaux*, p. 56.

⁸⁰ See T. Novitz, 'The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO', in Alston (ed.), *Labour Rights as Human Rights*, p. 229. ⁸¹ www.europa.eu.int.

⁸² GSP schemes are, in principle, contrary to the GATT's most favoured nation principle, because they grant preferences to developing countries without extending them to other WTO members. See T. M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press), 1995, p. 58. ⁸³ www.europa.eu.int.

⁸⁴ The Regulation entered into force on 1 July 1999 and covers the period until the end of 2001. It is the first one to cover all products and all arrangements (such as agricultural, industrial, textiles, GSP etc.). It is laid down in Council Regulation (EC) No 2820/98 of 21 December 1998.

measures.⁸⁵ The first one was a real sanction, *id est* the temporary, total or partial withdrawal of the advantages incorporated in the scheme of preferences in the case of any form of slavery as defined in the Geneva Conventions⁸⁶ and in ILO Conventions No. 29⁸⁷ and No. 105,⁸⁸ and in the case of products made in prisons. The temporary withdrawal was not automatic, but became effective only at the end of a specific procedure that could be initiated by a Member State or by any physical or legal person or by any non-legal personality association that could prove an interest in the sanction, by reporting the violation directly to the Commission. The second provision of the Regulation was a positive sanction of a promotional nature, a sign of a more cooperative rather than punitive approach. It consisted of the concession of a special 'system of encouragement' with the aim of helping recipient countries to improve their progress by preparing more advanced social policies. The disparity between grounds for granting and withdrawing preferential trade access was an evident basis for concern. Under the Regulation of 2001⁸⁹ special incentive arrangements for the protection of labour rights may be granted to countries already admitted to GSP which present a written request by which they prove that they have adopted and effectively applied internal legislation containing the provisions of the four core labour rights laid down in ILO Conventions: freedom from forced labour, freedom from child labour, freedom from discrimination, and freedom of association and the right to collective bargaining.⁹⁰ The Council Regulation furthermore provides that the request shall include the measures taken in order to implement and monitor the effectiveness of social legislation, and a commitment by the government to assume full responsibility for the control and execution of the established procedures.⁹¹

⁸⁵ Currently governed by Council Regulation 2501/2001/EC, OJ 2001 L 346/1, as amended.
⁸⁶ Slavery Convention, Protocol amending the Slavery Convention, Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Forced Labour Convention, Abolition of Forced Labour Convention, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, For more information, see: www.ohchr.ch.

⁸⁷ ILO Convention concerning Forced or Compulsory Labour (No. 29).

⁸⁸ ILO Convention concerning the Abolition of Forced Labour (No. 105).

⁸⁹ Council Regulation (EC) No 2501/2001 contains the legal provisions for the GSP scheme applicable for the period 1.1.2002–31.12.2005 (as amended). For more information, see: http://europa.eu.int/comm/trade/issues/global/gsp/legis/index_en.htm (accessed: 15 March 2006).

⁹⁰ For more information, see: europa.eu.int/comm/trade/issues/global/gsp/legis/index_en.htm (accessed: 15 March 2006).
⁹¹ *Ibid.*

There may be temporary withdrawal of these preferential arrangements in the case of 'practice of any form of slavery or forced labour'⁹² and or 'serious and systematic violation of the freedom of association, the right to collective bargaining or the principle of non-discrimination in respect of employment and occupation, or use of child labour, as defined in relevant ILO Conventions',⁹³ as well as 'export of goods made by prison labour'. In this manner the parity of grant and withdrawal of special preferences is apparently achieved.⁹⁴

Even if GSP is a unilateral and a European instrument, the Council includes additional objective and operative criteria on the basis of internationally accepted ones, takes note of the results of the studies carried out by the ILO, WTO, and OECD. This will thereby promote a new control mechanism based on cooperation among different international organisations, which should serve as a backbone of any future hypothesis about the inclusion of a social clause in international trade agreements.

By taking into consideration the direct reference to the ILO Conventions, the European system is on the whole characterised by being more respectful of the principles of international law than is the American one. As a consequence, one can affirm that the European Union has laid down the foundations of an international trade policy integrating fundamental social rights, which allows the Union to act in total consistency in order to make a social clause acceptable on the universal and on the multilateral level. Of course, whilst this approach is uncontroversial within the EU, it is regarded with suspicion by trade theorists, who are keen to insulate the WTO from extraneous non-trade issues.

The most recent proposal for a new GSP scheme (the so-called GSP+ Arrangement⁹⁵) does not seem to change this underlying philosophy; that is, still requesting that the beneficiary country cumulatively accept the main international conventions on social and human rights, environmental protection and governance [Article 9(1) of the GSP Proposal].

