

Introduction

A. TRADE MEASURES ON CHILD LABOUR

This study examines whether the prohibition of child labour in international law should be imposed through trade measures. It explores the status of child labour in international law and asks whether the existing legal framework should be complemented by trade measures.¹ It seeks to define an appropriate framework in international law.

I. The problem of child labour and the international community

The problem of child labour has existed for a long time. Whilst it was prevalent in Europe during the Industrial Revolution in the nineteenth century, it still exists on a large scale in developing countries in Asia, Africa and Latin America. From the end of the 1980s, the international community has increasingly recognised the need for action. Starting with the adoption of the Convention on the Rights of the Child (CRC) in 1989, followed by the World Summit for Children in 1990,² the adoption of various soft law instruments such as the Programme of Action for the Elimination of the Exploitation of Child Labour³ and the United Nations (UN) Special Session of the General Assembly in 2002,⁴

¹ The case law, as well as scholarly writing up to 30 September 2008, is considered.

² Cf. UN General Assembly, *Progress on Implementation of the World Declaration and Plan of Action from the World Summit for Children*, Report of the Secretary General, 22 July 1998 A/53/186.

³ UN Commission on Human Rights, *Programme of Action for the Elimination of the Exploitation of Child Labour*, forty-ninth session, 10 March 1993, E/CN.4/1993/79.

⁴ Cf. UN General Assembly, *A World Fit for Children*, Preparatory Committee for the Special Session of the General Assembly on Children, third substantive session, 7 June 2001, A/AC.256/CRP/Rev.3 (Part I).

the UN undertook various efforts to promote the rights of children, including addressing the problem of child labour.

Likewise, in 1998, in an effort to take up the challenges of globalisation, the International Labour Organization (ILO) adopted the ILO Declaration on Fundamental Principles and Rights at Work,⁵ which referred *inter alia* to the effective abolition of child labour, and, in 1999, the Convention on the Worst Forms of Child Labour. In addition, the ILO considerably increased its International Programme on the Elimination of Child Labour (IPEC).⁶

As well as efforts undertaken by ILO and UN bodies, various trade measures have increasingly been introduced since the 1990s to solve the problem of child labour. Examples are the proposed US Harkin Bill banning goods made with child labour⁷ or private sector action such as the adoption of codes of conduct by transnational corporations in response to criticism by civil society and exposure in the media.⁸ Also, at an international level, there have been efforts to link trade and labour standards. The linkage of trade and child labour is thus worth exploring.

II. The trade and labour linkage

The trade and labour debate is not new. Already during the Industrial Revolution in Europe in the nineteenth century, there were concerns that trade pressures would hinder the adoption of domestic laws for the elimination of child labour.⁹ Most importantly, the ILO Constitution as established by the Treaty of Versailles states in its Preamble:

⁵ ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, eighty-sixth session (Geneva: International Labour Office, 1998).

⁶ As of 2005, IPEC was operating in eighty-six countries, ILO, *The End of Child Labour: Within Reach, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: International Labour Office, 2006), para. 118.

⁷ The Child Labour Deterrence Act was introduced various times, for the first time in 1992 by Senator Harkin, see Harkin, Child Labour Deterrence Act of 1999, Senate 1551–106th Congress.

⁸ UNCTAD, *World Investment Report 1999, Foreign Direct Investment and the Challenge of Development* (Geneva: United Nations, 1999), p. 363; The apparel industry especially has received much criticism for substandard working conditions in Asian supplier factories, e.g. Nike, adidas or Puma, cf. Clean Clothes Campaign, S. Poos, Sialkot, Pakistan, *The Football Industry From Child Labour to Workers' Rights*, November 1999, www.cleanclothes.org/publications/child_labour.htm, p. 1.

⁹ V. A. Leary, 'Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, US Laws)' in J. N. Bhagwati and R. Hudec (eds.), *Fair Trade and Harmonization, Prerequisites for Free Trade?*, (Cambridge MA: MIT Press, 1996), vol. 2, pp. 177–229, p. 183.

... Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries; ...¹⁰

While unfair competitive advantages resulting from low labour standards were apparently in the minds of the drafters, human dignity was the underlying principle.¹¹

The Declaration of Philadelphia of 1944 reaffirmed the fundamental principles of the ILO and broadened its mandate stating *inter alia* that labour is not a commodity, that poverty anywhere constitutes a danger to prosperity everywhere, and that the ILO will address the social implications of economic and financial policies and fully cooperate with international bodies promoting a high and steady volume of international trade.¹² It thus foresaw the necessity of linking economic and financial policies and measures with the fundamental objective of social justice.¹³

Another example of the trade and labour link is the 1948 Havana Charter providing for the establishment of the International Trade Organization, which did not enter into force. One of the purposes of the Charter was:

(6) To facilitate, through consultation and cooperation, the solution of problems relating to international trade, employment, economic development, commercial policy, business practices, and commodity policy.

Art. 7 of Chapter II on Employment and Economic Activity reads:

1. The Members recognize that measures relating to employment must take fully into account the rights of workers under intergovernmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the

¹⁰ ILO, Part XIII (Labour) of the Treaty of Versailles of 28 June 1919, Section I (Geneva: International Labour Office).

¹¹ T. Cottier, A. Caplazi, 'Labour Standards and World Trade Law: Interfacing Legitimate Concerns' in T. Geiser, H. Schmid, E. Walter-Busch (eds.), *Arbeit in der Schweiz des 20. Jahrhunderts* (Berne/Stuttgart: Verlag Paul Haupt, 1998), pp. 469–507, p. 474; E. Lee, 'Globalization and Labour Standards: A Review of Issues', *International Labour Review*, 136 (2) (1997), 173–89, 174.

¹² ILO, Declaration adopted by the Conference, Appendix XIII, Record of Proceedings, International Labour Conference, twenty-sixth session, Philadelphia, Montreal, 1944, p. 621 et seq.; E. Lee, 'The Declaration of Philadelphia: Retrospect and Prospect', *International Labour Review*, 133 (4) (1994), 467–84, 478.

¹³ M. Hansenne, 'The Declaration of Philadelphia', *Labour Law Journal*, 45 (8) (1994), 454–60, 458.

4 INTRODUCTION

- improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.
2. Members which are also members of the International Labour Organization shall cooperate with that organization in giving effect to this undertaking.
 3. In all matters relating to labour standards that may be referred to the Organization in accordance with Articles 94 or 95, it shall consult and cooperate with the International Labour Organization.¹⁴

Thus, the drafters of the Havana Charter also recognised the interaction between trade and labour. The main concern was however not humane conditions but that low labour standards could be an obstacle to international trade.

As indicated above, there are also more recent examples of the trade and labour linkage.

1. The current state of affairs

Recent examples are so-called 'social clauses' in trade incentive regimes and in an increasing number of regional and bilateral trade agreements. For the purpose of this work, the term 'social clause' is broadly defined and refers to any linkage of trade rules and rules relating to labour standards in one international agreement.¹⁵ However, on the global level, efforts to link trade and labour so far have failed.

When the trade and labour debate restarted in the mid 1990s in the context of the Copenhagen Social Summit, the issue of a trade and labour linkage was firmly rejected and led to the creation of the Working Party of the Social Dimensions of the Liberalization of International Trade.¹⁶ An agreement was also reached that the ILO supervisory

¹⁴ Article 7 of the *Havana Charter, Final Act and Related Documents*, UNCTAD, Interim Commission for the International Trade Organization, Havana, 1948, E/Conf.2/78.

¹⁵ See also G. van Liemt, 'Minimum Labour Standards and International Trade: Would a Social Clause Work?', *International Labour Review*, 128 (4) (1989), 433–48, 434 who defines a social clause as a clause that 'aims at improving labour conditions in exporting countries by allowing sanctions to be taken against exporters who fail to observe minimum standards. A typical social clause in an international trade agreement makes it possible to restrict or halt the importation or preferential importation of products originating in countries, industries or firms where labour conditions are inferior to certain minimum standards.'

