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THE SOCIAL CLAUSE: BUILDING A BRIDGE BETWEEN HIGHLY DEVELOPED NORTH AND LESS INDUSTRIALIZED SOUTH

This article is concerned with an area of international labour law. A number of questions surrounded the use of a social clause are brought into agenda of different debates among scholars, lawyers, economists, governments, policy makers, non-governmental organizations and members of various trade unions across the globe. Issues with regard to core labour standards and their applications within the jurisdiction of different countries are not less sharp among others caused by rapid speed of globalization. Competition between a highly developed North and less industrialized South has led to a discussion as to whether the social clause is an effective tool in protection of labour rights for workers which are involved in production for exports by developing countries or whether it can justifiably be seen as a means used by the developed world to protect its own interests. Race for the better life within the South itself raises a number of questions whether a social clause can be indeed helpful in order to achieve their final goals or whether it lacks the power for such an important task. Arguments for and against by a number of scholars are examined and some of the issues involved are discussed with reference to China and Mexico. A final point of view is put forward in support of the social clause as an aid to the social and economic development for the developing countries.

Key words: social clause, labour rights, standards, developing countries, international trade arrangements.

Introduction

Recent discussions regarding WTO and ILO cooperation has led to a controversial debate between academics from different social science disciplines as to whether the social clause is an effective instrument to be included in WTO agreements, and whether it would abolish poverty in developing countries and enhance the level of workers' rights protection in the South. This article is structured as follows.

The first part is divided into three sub-sections and will focus on definition of the social clause, viewed through different academic perspectives. The long roots of

the social clause will be explored including the Pre-Singapore period. This subsection will look at the arguments (i) justifying the use of the social clause in the worldwide arena, and (ii) of those who reject the positive effect of the social clause. To find out how the social clause would work it is necessary to determine its implementation and technical aspects such content, the objective of implementation and consequences of breach.

The second part of the article attempts to justify the effectiveness of the social clause, using China and Mexico as particular examples.

The final part of the article will consider and discuss some conclusions.

I. The social clause

1. Historical background.

The social clause has a long root back into history. Some argue that it first appeared at the first two WTO Ministerial Conferences in Singapore in 1996, whereas K. D. Raju insists that it was first proposed during the UN Conference in Trade and Employment in 1946–1948. It was an intended by one party to include the social clause in the Havana Charter to create an International Trade Organization (ITO), the predecessor of the General Agreement on Tariff and Trade (GATT).¹ As the later Havana Charter was not ratified by the USA, establishment of the new organization therefore did not take place. The provision on labour standards in the Havana Charter was also missed when the World Trade Organisation appeared in the international arena. However, the Havana Charter contained only a single provision on prohibition of goods made by prisoners labour for export.

In 1996 an important Ministerial Conference took place in Singapore where a heated debate between the USA and Asian countries represented their arguments regarding international labour standards². As a consequence of the Conference, the Singapore Declaration announced the following:

«We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them [...] We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into

question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration»³.

This was an important announcement as it publicly confirmed that Ministers agreed on the competence of the ILO concerning core labour standards, rejected the use of the social clause related to protectionism and emphasized collaboration between the WTO and the ILO.

2. How can the «social clause» be understood? Different opinions.

From Keith Ewing's perspective the social clause is «the real prize for many trade unionists...».⁴ Hoe Lim suggests that the social clause is a legal provision included in international trade agreements to abolish hazardous forms of labour exploitation in countries which export their goods, thereby enabling importing countries to gain some effective instruments against those exporting countries which do not pay sufficient attention to minimum labour standards implemented on an international level.⁵ Hoe Lim demonstrates possible measures which could be put in place against exporting countries where they breach labour standards. Such measures could be as follows: parties in breach could be excluded from trade arrangements; they could face restrictive quotas, increase of tariffs and other trade barriers; and, even more, a prohibition of the importation of goods manufactured by a breaching country.⁶

Anita Chan and Robert Ross analysed the concept of a social clause, acknowledging that the clause relates to the trade and is implicated in five core labour standards, namely: freedom of association; freedom to organise and collective bargaining; prohibition of forced labour; the banning of child labour and the rejection of discrimination in

¹ D.K.D. Raju, 'Social Clause in WTO and Core Labour Standards: Concerns of India and Other Developing Countries', URL <http://ssrn.com/abstract=1195305>, p. 3.

