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Can a socio-historical analysis of the origins and institutional architecture of the World Trade Organization (WTO) and the International Labour Organization (ILO) help in the understanding of the current trade-labour gap in international law?

Introduction

What is international economic law? This is a question of perhaps surprising complexity, which has been discussed elsewhere.¹ However, the question is worth answering in the current context if only to delineate the parameters within which the following arguments are set. As a point of departure it has been suggested that the existence of a ‘world economy’ seems to be a necessary prerequisite before the law that governs it can emerge.² Thus although some sort of global economic transactions have taken place probably for as long as humans have existed,³ the international economic law that exists now relies upon the type of globalized economy built primarily during the twentieth century.⁴ One defining characteristic of the globalized economy as it currently exists is that in contrast to the broadly import and export model of previous centuries – where one country would export their domestically produced goods to a country that did not produce those goods and vice versa – the contemporary picture is much more fragmented and complex. For example in the production

¹ Steve Charnovitz, ‘What is International Economic Law?’ (2011) 14 J of Intl Economic Law 3 - 22; Steve Charnovitz, ‘The Field of International Economic Law’ (2014) 17 J of Intl Economic Law 607 - 626.

² Charnovitz, ‘What is International Economic Law?’ (2011) 4 - 5.

³ Questions of how trade should be done have also been pondered for a long time, for example Aristotle discussed the how economic activity should be carried out. Aristotle, *Politics* (trans. Benjamin Jowett) available <<http://classics.mit.edu/Aristotle/politics.html>> accessed 5 September 2015.

⁴ Of course it must be noted that legal rules governing economic relations of an international character are not new in the twentieth and twenty-first centuries. Treaties associated with trading relationships can be traced back much further, see e.g. Charnovitz, ‘The Field of International Economic Law’ (2014) 612, 618. And indeed the term international economic law appears to be a twentieth century construction. Early use of the term is ascribed to Ernst Feilchenfeld (see *ibid*, 616 - 617), although Charnovitz suggests Georg Schwarzenberger is the best candidate for ‘father’ of the associated discipline, and an early example of the phrase used in the American Journal of International Law appeared in 1939. Ernst H. Feilchenfeld, ‘Book Review of World Finance by Paul Einzig’ (1939) 33 American J of Intl Law 427 - 498, at 428.

of a single product the division of labour and competence is such that many different countries may be involved at the various stages of production; from sourcing the raw materials, to processing elsewhere, and perhaps ultimately different marketing location.⁵ It is clear, then, that it is almost impossible to think about an international legal regime associated with trade without also mentioning what these processes amount to: that is globalization. A concept which must surely be in contention for the title of most used terms of the contemporary era, and which can be both a term to describe the benefits and problems of the present global arrangements.⁶ For our purposes this ‘fetishised term’ as described by Alain Supiot encompasses the shrinkage of real geographical distance due to technological advances that means communicating with friends, colleagues, and strangers inhabiting different time zones becomes a simple task – subject to the courtesy of checking the time difference, of course.⁷ The other element as Supiot describes it is ‘[t]he free circulation of goods and capital’.⁸ This latter element, he suggests, is the consequence ‘of reversible political decisions’.⁹ And it is this part of globalization that is particularly relevant to the discussion taking place here; as within this essay I aim to explore how some of these political decisions are represented now in the international economic legal architecture. In particular the task in hand is to consider how two existing international economic organizations came into being; and whether by situating these organizations within thought traditions can help to explain their current relationship. For want of a better term we might call this process one of finding institutional origin stories.

⁵ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge: CUP 2013) 12 - 13.

⁶ Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization* (2013) 4 - 5, 13 - 17.

⁷ Alain Supiot, *The Spirit of Philadelphia. Social Justice vs. the Total Market* (London: Verso 2012) 43.

⁸ Supiot, *The Spirit of Philadelphia* (2012) 43

⁹ Supiot, *The Spirit of Philadelphia* (2012) 43

In the globalized economy described above the need for rules to govern the trading system appears clear. Indeed, as shall be seen below, the protective function of such rules is a point on which commentators from all sides of the political and economic spectrums seem to agree.¹⁰ In what follows I will look at two organizations in particular, the International Labour Organization (ILO) and the World Trade Organization (WTO).