¹⁶ Cf. M. Hansenne, *Globalization, Liberalization and Social Justice: Challenges for the International Community*, 28 October 1998, <http://ilo.law.cornell.edu/public/english/bureau/dgo/>

system needed to be strengthened but that no fundamental reform or overhaul by the introduction of trade sanctions was required.¹⁷ Likewise, the introduction of an explicit multilateral social clause into the World Trade Organization (WTO) was rejected at the first Ministerial Conference of the WTO held in Singapore. Proposed by Michael Hansenne, former Director-General of the ILO, in the conference and strongly supported by the US, it was opposed by a substantial number of developing countries and the UK.¹⁸ On the general issue of linkage between trade and labour standards, a compromise was reached in the final Ministerial Declaration:

We renew our commitment to the observance of internationally recognized labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put in question. In this regard, we note that the WTO and ILO secretariat will continue their existing collaboration.¹⁹

Whilst it is noteworthy that labour standards are mentioned in an official WTO document, there was no further progress, for example by establishing a WTO Committee on trade and labour.²⁰ This might be due to the strong opposition of developing countries to an explicit social clause and further initiatives in that direction.²¹ The main reason for this reluctance is the fear of disguised protectionism: a social clause only aims to take away the comparative advantages of developing countries and to weaken their competitiveness.²²

The ILO Declaration on Fundamental Principles and Rights at Work from 1998 reiterated that labour standards should not be used for

speeches/hansenne/1998/wash.htm; see also H. Bartolomei de la Cruz, G. von Potobosky, L. Swepston, *The International Labour Organization, The International Standards System and Basic Human Rights* (Oxford: Westview Press, 1996), p. 123.

¹⁷ Bartolomei de la Cruz, von Potobosky, Swepston, *The International Labour Organization*, p. 123.

¹⁸ V. A. Leary, 'The WTO and the Social Clause: Post-Singapore', *European Journal of International Law*, 8 (1) (1997), 118–22, 119; See also statements in favour and contra the incorporation of core labour rights into the WTO at the Third Ministerial Conference in Seattle, GG.277/WP/SDL/2(Add.1).

¹⁹ WTO, Singapore, Ministerial Declaration, 13 December 1996, WT/MIN(96)/DEC/W, para. 4.

²⁰ Leary, 'Post-Singapore', 119; Cottier, Caplazi, 'Labour Standards and World Trade Law', p. 480.

²¹ Lee, 'Globalization and Labour Standards', 177.

²² Cottier, Caplazi, 'Labour Standards and World Trade Law', p. 487.

6 INTRODUCTION

protectionist purposes.²³ However, the recent ILO Declaration on Social Justice for a Fair Globalization adopted in June 2008 constitutes a shift in the debate, stating

that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes.²⁴

Thus, increasing national economic growth should not take primacy over achieving the fulfilment of fundamental rights at work. Most importantly, the Declaration on Social Justice for a Fair Globalization highlights that the ILO has a key role to play in placing decent work at the centre of economic policies and invites other international organisations in related fields to contribute to the promotion of decent work.²⁵

Hence, it is timely to explore the question of a trade and child labour linkage at the international level.

2. Different rationales for the linkage

Although the most obvious reason why trade and labour should be linked in international law is that labour is the main component of production, there is an extensive debate in academia as to whether such linkage is indeed recommendable. One can distinguish four main approaches to the trade and labour debate.²⁶

The following section will briefly outline the state of the debate, putting the rationale chosen in this work into context.

a) *The fair trade/free trade debate*

The first group of arguments focuses on the fair trade/free trade debate. As indicated above, the Preamble of the ILO Constitution and the Havana Charter suggest that the prevailing rationale for the adoption of social clauses to date has been fair competition.²⁷ In a similar vein, advocates of a trade and labour linkage argue that ‘fair trade is free trade’s destiny’,

²³ Para. 5 of the ILO Declaration on Fundamental Principles and Rights at Work.