² Anita Chan and Robert J S Ross, 'Racing to the bottom: international trade without a social clause', 2003, Vol. 24, No 6, *Third World Quarterly*, p. 1012.

³ WTO, Singapore Ministerial Declaration (1996), WT/MIN(96) DEC, 18 December, WTO, Geneva, URL http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.

⁴ Keith Ewing, 'Trade unions rights in the twenty-first century', Working USA, 2001, Vol. 5, Issue 1, p. 2.

⁵ Hoe Lim, 'The social clause: issues and challenges', 2001, Report. Turin: ILO. Bureau of Workers Activities, URL www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/hoelim.htm.

⁶ Ibid 5.

employment.¹ These rights have been stated in ILO Core Conventions as follows:

— Freedom of Association and Protection of the Right to Organise, 1948, (No. 87)

— Right to Organise and Collective Bargaining, 1949, (No. 98)

— Forced Labour Convention, 1930, (No. 29)

— Prohibition of Forced Labour, 1957 (No. 105)

— Equal Remuneration Convention, 1951 (No. 100)

— Discrimination (Employment and Occupation), 1958, (No. 111)

— Minimum Age Convention, 1973 (No. 138)

3. Arguments in favour of and against the social clause.

3.1 North v South or is the North's aim to help the South?

There are inevitably strong opponents to the social clause and those who lead the resistance. The concept of the social clause is usually defended by industrialized countries which are collectively known as the «North» and is opposed by less-developed states which are known as the «South». This has led to a conflict relating to the acceptance of the social clause and there is, of course, a clear need to understand both arguments.

It is important to firstly look at basic workers' rights from a global spectrum: all workers should have opportunities to exercise rights corresponding to their jobs. Gerda van Roozendaal provides an example of the right to organise and freedom from forced labour.² However, numerous countries from the South including influential ones such as China and India with massive workforces did not sign up to a large number of key ILO Conventions, including the Core Convention No. 87: Freedom of Association and Protection of the Right to Organise, Convention No. 98:

Right to Organise and Collective Bargaining. Not only could rights not be exercised by labour but moreover, it was found in a survey carried out by the International Confederation of Free Trade Unions (ICFTU) that some trade union activities caused the killing of hundreds of trade unions members in some countries.³ Therefore, a number of trade union leaders believe that the absence of a social clause will be followed by a significant decrease in standards which could cause a withdrawal of foreign investment of developed countries. This would inevitably lead to job cuts of thousands of workers resulting in serious social problems within the nations concerned.

While developed countries, i. e. the North argue that a social clause would improve the working conditions of developing countries, in the South, the motives of the North are viewed with some suspicion.⁴ Many trade union leaders and activists from the South have expressed their concerns with regard to the social clause as a tool which secures jobs in the rich North rather than one which has the objective of seeking economic improvement and social wealth in the less industrialized and prosperous South.⁵

A strong point in favour of the social clause can be found from human rights protectionists perspective who argue that labour standards should be directly interlinked with human rights.⁶ They believe that the inclusion of the social clause in WTO agreements is vital. In their view, developing countries are not able to improve the labour standards on their own and there is therefore a clear need for developed countries to intervene in this area. Furthermore, Valor argues that if labour standards are operated in the global arena, then countries would not have a comparative advantage in international trade.⁷

The ICFTU which includes more than

¹ Chan, Ross, op. cit., p. 1011.

² Gerda van Roozendaal, «Trade unions and global governance: the debate on the social clause» 2002, p. 5.

³ Cited in *ibid* 8, p. 3.