When considering the field of international economic law the WTO is amongst the most conspicuous figures in that particular domain. Of course the way the field is defined is fundamental to how the various institutions are seen to populate the specific landscape.¹¹ Nevertheless, the WTO is the main forum for trade related matters as they concern states. The starting point for this essay is the existence of what I describe as the trade-labour gap. Through the explorations below I hope to uncover whether the origins of this gap may better be understood by looking at the institutional character of the two organizations in question. However, it will be helpful to take a moment now to pinpoint the recent history in which this gap was confirmed – the question of the inevitability or not of this gap is one that will be addressed throughout this essay. The gap so far discussed refers to the decision by the WTO to *delegate* any competence regarding labour matters to the ILO. The official manifestation of this decision was confirmed in 1996 at the WTO's first Ministerial Conference in Singapore. That this intent was declared just a year after the formation of the WTO may be considered significant. At that meeting whilst a commitment was made to observe 'internationally recognized core labour standards' the ILO was recognized as 'the competent body to set and

¹⁰ See e.g. Supiot, *The Spirit of Philadelphia* (2012) 10 – 13; also Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization* (2013) 32 - 33.

¹¹ See e.g. Charnovitz, 'The Field of International Economic Law' (2014)

deal with these standards'.¹² Of course the fact that different international organizations have competence for different areas of international legal regulation is neither extraordinary nor in and of itself problematic. However, as Koskenniemi puts it, 'the most important political conflicts in the international world are often legally articulated as conflicts of jurisdiction and applicable law.'¹³ As such there are a number of relevant questions: firstly, whether these areas of legal regulation can indeed be treated as distinct; secondly, if they can reasonably be thought to be distinct should the organizations charged with their oversight be expected to be of equivalence in terms of regulation type; and thirdly, and most importantly for the current undertaking what role do the institutional histories of these organizations play in the division of these matters? The full extent of these questions cannot be exhaustively explored herein; however, they must be stated here in order to inform the current inquiry. It is my contention that this gap is not only artificial – as to consider trade without considering matters of labour appears to miss at least part of the story¹⁴ – but also a consequence of a changed socio-economic narrative surrounding the global economy. It is this latter point that will be addressed most fully in this study. The method by which I will assess this question is where I turn next.

¹² SINGAPORE WTO MINISTERIAL 1996: MINISTERIAL DECLARATION WT/MIN(96)/DEC (Adopted on 13 December 1996). <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> accessed 5 September 2015.

¹³ Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20, 1 EJIL 10

¹⁴ Indeed, key figures of the political economy such as Adam Smith, David Ricardo, and John Stuart Mill saw labour as not only indispensable to the economy but that to understand the economy labour and the well-being of workers as essential metrics. See e.g. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Vols 1& 2, Edwin Cannan (ed), first published 1776, London: Methuen, 1904). E-book version <<http://oll.libertyfund.org/titles/smith-an-inquiry-into-the-nature-and-causes-of-the-wealth-of-nations-cannan-ed-in-2-vols>> accessed 5 September 2015; David Ricardo, *On the Principles of Political Economy and Taxation* (first published 1817, London: John Murray 1822) <<http://www.econlib.org/library/Ricardo/ricPCover.html>> accessed 5 September 2015; John Stuart Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (first published 1848, London: Longmans 1909) <<http://www.econlib.org/library/Mill/mlPCover.html>> accessed 5 September 2015.

Although the approach taken in this essay is broadly historical I am acutely aware of my limitations herein as a non-historian; however the historical approach taken here is in fact the means by which questions of a more sociological nature are explored. By looking at some key moments in the history of these two organizations I aim to uncover what may be considered to be relevant socio-economic themes. Moreover, by considering what may be understood to be the economic orthodoxy at the time of the institution's emergence I hope to build a picture of something amounting to an institutional character. Clearly, this in itself is a mammoth task and so the focus is somewhat narrower in as much as I consider not only the key historical moments but also, in a limited way, the individuals that may stand as their representatives. Thus a constant theme throughout this essay is the relationship between law, economics, and the pursuit of social justice. Indeed it is in thinking about these relationships that the notion of the spirit of the law versus the letter of the law becomes relevant. Usually discussed in relation to the interpretation of legal texts which may result in outcomes that do not follow the spirit of the law as intended by the law-makers; in this context I want to use the idea of the spirit of the law somewhat differently. Here the idea is that legal organizations carry a spirit of their founding.

In Part One I introduce the institutions in question, namely the ILO and the WTO, but also the GATT insofar as it informs the discussion of the WTO. Within the ILO section attention is paid to the Concept of Labour and the Role of Regulation. In the section on the GATT the concept of 'Embedded Liberalism' is introduced. The section on the WTO deals with the changes in the economic orthodoxy that occurred between the formation of the GATT regime and then the establishment of the WTO.

In Part Two I build on the stories of the institutions introduced in Part One. Here the concepts of Epistemic Communities and their relationship to the Labour Gap are discussed. The

following section aims to dig down further into the idea that these organizations have a spirit; and in so doing the Protective Function of Law is considered. In the final section of Part Two I attempt to put the exploration so far into the context of the Social Clause Debate and the impact of Core Labour Standards (CLS) on this and labour rights more generally. In the course of this the ideas of how and whether these two institutions, with their unique histories, are able to communicate effectively in the contemporary international economic law landscape is considered; before concluding as to how successful this study has been in gaining insight into the trade-labour gap.