²⁴ ILO, *Provisional Record 13 A/B*, International Labour Conference, ninety-seventh session (Geneva: International Labour Office, 2008).

²⁵ Preamble, section I A and section II C of the ILO Declaration on Social Justice for a Fair Globalization.

²⁶ For a detailed overview of the trade and labour debate see A. Blüthner, *Welthandel und Menschenrechte in der Arbeit, The Compatibility of Human Rights at Work with the WTO-System* (Frankfurt am Main: Peter Lang GmbH/Europäischer Verlag der Wissenschaften, 2004), p. 32 et seq.; see also Cottier, Caplazi, ‘Labour Standards and World Trade Law’, p. 486 et seq.

²⁷ Whether this holds true for the more recent social clauses in regional and bilateral trade agreements will be examined during the course of this work.

and that there is no way for trade policy to be insulated from the political issues at stake including labour relations.²⁸ It is held that the absence of a social clause is an unfair trade advantage.²⁹ Brown, Deardoff and Stern, who argue that the case for the harmonisation of international labour standards is rather weak, exempt child labour, stating that, in this case, there are current allocations that are highly inadequate.³⁰ Trade could therefore be considered to be 'unfair'.³¹ Likewise, Bhagwati, who usually argues against social clauses, maintains that exploitative child labour should be prohibited on a global scale, although such a prohibition contained in a trade agreement would not be very effective.³²

Many countries – mostly developing – often argue that divergent labour standards are just another comparative advantage.³³ In their view, it would contradict the rationale of the WTO to make high labour standards a legal condition. They reject the incorporation of labour standards into trade agreements as disguised protectionism.³⁴

Whether fair competition indeed requires the inclusion of labour standards into a trade agreement from an economic point of view is however subject to much debate.³⁵ While it is obvious that labour standards have an impact on the competitiveness of economic players, the precise effect of labour standards on terms of trade is not clear in economic theory.

²⁸ B. A. Langille, 'General Reflections on the Relationship of Trade and Labour (Or: Fair Trade is Free Trade's Destiny)' in J. Bhagwati, R. Hudec (eds.), *Fair Trade and Harmonization, Prerequisites for Free Trade?*, 2 vols. (Cambridge, MA: MIT Press, 1996), vol. II, pp. 231–66, p. 236; see also Lee, 'Globalization and Labour Standards', 180.

²⁹ P. Waer, 'Social Clauses in International Trade, The Debate in the European Union', *Journal of World Trade*, 30 (1996), 25–42, 39; Leary, 'Workers' Rights and International Trade', 178; D. Ehrenberg, 'The Labour Link: Applying the International Trading System to Enforce Violations of Forced and Child Labour', *Yale Journal of International Law*, 20 (1995), 361–416, 379; see also S. Charnovitz, 'The World Trade and Social Issues', *Journal of World Trade*, 28 (5) (1994), 17–33, 32–3.

³⁰ D. K. Brown, A. V. Deardoff, R. M. Stern, 'International Labour Standards and Trade: A Theoretical Analysis' in J. N. Bhagwati, R. Hudec (eds.), *Fair Trade and Harmonization, Prerequisites for Free Trade?*, vol. 1 (Cambridge, MA: MIT Press, 1996), pp. 227–79, p. 270.

³¹ *Ibid.*

³² Interview with J. N. Bhagwati in *Die Zeit*, 23 November 2006.

³³ See for example statements of ministers made at the Third Ministerial Conference of the WTO in Seattle, GB.277/WP/SDL/2(Add.1).

³⁴ Singapore Ministerial Declaration, WT/MIN (96) /DEC, adopted on 13 December 1996; see also references in E. de Wet, 'Labour Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organization', *Human Rights Quarterly*, 17 (1995), 443–62, 449.

³⁵ For an overview of the debate see Lee, 'Globalization and Labour Standards', 176 et seq.