⁴ Chan, Ross, op. cit., p. 1013.

⁵ Ewing, op. cit., p. 2.

⁶ Carmen Valor, 'What if all trade was fair trade? The potential of a social clause to achieve the goals of fair trade', 2006, 14, *Journal of Strategic Marketing*, p. 266.

⁷ *Ibid* 12, p. 266.

200 organizations from around 148 countries is a strong proponent of the social clause. Surprisingly, under the chairmanship of China, within the All China Federation of Trade Unions supports the social clause and likewise the Korean Confederation of Trade Unions which finds the effectiveness of social clause in the protection of social trade unions rights.¹

3.2. Problems concerned with implementation.

The effective implementation of the social clause results in a number of important questions.² According to Hoe Lim, historically there have been two opposing schools of thought: the neo-classical and the neo-institutional. The former argues that there were no grounds for implementing core labour standards through international trade agreements. At the same time, the neo-institutional proponents strongly oppose this view and believe that domestic and international markets would only be effective when they function on transparent legal frameworks and all rights and standards be in force. From the neo-classical economic approach, which is supported by a number of economists, free trade and open markets are the best mechanisms for achieving efficient results. Therefore, international labour standards are not justified by the neo-classicists as such standards belong to forces that would interfere with the free operation of the market. However, if core labour standards did not exist, there would be disorder in the labour market followed by lack of efficiency. Therefore, Lim argues that for labour standards to be implemented, profound economic changes must be brought into account. The author looks at five core labour standards and explores each of them and opines that freedom of association and collective bargaining is essential in order to achieve a balance between rights of employees and power of employers and, at the same time to increase a competition within a labour market. According to Hoe Lim, freedom from forced labour is inevitably important

as without its existence there would be expropriation of employees rights forcing them to work in an industry which does not correspond to their skills. The latter would lead to a lack of economic efficiency and ineffective outcomes. No labour discrimination in the market is very important as it would enhance its efficiency, creating equal opportunities to males and females to fulfil their professional skills. The market should ensure that there are enough incentives to ensure a good level of education for the future labour resources and ban any form of child labour, making for a more transparent and efficient market.³

Jean-Michele Servais critically examines the technical difficulties which arise from the implementation of the social clause. He investigates a problem with regard to its content first, questioning the aspect as to whether it covers all the standards included in ILO Conventions. Some specialists may argue that only those standards should be covered by the social clause which are basic and fundamental. The 1998 Declaration on Fundamental Principles and Rights at Work clearly can prove it, stating these rights: freedom of association and the right to collective bargaining; the prohibition of forced labour; the abolition of child labour; and the ban of work discrimination. A second question raised by Servais is what should the limitation in the scope of the social clause be? He queries whether it should set some new standard or just conform to the well-established in ILO Conventions. Another interesting point in his work «International Labour law» is the question concerning the level of development of countries with regard to forcing rules on them in cases of infringement labour rights. Here, the author has a doubt on whether standards should be accepted only be the industrial sector of the country which is involved in importing goods or whether the whole state shall obey the standards.⁴

¹ Chan, Ross, op. cit., p. 1013.

² Inmaculada Hurtado, Patricia Argerey, 'Social Dumping: The Debate on a Multilateral Social Clause', 2008, Vol 8, Issue 1, *Global Economy Journal*, p. 7.

³ Lim, op. cit., URL www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/hoelim.htm.

⁴ Prof. Jean Michel Servais, «International Labour Law», second revised edition, 2009, p. 37–38.

Hurtado and Argerey illustrate three ways for social clause to be implemented:

— Sanctions must be enforced on those parties which use low labour standards and create unfair competition. «This would require an international harmonization of labour standards and an assessment of their implementation through the analysis of workers' well-being»;¹

— on the regulatory level there must be an enforcement of ILO Conventions which establish the link between international trade and labour rights; and

— self-regulation policies by countries in which multinational firms are located and which activities are regulated by host and domicile countries thereby, complying with two types of laws.