Part One

In examining the origins of the gap outlined above I suggest that it is essential for any understanding of the current situation to explore the historical socio-economic policy environment of the institutions under investigation. It is my contention that these institutional founding stories, like the founding myths of many human cultures,¹⁵ continue to influence institutional decision-making. Indeed, like a founding myth the factors present in the creation of the organization's structure are present thereafter.¹⁶ To expand the notion slightly we may look at the words of John Gerard Ruggie: 'the formation and transformation of international regimes may be said to represent a concrete manifestation of the internationalization of political authority.'¹⁷ If, then, founding myths continue to inform the structures of these institutions, their decision making, and possible choices it is important to consider what ethics lay behind them. In short, do dominant thoughts about policy direction at the time of creation having lasting influence throughout the life cycle of the organization?

¹⁵ See e.g. Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge: CUP 1983).

¹⁶ See e.g. Andrew Lang and Susan Marks, 'People with Projects: Writing the Lives of International Lawyers' (2013) 27 *Temple Intl and Comp Law Journal* 437 – 453, at 444, discussed below.

¹⁷ John G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 *Intl Organization* 380 (hereafter 'International Regimes')

The ILO

The ILO created by the Treaty of Versailles, which emerged from the post-war conference in Paris 1919, survived the dissolution of the League of Nations some twenty years later. It is a survivor.¹⁸ Fast approaching its centenary, and in reflective mood, the ILO has embarked upon a Century Project.¹⁹ A project which inevitably assesses the purpose and role of this international organization. This type of institutional autobiography is at the very least interesting and, as for individuals, perhaps this type of process tells us something about the organization's ethic.²⁰

The founding of the ILO in 1919 was premised on the idea that in the aftermath of terrible war social justice would be an essential component in peaceful international relations. Uniquely the ILO was set up with a tripartite structure which meant (and means still) that the system is already designed to consider the views of non-state actors; thus workers, employers, and governments are represented.²¹ The particular project encompassed in the ILO can be traced back to a strand of responses to the social injustice witnessed during the rampant expansion of capitalist industrialization – a so-called 'humanitarian sensibility'.²² At a time of great industrial growth worker exploitation and the resulting commodification of labour was a fact of life.²³ This system, did appear to many to be unsustainable and thus the need for an 'international approach to deal with social-economic problems' was put forward by early industrialists like Scotland's own Robert Owen as well as economists and social

¹⁸ Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Oxford: Hart Publishing 2013) 2 - 3.

¹⁹ <http://www.ilo.org/century/lang--en/index.htm>

²⁰ Lang and Marks, 'People with Projects: Writing the Lives of International Lawyers' (2013) 441 – 442.

²¹ Maupain, *The Future of the International Labour Organization in the Global Economy* (2013) 103.

²² Thomas L. Haskell, Capitalism and the Origins of the Humanitarian Sensibility, Part 1 (1985) 90 *The American Historical Rev* 339 - 361, at 340 - 341

²³ See e.g. Supiot, *The Spirit of Philadelphia* (2012) 3

theorists.²⁴ And of course the Marxist ideal of an internationalized labour movement was very influential in the nineteenth century.²⁵ The point being that by the time of coming into being the ILO already had a theoretical heritage. And indeed an epistemic community²⁶ the topic of which will be considered in part two of this essay.

Throughout its history the ILO has responded to changing global economic situations and the aim of achieving social justice has been its driving motive. In short pursuit of social justice is, in the words of former Director-General Juan Somavia, the ILO's 'past and ... mandate for the future'.²⁷ One only needs to look at the preamble of the ILO constitution to understand what is meant by the term.

Whereas universal and lasting peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;

²⁴ For a discussion of this see, Jasmien Van Daele, *Engineering Social Peace: Networks, Ideas, and the Founding of the International Labour Organization* (2005) 50 *Intl Rev of Social History* 435 - 466, at 439.

²⁵ Van Daele, *Engineering Social Peace* (2005) 439.

²⁶ Van Daele, *Engineering Social Peace* (2005).