The company dimension and Codes of Conduct

This last level of supranational regulation takes us to the complex dimension of company structure, a powerful non-state actor of international

⁹² *Ibid.* ⁹³ *Ibid.*

⁹⁴ T. Novitz, 'The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO', in Alston (ed.), *Labour Rights as Human Rights*, p. 231.

⁹⁵ COM (2004) 699 Final, October 20, 2004.

relations which aspires to the recognition of having legal personality in international law. In an era of increased transborder commercial exchanges, the preoccupation of states with controlling multinational enterprises (according to a typical view of the 1960s and 70s that saw the emergence of this new economic power as a threat to state sovereignty) changes to a positive evaluation of the role of the enterprise, vector of internationalisation of foreign direct investment on its own territory. In this context, the State is ready to make all sorts of concessions in order to guarantee favourable conditions for the investors, starting from the provision of mechanisms of dispute settlement against the hosting state at international arbitration fora to the creation of free zones where the non-respect of fundamental social rights is justified in the name of world competition. It is clear that such an economically powerful and politically influential subject can modify the normative setup where it is present. Indeed, parallel to its international economic action, the enterprise incorporates norms of good conduct of various origins; not least an internal one, a result of an autonomous regulation that crosses the different levels of the value chain incorporated in the network of a complex structure company.

Codes of conduct for international business operations are proliferating and taking shape as a part of a broader movement of corporate social responsibility. There are two main types of codes:⁹⁶ one type is the 'external' ones, prepared by international organisations such as OECD Guidelines⁹⁷ and the Tripartite Declaration of the ILO;⁹⁸ the other type is 'internal' codes adopted by multinational enterprises.

External codes, dating back further in time and more widely known, show a low efficiency level. They are instruments of 'soft law' and their provisions are voluntarily adopted without any enforcement and/or sanction mechanism. The latest observation on external codes of conduct demonstrated significant implementation problems with the ILO Tripartite Declaration,⁹⁹ and it is at least doubtful whether the OECD Guidelines produced that contribution to the promotion of social welfare that lingers in the document as a programmatic objective. In this regard,

⁹⁶ See L. A. Compa and T. Hinchliffe Darricarrère, 'Private Labor Rights Enforcement Through Corporate Codes of Conduct', in L. A. Compa and S. F. Diamond (eds.), *Human Rights, Labor Rights, and International Trade* (Pennsylvania: University of Pennsylvania Press), 1996, p. 181; see the contribution of Marrella in this volume; see further the contributions of Benedek and Francioni. ⁹⁷ See www.oecd.org.

⁹⁸ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; for more information, see www.ilo.org. ⁹⁹ *Ibid.*

the efforts of the UN should be mentioned, such as the Code of Conduct on Transnational Corporations,¹⁰⁰ and the Global Compact,¹⁰¹ which is not a code of conduct but an attempt to promote the fundamental principles of the UN in a field that is dominated by enterprises. Through cooperation with the UN, trade union organisations, and NGOs, companies are encouraged to adopt a 'good practices' approach, defined by a dialogue between the different stakeholders. The UN Code of Conduct on Transnational Corporations considers that each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

Internal codes, self-written, are communicated to the contracting or sub-contracting companies of the multinational enterprises through the outsourcing or supply contract, which represent a sort of standard clause, included in the text itself, or a reference is made to it. By signing the contract, the contractor obliges him/herself to respect the rules of the code under the threat of punishment by the application of foreseen sanctions, which can even lead to the dissolution of the contract. The major weakness of internal codes lies in the application and monitoring procedures; generally the control systems are carried out by the companies themselves and not by trade union organisations or NGOs that could guarantee the independence and the impartiality of the evaluation. It is necessary to create more advanced and credible regulative instruments on the basis of the Codes of Conduct negotiated by social partners. An example would be the agreement, directed to European enterprises, between the European Trade Union Federation: Textile, Clothing and Leather (ETUF: TCL) and the entrepreneurs' European Apparel and Textile Organisation (EURATEX) in the textile and clothing sector. The reference to the ILO Conventions and the provision of their exact application is the most interesting part of this European code. Normally, indeed, the transnational companies' texts recall only the principles of the mentioned conventions, partially modifying the original wording, which can cause interpretative and applicative distortions, to the detriment of the rights

¹⁰⁰ Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, art.15 (accessed: 15 March 2006). ¹⁰¹ www.un.org/depts/ptd/global.htm (accessed: 15 March 2006).

of the workers. The reference to the Export Processing Zones in the Agreement is also fundamental. It is in these areas, where there is the risk of non-application of the Conventions ratified by the country due to the provided derogations. The application of the EURATEX – ETUF: TCL could contribute to guaranteeing the respect of fundamental social rights.