Jean-Michel Servais therefore questions the technical feasibility of imposing sanctions, such as who is in charge to apply the measures and whether they must be applied to the whole state that breached the norms or to a particular sector, or, perhaps, only to the individual firm that infringes labour rights.²

II. How effective can the social clause be to ensure that work-related social issues are appropriately taken into account in the operation of 21st Century international trade arrangements?

With the rapid development of globalization and increase in free market operations there are a number of significant problems that exist at the national level of the countries which are highly involved in international trade. We are all aware of the child labour involvement in the day to day running of production for export by developing countries, forced labour is still in vogue and breaches of international labour standards are frequently in the news. I will consider one of the aspects of the international labour standards that is infringed using China and Mexico as examples, both of which are leading developing countries in exporting goods, and also representing the competition within the South.

Both countries are signatories to one of the Core ILO Conventions No. 100 «Equal remuneration Convention», however only Mexico has signed the «Minimum Wage Fixing Convention» No. 131 with Special Reference to Developing Countries. But how are these two countries complying with the standards stipulated in these Conventions in reality? As Anita Chan points out the minimum wage in China is very decentralized and varies from city to city and even districts within the same city can have its own minimum wage standards. For example in 2001 Shenzhen City set up two standards as the highest minimum wage at 574 yuan/month; at the same time other parts of China experience less than 440 yuan/month. The biggest group to suffer are migrant workers, typically those moving from the rural areas into the cities. Anita Chan affirms that only on paper, do local governments comply with central government's requirements about the raising of migrants wages; but in fact the wages of migrant workers are very often lower than official standards. A survey that Anita Chan conducted in China's footwear industry indicated that workers were forced to work 11 hours each day without days off and also had to work for less than the minimum set wages.

In Mexico the wages situation is similar as «in reality the minimum wage levels set in Mexico are far below the standard stipulated by the law...»³

As a result of the Chinese registration system, workers are in very weak position and this is similar to the situation faced by Mexican workers working in the USA. In China, temporary residence permits are granted to migrant workers to lawfully work. This system is very abusive when managers keep these certificates and therefore do not allow migrant workers to leave the employment of the factory at their will.⁴ China faces a strong competitive pressure from Mexico due to its geographical proximity to the USA. However, Mexico has fewer benefits with regard to quotas. At the present time will.

¹ Hurtado, Argerey, op. cit., p. 7.

² Servais, op. cit., p. 40.

³ Cited in Chan, Ross, op. cit., p. 1021.

⁴ Anita Chan, 'Globalization, the Social Clause, and China's Workers', 2001, Vol. 34, No. 6, *The Chinese Economy*, p. 17.

China is in a favourable position as a result of foreign direct investment and in my view it should take appropriate and effective actions towards eliminating poor working conditions and terms of employment which result in the humiliation of workers. This should include introducing rights not only in respect of their already very low wage norms but also improving the fundamental rights of Chinese workers such as right to organize and collective bargaining.

Anita Chan argues that breach of set standards for wages should be considered as a violation of human rights, stating that «Wages that are adequate for the worker's survival and for the subsistence of the worker's family, the right to sufficient rest and relaxation, the right to basic health-should all be recognised as the most fundamental human rights».¹

In my opinion the social clause is very important in helping to regulate and improve employee rights but it will not on its own be a sufficient mechanism in achieving good quality work conditions and fair remuneration for poor Chinese workers when China decides to sign up for a «Minimum Wage Fixing Convention» No. 131. There must be a profound reform introduced to effectively implement the social clause at the national level which can efficiently correspond with local laws and culture and be effectively monitored in terms of compliance by employers.

Conclusion

From an employment perspective the world consists of two quite different and distinct halves: the North and the South which are made up of different countries that compete with each other for a betterment of work conditions, value creation and higher reputation.