²⁷ ILO Origins and History: <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>

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;²⁸

As such the ILO, through its unique tripartite structure, is tasked as the custodian to oversee the betterment of the conditions of workers throughout the world; in the belief that the raising of standards for one group of workers is beneficial for other groups. However the history of ensuring governmental compliance with ILO Conventions has proved somewhat more complicated.²⁹ After a strong start in terms of getting Conventions adopted the Great Depression and the advent of the Second World War required adaptation and reinvention on the ILO's part.³⁰

The idea that labour matters are and should be central to the international economic order is not a new one.³¹ Indeed, it was the first Director-General of the ILO, Albert Thomas, for whom the concern that matters of work were marginalized within the economic sphere proposed that labour should be considered as an essential and indivisible part of economic “production” itself.³² In practical terms this meant that in the context of the League system Thomas thought the ILO should have primary competence for economic matters whilst political matters would be dealt with by another agency.³³ Somewhat marginalized under the League system the ILO emerged from the collapse of that system successfully; and indeed the collapse of the League system seemed to offer an opportunity for the ILO to gain increased

²⁸ http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A1

²⁹ See e.g. Maupain, *The Future of the International Labour Organization* (2013) 209 - 214.

³⁰ Maupain, *The Future of the International Labour Organization* (2013) 2 - 4; also, <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>

³¹ This is perhaps one of the lasting legacies of figures like Smith, Ricardo, and Mill, see *supra* n 14.

³² Maupain, *The Future of the International Labour Organization* (2013) 68, see also 117 for the story of modern marginalization.

³³ Maupain, *The Future of the International Labour Organization* (2013) 68.

relevance within global economic organizations. The early 1940s appears to have been a particularly promising time for the ILO not only did the Atlantic Charter seem to provide renewed energy to the ILO's 'reformist philosophy';³⁴ then in 1944 the Declaration of Philadelphia was to follow. The Atlantic Charter of 1941 stands as an example of wartime compromise and is a topic I will return to shortly. For now however it is worth thinking a little more about the Declaration of Philadelphia, which in many ways revived the fortunes of the ILO but also provides a good indication of the ethic of the organization if it is seen as a distillation of the thought landscape from which the ILO emerged.

The Concept of Labour

I have said above that the idea that raising worker standards in one area is good for all is a founding principle of the ILO. In this way the organization has always been premised on the notion that supporting the current system is necessary. The point is worth emphasizing as in later discussions about the incompatibility of the ILO and WTO systems the point being made is not that one is an anti-free trade organization and the other is pro- rather the idea being generated here is that it is the economic, political, and social ethos of the organizations in relation to free trade that is at odds. Thus far from being an anti-capitalist organization the ILO has always been an organization which sought (in the way of Robert Owen and his contemporaries, see above) to act as protective and humanizing force in the pursuit of free trade in the global economy.

As I have said the ILO emerged within the League system and that context is important. Certain debates in the League focused on the type of global economy that should rise out of

³⁴ Maupain, *The Future of the International Labour Organization* (2013) 69.

the post-war desire of states to enter a more cooperative and interdependent mode of doing international relations. In this context, regarding the international economy, questions arose about the efficacy of the colonial system, not least because it was an obstacle to free trade.³⁵ The free trade motivation for ending colonial rule was one that would continue to be discussed, not least in the imperial preference discussions within the negotiations that would ultimately yield the General Agreement on Tariffs and Trade (GATT) 1947 (see below). Indeed, the ‘economic efficiency’ offered by free trade was here linked to a greater ‘humanitarianism’.³⁶

The evolution of the concept of labour in the international economy is a complex one. As noted, Anghie suggests in one way the productive potential of natives had a liberatory effect as colonial rule was seen to be ‘inefficient’ in allowing free trade to utilize this resource.³⁷ However, the category of labour also served as a universalizing mechanism by which the ‘natives’ could be brought not only into the global economy but also ‘civilized’.³⁸ Theorists of the time saw that in creating a more mutually beneficial global economy than an ‘open door, not only for trade and for capital but for labour’ was essential.³⁹ It was also through the ‘prism [of labour that] questions of welfare in general were approached.’⁴⁰ The ILO was a key player in ensuring that this ‘welfare’ requirement was met. Again in this way the role of the ILO as the body responsible (and crucial) for ensuring the sustainability of the productive element

³⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP 2007) 162.

³⁶ As Anghie suggests ‘the native was no longer merely to be conquered and dispossessed; rather, he was to be made more productive.’ Anghie, *Imperialism* (2007) 163. The idea of free trade as emancipatory is a common theme throughout the writings of political economists, not least Adam Smith in *The Wealth of Nations*.

³⁷ Anghie, 2007, *Imperialism* 162.

³⁸ Anghie, 2007, *Imperialism* 165. Cf. Supiot, *The Spirit of Philadelphia* (2012) 3

³⁹ J. A. Hobson, *Towards International Government* (New York: The MacMillan Company, 1916), at 117 cited in Charnovitz, 2014 *The Field of International Economic Law. Journal of International Economic Law* 17, 613.