It is desirable that the mentioned models are rigorously applied, overcoming the underlying weaknesses that have become visible during the application of internal codes. Beyond imposing more stringent and precise obligations on the contractors, companies should above all entrust the procedures of application of the codes not only to quality controllers or trade agents (internal monitoring), but also to external and independent subjects, competent in the field of labour law, industrial relations and human rights (external monitoring). The model code drafted by the Apparel Industry Partnership (AIP),¹⁰² an organisation consisting of companies, NGOs and trade unions, represents a measure of progress into this direction. Indeed, the coalition has elaborated the Principles of Monitoring, which regulate the control of the codes, both as regards internal and external monitoring. In the case of internal control, the involvement of experts in the field of employment and human rights is proposed, who would carry out periodical controls on the facilities of the contractors even without prior notice about the controls. A regular consultation with the trade union representatives of the legally established workers' association, and local institutions and organisations working with human rights is also established, and their opinion on the application of the code is sought. The company should also guarantee that the implementation procedures of the code are not contrary to the company collective agreements. Concerning external control, the section on the *Obligations of Independent External Monitors* of the AIP Code also provides for the application of the relevant tasks to associations specialised in human rights or in labour law.¹⁰³ It is carried out with the help of clear evaluation criteria, based on both periodic and also unexpected inquiries made of a representative sample of the companies. The evaluation has to include, amongst other things, the level of knowledge of employees on the content of the code, the existence of a claim procedure that does not expose the employees to reprisals, and sample interviews

¹⁰² www.itcilo.it/english/actrav/telearn/global/ilo/guide/apparell.htm.

¹⁰³ Section II of AIP Code, www.itcilo.it/english/actrav/telearn/global/ilo/guide/apparell.htm#Apparel%20Industry%20Partnership%20Agreement (accessed: 15 March 2006).

with the workers, undertaken with the assistance of trade union or religious association representatives.

There are different interpretations with regard to Codes of Conduct. For example, one can imagine that respect for these codes represents a functionally weak substitute, for effective interstate regulation, in the absence of such effective regulation. The new institutional rationality then degrades into soft regulation, and becomes eventually subjected to the supervision of NGOs in the absence of a supranational authority capable of controlling economic actors.¹⁰⁴ Can this voluntary, flexible and non-binding regulation have the same efficiency as the legal norm imposed by the nation-state within its boundaries? It is right to doubt it. However, this modern vector of transnationalisation of rights cannot be ignored or underestimated, especially in the light of the internal markets and the commodity chains created by transnational and associated enterprises.¹⁰⁵ The big transnational corporations decide more and more often, for complex reasons, to adopt principles and norms on conduct on environmental and social matters, regardless of where they are based, and they request from their employees – wherever they may be – loyalty to the values of the company, tailored to fundamental principles (equal treatment of men and women, non-discrimination, etc.). In this sense, they represent a path among the many pieces of the puzzle that we are trying to reconstruct, in the search for an embryonic constitutional, multipolar and asystematic network that ratifies the sense of connection between the economy and social values in the era of globalisation.

Concluding remarks: labour law in the post-national puzzle

From the intensification of international competition to the transnationalisation of production activities, the changes brought about by economic globalisation have radically challenged the capability of national legal systems to come up with adequate rules to govern the new dimensions of the markets. Indeed, both in doctrinal and political circles, the

¹⁰⁴ As B. Hepple noted, the main weaknesses of all codes is 'the absence of positive obligations on states to require TNCs to observe both core and core-plus standard [...] and] the reliance that the international system places on national labour laws at a time when national governments have been disempowered by globalization', 'A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct', *Comparative Labour Law and Policy* 20 (1999), 361.

¹⁰⁵ See Lord Wedderburn, 'Common Law, Labour Law, Global Law', in Hepple (ed.), *Social and Labour Rights in a Global Context*, p. 52.

opinion that the instruments of labour relations should be envisaged on macro-regional levels, thus reconciling the exigencies of global competitiveness with those of social justice and equity, is widely held. In view of a normative action of the ILO, which is rather useful to identify universally recognised social standards but hardly effective as regards efficiency, it is necessary to mobilise institutions that incorporate supra-state communities in order to promote the convergence between the minimum standards of labour regulations.

The task of juridical research is to contribute to the promotion of the adoption of mechanisms capable of efficiently regulating phenomena of social dumping – being harmful to fundamental social rights and distorting international competition at the same time – and promoting social progress and fundamental rights. In this field, a synergy between the institutions and international organs and their regulative capability is required by the link between social justice, economic growth and the regulation of international competition. It is a link that could produce either praiseworthy effects or, on the contrary, which could also lead to an unstoppable race to the bottom. From its beginnings, the very international labour law itself has been closely related to competition preoccupations: those companies that do not internationalise the social costs of production put in place an unfair trade practice and obtain a competitive advantage on the market. Respect for certain social standards capable of guaranteeing a minimum of supranational social citizenship reflects not only the requirements of social fairness and justice but also the regulative function of the competition carried out by labour law norms.