8 INTRODUCTION

The well-known Organisation for Economic Cooperation and Development (OECD) study on the interaction of trade and labour found:

The view which argues that low-standards' countries will enjoy gains in export market shares to the detriment of high standards' countries appears to lack solid empirical support.³⁶

It also found:

Moreover on average, the price of US imports of textile products does not appear to be associated with the degree of enforcement of child labour standards in exporting countries.³⁷

On the other hand, according to estimates from 2001, manufacturing costs per worker could be reduced by US \$6000 per year in economies where both freedom of association and child labour are not well protected.³⁸

b) *The race to the bottom*

Another line of reasoning invokes a 'race to the bottom' scenario.³⁹ Advocates of a social clause hold that the globalisation of production and the growing mobility of capital will reduce standards in higher-standard countries.⁴⁰ Governments indeed often choose to suspend or modify labour laws inside so-called export processing zones (EPZs) in order to attract investment and to raise export competitiveness.⁴¹

³⁶ OECD, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade* (Paris: OECD, 1996), p. 105; C. Pearson, 'Labour Standards' in P. F. J. Marcory, A. E. Appleton, M. G. Plummer (eds.), *The World Trade Organization, Legal, Economic and Political Analysis*, (New York, NY: Springer, 2005), vol. 2, pp. 171–88, p. 181 with further references.

³⁷ OECD, *Trade, Employment and Labour Standards*, pp. 12–13.

³⁸ Economic Strategy Institute, P. Morici, E. Schulz, *Labour Standards in the Global Trading System* (Washington DC: Economic Strategy Institute, 2001), p. 7.

³⁹ See for example Economic Strategy Institute, Morici, Schulz, *Labour Standards in the Global Trading System*, p. 6 et seq.; ICFTU, *Building Workers' Human Rights into the Global Trading System*, 1999, <http://www.icftu.org/www/english/els/escl99BWRGTS.pdf>, p. 47; for a critical analysis of this argument see also Pearson, 'Labour Standards', p. 181 et seq.; Langille, 'General Reflections on the Relationship of Trade and Labour', p. 254 et seq.

⁴⁰ Economic Strategy Institute, Morici, Schulz, *Labour Standards in the Global Trading System*, p. 6 et seq.; Without explicitly mentioning the term 'race to the bottom', Hansenne, 'The Declaration of Philadelphia', 458 underlines the need to improve labour standards worldwide because of the increasing globalisation; see also Langille, 'General Reflections on the Relationship of Trade and Labour', p. 254.

⁴¹ K. E. Maskus, 'Should Labour Standards Be Imposed Through International Trade Policy', *World Bank Policy Research Working Paper*, 1997, 10; ICFTU, S. Perman, *Behind the Brand Names, Working Conditions and Labour Rights in Export Processing Zones*, 2004, www.icftu.org/www/PDF/EPZreportE.pdf, p. 5 et seq.

The chronic unemployment in Germany is often deemed to be caused by the relocation of German companies to places like China where wages are lower. A multilateral social clause is therefore needed to provide a 'level playing field'.⁴² It is argued that markets cannot decide on their own on the regulatory optimum and that social clauses are justified if based on minimum standards and multilateral negotiations.⁴³ The ILO addressed the problem of a 'beggar-thy-neighbour' policy in its 1998 report on child labour, recommending a joint solution by all countries involved.⁴⁴

On the other hand, it is held that the likelihood that inadequate labour standards in developing countries place downward pressure on wages in developed countries is small.⁴⁵ Arguably technological change is a much larger factor than third-world competition in the growth of low-wage work in the US.⁴⁶ In particular, in relation to child labour, it has been estimated that changes of trade flows after child labour has been eliminated or reduced by 50 per cent are so marginal that effects on relative wages are too small to be observable.⁴⁷ Finally, while multinational enterprises in labour-intensive sectors may invest *inter alia* on the basis of low wages, there is little systematic evidence that these incentives are markedly enhanced by poor labour standards.⁴⁸

⁴² S. Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime, A Historical Overview', *International Labour Review*, 126 (5) (1987), 565–84, 581.