⁴⁰ Anghie, 2007, *Imperialism* 166.

of a globalized economy is clear.⁴¹ This role is described by Anghie as being ‘presented ... as an exemplification of humanist and liberal principles.’⁴²

The Role of Legal Regulation

The role of legal regulation is another point on which the incompatibility of the two organizations under consideration arises. Clearly at some level there is always regulation within a market; however, as we shall see what form this is expected to take can change quite dramatically. In the period of the Declaration of Philadelphia the protective function of law is paramount and indeed inasmuch as this document has come to form part of the ILO Constitution it is vital in telling us something about the policy character of that organization.⁴³ Supiot suggest the legal regulation being performed by the Declaration amounts to a role of protector of resources that have become artificially commodified is essential for the sustainability of the market. We shall see below that in the organizational character of the WTO the protective function of the law is also emphasized but for very different ends.

[T]he Declaration of Philadelphia ... was exhorting nations to adopt labour legislation and a social security system which would guarantee the physical and economic security of employees and their families – in other words, it was establishing the legal foundations required for the labour market to remain functional in the long term, across generations.⁴⁴

I have talked already about the reaction against the unimpeded use of human resources and the humanitarian aims of those who sought to alleviate this. The Declaration was explicit

⁴¹ Anghie, 2007, *Imperialism* 166 - 167; see also Supiot, *The Spirit of Philadelphia* (2012)

⁴² Anghie, 2007, *Imperialism* 167.

⁴³ See e.g. Supiot, *The Spirit of Philadelphia* (2012) 42 - 43.

⁴⁴ Supiot, *The Spirit of Philadelphia* (2012) 42 - 43.

restating therein the fundamental principle that ‘labour is not a commodity’.⁴⁵ Moreover that global economic prosperity depended upon the raising of everyone out of poverty; as ‘poverty anywhere constitutes a danger to prosperity everywhere’.⁴⁶ The latter principle appears to endure (as we have seen from Adam Smith to the WTO, explored below); however the way in which this principle is performed in the international economic legal regimes is subject to ideological interpretation.

It is clear that the market and legal regulation have coexisted through time and as the discussion of the GATT regime below will demonstrate that has certainly been the picture on the international level in the twentieth century. That this is a necessary coexistence also appears to be broadly accepted. During the period of the welfare state⁴⁷ commitments to labour principles and standards like those set out in the Declaration of Philadelphia became part of national legal frameworks. However, in the latter part of the twentieth century ‘systematic deregulation’ (a topic discussed further below) has disrupted the protective role played by legal regulation within the market economy.⁴⁸

In response to the deregulatory impetus of globalisation⁴⁹ the ILO’s commitment to social justice and providing that element to the international economic order seems all the more important. If as Maupain suggests the ILO is (or ought to be) the ‘social regulator of the global economy’⁵⁰ then it continues to face very real challenges in its ability to perform this function. Indeed, it is of course the very fact of the deregulatory nature of the neoliberal paradigm that has posed a major problem for the ILO’s work.

⁴⁵ Declaration of Philadelphia, 1 (a)

⁴⁶ Declaration of Philadelphia, 1 (c)

⁴⁷ Supiot, *The Spirit of Philadelphia* (2012) 31 - 41.

⁴⁸ Supiot, *The Spirit of Philadelphia* (2012) 43.

⁴⁹ Supiot, *The Spirit of Philadelphia* (2012) 43.

⁵⁰ Maupain, *The Future of the International Labour Organization* (2013) 243.

Finally in this current discussion of the ILO I want to say something briefly about the 1998 Declaration on Fundamental Principles and Rights at Work.⁵¹ From this Declaration we obtain the four core labour standards (CLS) which essentially consist of freedom of association, the elimination of forced labour and child labour, and the elimination of discrimination in employment. The CLS were seen by many as a necessary response from the ILO to the changing nature of the globalized economy and a way to overcome the problem of attaining ‘the fickle goodwill of each Member’ in relation to ILO Conventions.⁵² However, the CLS remain a controversial step in the ILO’s history; indeed some suggest that this marks a fundamental down shift in the ILO’s regulatory impact.⁵³ This is a topic to which I shall return in the second Part of this dissertation. For now however, it will be helpful to consider how the WTO and its particular ethic emerged; and to facilitate this I turn now to a discussion of the GATT 1947.

The GATT

It is not possible to understand the WTO without at least looking in some small way at the organization that preceded it and with which it still shares its main legal text. If the ILO founding was based on the notion that social justice was essential to peaceful relations; then the GATT was created at a time when the ‘scourge of war’ was again rampant and for peace to last the belief was that economic development and interdependence were vital components. In the general vein that there are no new ideas under the sun this quote from

⁵¹ ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 86th Session, Geneva, June 1998. [http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm](http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm)

⁵² Maupain, *The Future of the International Labour Organization* (2013) 52.