The «poor» South has a large number of yet unresolved problems which are causing obstacles to the further development of less industrialized countries. Whether this is because certain countries do not proceed

quickly to accept the social clause which stands behind core labour standards or whether they could not effectively implement these standards in their systems (or perhaps, there are other reasons which prevent them from taking action to improve the wealth and well-being of workers), is not known for certain but quick solutions must be found to improve the situation.

Proponents of the social clause insist that implementing the social clause would radically change the lives of poor countries by providing them with a light on the way to self-development, thereby improving the standards of living of each worker and therefore the wider economy. Opponents express their concerns regarding this — they take the view that the only purpose of the social clause for developed countries is protecting the jobs of its members against what they see is unfair competition.

According to Anita Chan, Chinese trade unions can offer to their Government the creation of an association which would consist of other developing countries and cooperate with them regarding collective bargaining and establishment of protection of labour rights for their constituents. China has proclaimed itself as on the defensive side of rights for developing nations, thereby it could have a good chance to prove it in practice.²

From J-M. Servais' perspective and other scholars views, various questions regarding the social clause implementation remain open and there is a need to find an appropriate instrument to make the social clause work in real life circumstances.

In my view, just an acceptance of the social clause through the mere signing of a Convention is not sufficient for developing countries to improve their standards — it requires hard action and also very importantly the winning of hearts and minds of those who must implement the social clause and all that flows from it.

¹ Ibid 21, p. 26.

² Chan, op. cit., p. 29.

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Журавель Мар'яна. Соціальна норма: побудування «мосту» між високорозвинутою північчю та менш промислово-розвинутим півднем.
Дана стаття стосується теми міжнародного трудового права. Ряд питань, пов'язаних з використанням соціальної норми, виноситься на порядок денний численних обговорень

серед науковців, юристів, економістів, урядів, політиків, неурядових організацій та членів профспілок по всьому світу. Проблеми, які стосуються основних трудових норм та їх застосування в рамках юрисдикцій різних країн, є не менш гострими серед інших, викликаних швидким розвитком глобалізації. Конкуренція між високорозвинутою північчю та менш промислово-розвинутим півднем призвела до обговорення ефективності соціальної норми як механізму захисту трудових прав працівників, які беруть участь у виробництві продукції для експорту країн, які розвиваються. Також постало питання, чи соціальна норма насправді є корисною для досягнення кінцевих цілей, чи їй бракує сили. Автором проведений аналіз аргументів «за» та «проти» соціальної норми, а також обговорені проблеми даної теми з посиланням на приклади Китаю та Мексики. Презентована точка зору в підтримку соціальної норми в якості допомоги країнам, які розвиваються, в контексті соціально-економічного розвитку.

Ключові слова: соціальна норма; трудові права; стандарти; країни, що розвиваються; розвинуті країни; міжнародні торгові угоди.

Журавель Марьяна. Социальная норма: построение «моста» между высокоразвитым севером и менее промышленно-развитым югом.

Данная статья касается темы международного трудового права. Ряд вопросов, касающихся использования социальной нормы, рассматривается учеными, юристами, экономистами, правительствами, политиками, неправительственными организациями и членами профсоюзов по всему миру. Проблемы, относящиеся к основным трудовым нормам и их применениям в рамках юрисдикций разных стран, являются не менее острыми среди других, вызванных быстрым развитием глобализации. Конкуренция между высокоразвитым севером и менее промышленно-развитым югом привела к обсуждению эффективности социальной нормы как механизма защиты трудовых прав работников, участвующих в производстве продукции для экспорта развивающихся стран. Также стал вопрос, является ли социальная норма на самом деле полезной для достижения конечных целей, или ей не хватает силы. Автором проведён анализ аргументов «за» и «против» социальной нормы, а также обсуждены проблемы данной темы со ссылкой на примеры Китая и Мексики. Представлена точка зрения в поддержку социальной нормы в качестве помощи развивающимся странам в контексте социально-экономического развития.

Ключевые слова: социальная норма; трудовые права; стандарты; развивающиеся страны; развитые страны; международные трудовые соглашения.