The idea of the social clause, the mechanism that accompanies international trade liberalisation subordinating the enjoyment of tariff benefits to the respect of some fundamental social principles, is now under discussion in the international community. The social clause should overcome the traditional intrinsic limits of international labour law by the help of a higher level of efficiency, guaranteed by trade sanctions which could be imposed on states that disregard the most elementary rules of the protection of fundamental human rights. The identification of basic social rights (*id est* 'fundamental' or 'internationally recognised') through the recognition of the norms drafted by international organisations (*in primis* the ILO and UN) allowed an opportunity for a reconstructive hypothesis to consider social clauses not as instruments of masked protectionism – as denounced by many developing countries that oppose their adoption – but as an operative reinforcement of universally recognised human rights already existing in general international

law and, maybe, in *jus cogens* as well. The central point of this social clause is not intended to cancel the competitive advantages (on a comparative basis) of the developing economies, or the ones in transition, but to create the necessary requirements of international trade so that the minimum conditions of social and trade union fairness be respected.¹⁰⁶ Thus, possible action strategies have been identified in the multilateral sphere, testing the compatibility of the social clause with the GATT-WTO rules in force. In this respect, it is necessary to offer a critique of some of the international trade-regulating principles, from a perspective of taking advantage of the GATT's 'public' profiles, by hypothesising the extraterritorial application of the previously identified social standards. For example, the failure to adopt social guarantee instruments by a country could be qualified as a 'subsidy' to the national industry, likely to be considered as a compensatory measure. The GATT rules on safeguard clauses, exceptions and protection of concessions and benefits should be analyzed under the same interpretative line.

However, the social clause is already *de facto* operational, especially at the level of unilateral action. This is especially so in the case of the generalised preferences in the US experience, and, more recently, that of the EU. The US experience is particularly significant for the radical nature of the criteria of social conditionality of trade legislation; however, it shows the limits of a unilateral perspective that reveals a strong political, aggressive, and arbitrary use of the social clause. This does not seem to be the case in the European practice, which is characterised by a higher commitment to the principles of international labour law and avoids any selective and discretionary interpretation of the enshrined social rights.

The North American Agreement on Labor Cooperation (NAALC) merits a wider consideration; it accompanied, in a unique way the opening of a regional economic integration phase, marked by the entry into force of NAFTA.¹⁰⁷ It is a very peculiar experience that on the one side does not provide for mechanisms of social harmonisation which would allow Member States to preserve their full sovereignty on juridical-institutional level. On the other side, it establishes institutional surveillance structures and collaboration between States in order to guarantee the promotion of respect for respective internal legislation by providing both for a higher standard and an effective application.

¹⁰⁶ See D. Held, *Global Covenant. The Social Democratic Alternative to the Washington Consensus* (Cambridge: Polity Press, 2004).

¹⁰⁷ The NAFTA entered into force on 1 January 1994.

Nonetheless, the protection of the core labour standards can also be implemented by voluntary and consensual solutions, codifying the rules of good ethical-social conduct shared by multinational companies. Among these soft law instruments, the codes of conduct have a primary role, which could be prepared by international organisations such as the ILO or the OECD or by the multinational companies themselves. Whilst the first can be adopted spontaneously by the addressees, the second shows the growing consciousness of the companies to produce and commercialize their products in a 'socially' adequate way. With this regard, a significant role could be played by governments, adopting measures aimed at promoting the transparency of the social conditions of the production. This could be done either by obliging companies to prepare annual reports with information on their productive environment or by the creation of 'social labels' which guarantee to the consumer the respect of certain fundamental workers' rights.

To conclude: this analysis has illuminated some profiles of fundamental social rights, which, under the banner of supranational regulation, reveal problematic relations between values, rights, and the economic dimension of globalisation. At present, the possibly indicative composition of numerous and diverse levels of regulation is witnessed; from one perspective, denying the image of a market unified on the global level, guided solely by an economic logic; from another, there appears to be delicate problems of governance, in the absence of a constitutional framework able to face the challenge posed to labour law by what Habermas defined as a 'post-national constellation'. For the moment, it is possible to confine oneself to noting the formation of a complex and polycentric system of partial legal spaces, involving public and private subjects and global, regional and local levels of deregulation. This pluralism of sources perhaps represents regression, if judged by the traditional categories of a labour law of statutory tradition, but it constitutes a necessary form of regulation of a transnational space in the search for a possible global constitutional panoply.

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PART II

The Relevance of Human Rights for International Economic Organisations