⁵³ See contributions to the debate from Philip Alston, Brian A. Langille, and Francis Maupain all in the 2005 issue 16 (3) *European Journal of International Law*.

John Stuart Mill demonstrates that the idea that trade and peace go hand-in-hand is certainly not new.

It is commerce which is rapidly rendering war obsolete, by strengthening and multiplying the personal interests which are in natural opposition to it. And it may be said without exaggeration that the great extent and rapid increase of international trade, in being the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions, and the character of the human race.⁵⁴

Continuity and the Rise of 'Embedded Liberalism'

Figures like US Secretary of State Cordell Hull were certain that liberal trade was essential for peaceful international relations.⁵⁵ There was also a degree of continuity in spirit from the Paris Peace Conference of 1919; the mode of operation for international matters was now decidedly cooperative and thus, quite apart from the collective security provisions of the League which were then replaced by the UN system, renewed attention was paid to the global economy. More continuity came in the form of John Maynard Keynes, not only famous for his derisory account of the German economic settlement contained in the Treaty of Versailles but also his attention to the need for global economic institutions.⁵⁶ And indeed Keynes was an integral part of the famous war-time negotiations in Bretton Woods from which the IMF and World Bank would emerge in 1944 and then the GATT in 1947 were intended to shape the post-war economic picture.

⁵⁴ John Stuart Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (1909) Book III, chapter 17, para 14.

⁵⁵ D. A. Irwin, P. C. Mavroidis, and A. O. Sykes, *The Genesis of the GATT* (1st edn, Cambridge: CUP 2009), 9 - 10

⁵⁶ John Maynard Keynes, *The Economic Consequences of the Peace*. (First published 1919, New York: Skyhorse Publishing 2007).

If a 'humanitarian sensibility' informed the ILO then perhaps an ideological underpinning to the GATT negotiations can be characterized by Ruggie's term 'embedded liberalism'.⁵⁷ Compromise was at the heart of embedded liberalism, and although there were very clear agendas involved in the post-war negotiations,⁵⁸ which meant that what was envisaged was a multilateral system in nature but one which preserved the space for governments to intervene in their domestic economies. In short, this was liberalism with protectionist characteristics.⁵⁹ Records and accounts of the negotiations that took place during the war and that led to the 1941 Atlantic Charter demonstrate just how this unique outcome arose.⁶⁰ Somewhere between the desires for the expansion of a free trade agenda in international trade (most often represented by the US delegation⁶¹) and the reluctance of the UK to give way on its long held benefits of imperialism the compromise that was reached had these special characteristics. As already stated this was the period in which national governments were implementing welfare state policies.⁶² Thus the idea that governments would intervene in the economic sphere was very much on the table.

These ideological battles between greater unfettered trade and the necessity for governmental intervention can ultimately be seen as battles and compromises between individuals. In the case of Winston Churchill and Franklin Roosevelt the compromise was made regarding the Lend Lease Agreement and the question of British imperial preference. In some ways it is surprising that a compromise had to be made considering 'Churchill himself

⁵⁷ Ruggie, 'International Regimes' (1982) 392.

⁵⁸ The Americans were keen on removing the vestiges, such as the imperial preference, of a declining dominance of the British Empire. D.A. Irwin *et al.*, *The Genesis of the GATT* (2009) 16 - 19.

⁵⁹ Ruggie, 'International Regimes' (1982) 393.

⁶⁰ See e.g. Irwin, *et al.*, *The Genesis of the GATT* (2009); Benn Steil, *The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White, and the Making of a New World Order* (Princeton and Oxford: Princeton UP 2013).

⁶¹ This view also had significant support in the UK in the form of the Labour party.

⁶² See e.g. Andrew Cumbers, *Reclaiming Public Ownership: Making Space for Economic Democracy* (London: Zed Books, 2012) 11 – 37.

had been a lifelong supporter of free trade and opponent of imperial preference.⁶³ However, it was the domestic political situation and his then membership of the Conservatives that made him publically, at least, back the continuation of the imperial preference.⁶⁴ It is interesting to note that again the idea of the emancipatory nature of free trade and its link to ending colonial practices was present – not only perhaps in Churchill’s heart of hearts but, more explicitly, -- in the form of the support from the UK Labour Party.⁶⁵

Even so, the divergence in approach between the key figures from the US and UK delegations were was more pronounced.⁶⁶ Whilst the accord between Atlantic partners on the topic of how far liberalization should go and to what extent state intervention was acceptable must not be over stated;⁶⁷ ‘these differences among the industrialized countries concerned the forms and depth of state intervention to secure domestic stability, not the legitimacy of the objective.’⁶⁸ Moreover, as some commented at the time of the GATT negotiations free trade proper was certainly not the order of the day.⁶⁹ Thus regardless of the individual appetite for it the idea that governments are rightfully involved in the economic sphere is integral to this post-war approach. It is fair to say then that the unique circumstances of the post-war period induced a mood of cooperation and compromise in the parties to the negotiation especially by the US which at the time held the dominant economic and political position.⁷⁰ A clear demonstration that in this period the desire for international relations to be governed on the basis of Right – over the previously dominant Might – was keen.