⁴³ C. Scherrer, 'The Pros and Cons of International Labour Standards' in N. Malanowski (ed.), *Social and Environmental Standards in International Trade Agreements* (Münster: Westfälisches Dampfboot, 1997), pp. 32–44, p. 41.

⁴⁴ ILO, *Child Labour, Targeting the Intolerable*, Report VI (1), International Labour Conference, eighty-sixth session (Geneva: International Labour Office, 1998), p. 19 et seq.

⁴⁵ Maskus, 'Should Labour Standards Be Imposed Through International Trade Policy', 49. For a rejection of the 'race to the bottom' argument see also B. A. Langille, 'Eight Ways to Think about International Labour Standards', *Journal of World Trade*, 31 (4), 27–53, 38.

⁴⁶ T. N. Srinivasan, 'International Trade and Labour Standards from an Economic Perspective' in P. van Dijk, G. Faber (eds.), *Challenges to the New World Trade Organization* (The Hague/London/Boston: Kluwer Law International, 1996), pp. 219–43, p. 239.

⁴⁷ A. Flasbarth, M. Lips, *Effects of a Humanitarian WTO Social Clause on Welfare and North-South Trade Flows*, Discussion paper no. 2003–03 (University of St. Gallen, 2003), p. 25.

⁴⁸ Maskus, 'Should Labour Standards Be Imposed Through International Trade Policy', 46. It should however be noted that this might be different in the case of child labour since child labour has a direct bearing on wages.

c) *Human rights arguments/Coherence in international law*

A third rationale for linking trade with labour standards is based on human rights arguments.⁴⁹ As mentioned above, the ILO already recognised human dignity as the underlying rationale for linking trade and labour. Human rights arguments may well be a solution for advocates of a social clause faced with a growing amount of counter-arguments raised by trade economists. It is argued:

... the most obvious and compelling normative basis for insisting on compliance with minimum welfare may have little relation to economic welfare; this is particularly true in the case of universal human rights ... Human rights are frequently and increasingly regarded as inalienable rights ...⁵⁰

It has been pointed out that WTO law has to be applied in accordance with the international law on child labour, suggesting that the most exploitative examples form part of *ius cogens*.⁵¹ The human rights argument is thus closely connected with the issue of coherence in international law. These arguments highlight the link of trade and labour to the trade and human rights debate, which has increasingly been at the centre of academic debate on public international law.⁵²

d) *Effectiveness arguments/Trade measures for human rights*

Finally, another main approach to the trade and labour debate is based on the idea that the current human rights system is inadequate to prevent human rights violations and that therefore an economics based system is needed to achieve effective enforcement.⁵³ Some scientists have calculated that a tariff increase of 50 per cent would yield sufficient

⁴⁹ Langille, 'Eight Ways to Think about International Labour Standards', 34 et seq.; J. Diller, D. Levy, 'Child Labour, Trade and Investment: Toward the Harmonization of International Law', *The American Journal of International Law*, 91 (1997), 663–96, 677 et seq.; see also Lee, 'Globalization and Labour Standards', 186 who argues that there is a strong moral case for observing human rights, which cannot be overridden by economic considerations.

⁵⁰ R. Howse, M. J. Trebilcock, 'The Fair Trade/Free Trade Debate: Trade, Labour, and the Environment', *International Review of Law and Economics*, 16 (1996), 65.

⁵¹ Diller, Levy, 'Child Labour, Trade and Investment', 664 and 678 et seq.

⁵² See for example the articles by various legal scholars in T. Cottier, J. Pauwelyn, E. Bürgi, (eds.), *Human Rights and International Trade* (Oxford University Press, 2005); and F. Abbott, C. Breining-Kaufmann, T. Cottier (eds.), *International Trade and Human Rights, Foundations and Conceptual Issues* (Ann Arbor: University Press of Michigan, 2006); G. Marceau, 'WTO Dispute Settlement and Human Rights', *European Journal of International Law*, 13 (2000), 753–814.

⁵³ Ehrenberg, 'The Labour Link', 377; similarly de Wet, 'Labour Standards in the Globalized Economy', 455.