⁶³ Irwin *et al.*, *The Genesis of the GATT* (2009) 19

⁶⁴ Irwin *et al.*, *The Genesis of the GATT* (2009) 19

⁶⁵ Ibid.

⁶⁶ See e.g. Irwin *et al.*, *The Genesis of the GATT* (2009) 14 – 17; also Steil, *The Battle of Bretton Woods* (2013) variously.

⁶⁷ See e.g. Irwin *et al.*, *The Genesis of the GATT* (2009) 8 - 16, 21, 26.

⁶⁸ Ruggie, ‘International Regimes’ (1982) 394.

⁶⁹ Ruggie, ‘International Regimes’ (1982) 396.

⁷⁰ See e.g. Irwin *et al.*, *The Genesis of the GATT* (2009), 96 - 97; also, Ruggie, ‘International Regimes’ (1982) 397 - 398.

From the negotiations at Bretton Woods the GATT emerged and proved to be a very successful instrument during the twentieth century. However, the intention had always been that the fulfilment of these negotiations would be the Havana Charter under which the International Trade Organization (ITO) was to be established. In the end this did not prove to be the case.⁷¹ Indeed, one of the stumbling blocks on the road to the ITO was the British desire, given the experience during the 1930s, to maintain the space within an international trading system to protect domestic employment from the impact of international trade. Notably this desire was not echoed by the US, although ultimately this was a difference of degree rather than kind.⁷² It is clear that at this point in time the thinking about how the regulations governing the global economy should be structured was certainly not uniformly in favour of a broadly free trade approach. Whatever the reasons – and those were not necessarily progressive as was the case of the British desire to hold onto the vestiges of Empire – it is worth noting again that the ideas that had informed the ILO were still active here. Legal protection for the productive forces of the economy persisted.

This has broader implications for the fertility of the ground that is available for policy implementation. As is clear this was a period in which Keynesian economic policy was deeply influential. As we see above with the ILO's Declaration of Philadelphia, this period was profoundly influenced by the two devastating wars that had taken place in such quick succession and which had set in sharp relief the commodification of humans.⁷³ The response had been the surge of humanism that as we have seen, and as Supiot suggests, was demonstrated in the Declaration of Philadelphia and the subsequent post-war legal texts in

⁷¹ Irwin *et al.*, *The Genesis of the GATT* (2009), 98.

⁷² Ruggie, 'International Regimes' (1982) 396; Andrew Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* (Oxford: OUP 2011) 25 - 26.

⁷³ Supiot, *The Spirit of Philadelphia* (2012) 2 - 3.

which he describes the nature of the policies regarding the regulation of the global economy are distilled in that “‘spirit of Philadelphia’”.⁷⁴ On both sides of the Atlantic the tendency was thus towards a less human-commodified economic system which ‘linked social justice inextricably to economic prosperity’.⁷⁵

The WTO

The WTO is a very contemporary institution and although, as stated above, it shares a legal text with the GATT 1947 regime the context of its founding and its institutional characteristics are quite distinct. At twenty years old it is interesting to ponder whether the WTO marks a continuation of the post-war international legal era, or whether it is in fact an entirely different species. Moreover, there is a question of whether the WTO and the ILO as legal economic institutions are able to successfully communicate through the separation of time and perhaps more importantly ideology. It is perhaps wise at this point to flesh out a little more the character of the WTO in particular the political and socio-economic context of its creation.

Despite the success of the GATT regime during its almost fifty year term the lack of the fully imagined ITO remained. In terms of continuation the WTO does perhaps mark the fulfilment of the original Bretton Woods negotiations in which, as we have seen above, an International Trade Organization was planned for. Whether or not the WTO represents a fulfilment of the project started at Bretton Woods in the 1940s, the WTO’s ideological underpinnings can be said to be quite distinct. Coming as it did in 1995 and thus just after the end of the Cold War the global political landscape had obviously changed considerably; the prevailing ideology in

⁷⁴ Supiot, *The Spirit of Philadelphia* (2012) 11

⁷⁵ Supiot, *The Spirit of Philadelphia* (2012) 10

the economic landscape was no less changed. The story of the initial implementation of neoliberal policies in the UK and US in the 1970s is well told elsewhere.⁷⁶ The ripple effects of this were felt throughout the following decades. As David Harvey suggests there was in the 1980s in institutions such as the IMF a ‘purge of Keynesian economists and their replacement by neoliberal monetarists’.⁷⁷ This marked a return to some form of *laissez-faire* economics. According to a Keynesian account this had been a failure in the nineteenth century⁷⁸ and it was something that Keynes had been particularly cautious about during the Bretton Woods negotiations of the 1940s, fearing its potential return.⁷⁹ The arrival of the WTO came at what may now be considered to be a high-water mark in the turn away from the embedded liberal tradition of the post-war international economic order. Indeed, the creation of the WTO was within the context of what was dubbed by John Williamson at the time as the “Washington consensus”.⁸⁰ There was, as Lang puts it, a transformation of the GATT/WTO’s “legal imagination”.⁸¹ Indeed he continues:

the trade regime’s neoliberal turn was in significant part a transformation of these intersubjective frameworks of meaning ... a transformation of collective ideas about the nature and purpose of the trade regime, collective ideas about the function of law in trade politics, and collective principles and techniques for evaluating the legitimacy of governmental action⁸²

Although we have seen above that the seeds of more liberalized international economics were already present (e.g. figures like Cordell Hull) at Bretton Woods the outcome of the

⁷⁶ David Harvey, ‘Neoliberalism as Creative Destruction’ (2007) 610 *Annals of the American Academy of Political and Social Science* 22 – 44, at 23 - 26.

⁷⁷ David Harvey, ‘Neoliberalism as Creative Destruction’ (2007) 32

⁷⁸ Keynes, *The Economic Consequences of the Peace*. (2007) 11 – 12.

⁷⁹ D.A. Irwin *et al.*, *The Genesis of the GATT* (2009) 15

⁸⁰ John Williamson, ‘Democracy and the “Washington Consensus”’ (1993) 21 *World Development* 1329 - 1336, at 1329.

⁸¹ Lang, *World Trade Law after Neoliberalism* (2011) 181.

⁸² *Ibid.*

negotiations had been tentative at best in that regard. However, the shift that occurs in economic thought by the time of the foundation of the WTO is profound. This shift is characterized not only by an emphasis on the greater liberalization of markets but, crucially, by the belief that ‘the market is veridiction’.⁸³ The complete domination of this principle leads to what has been presented as ‘[t]he most significant contribution of neoliberalism was not a set of answers ... but a new vocabulary for debating them – part economics, part politics, part sociology.’⁸⁴

This ‘new vocabulary’ is important in that it is all encompassing. We have already encountered this idea if not explicitly then in the discussion about the function of the law in the global economy. Supiot imagines the result of this new vocabulary as something he describes as: ‘a Total Market.’⁸⁵ The change is crucial as this marks the movement from a position which sees the economy as part of a broader socio-political sphere to one where economics is the dominant force; and one in which politics should (must) not intervene.⁸⁶ In this shift the perceived role for law also changes. Instead of explicitly guarding social justice aims the role of legal regulation is now directed as a ‘*shield*’ to protect ‘against ... trade-restrictive measures.’⁸⁷ The shift is huge as from the point of considering that social justice is integral to a successful economy the bias is now towards a belief that the economy will in some way self-manage and that the only regulation required is to prevent unwanted intervention.⁸⁸ Across party political boundaries this idea is pervasive. ‘the infallibility of the market, the beneficial

⁸³ Michel Foucault, *The Birth of Biopolitics. Lectures at the Collège de France 1978-1979* (trans. Graham Burchell, Palgrave: 2010) 44

⁸⁴ David Kennedy, ‘The ‘Rule of Law,’ Political Choices, and Development Common Sense’ in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (New York: CUP 2006) 136

⁸⁵ Supiot, *The Spirit of Philadelphia* (2012) 44

⁸⁶ See e.g. Supiot, *The Spirit of Philadelphia* (2012) 21; also Foucault, *The Birth of Biopolitics* (2010) 45.

⁸⁷ Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization* (2013) 32.

⁸⁸ Cf. Supiot, *The Spirit of Philadelphia* (2012) 17 – 23.

effects of universal competition, privatisation of public services, deregulation of labour markets, and the free circulation of goods and capital.’⁸⁹ This is the wave on which the WTO entered. It is also the ‘legal imagination’ leap that, I suggest, allows the trade-labour gap to come into being.

Clearly, the implications of this for the role of humans within the market and thus their position as the labour force are far-reaching. Indeed in this environment systematic deregulation occurs. Here there is a distortion of Adam Smith’s ideas. We might think of his notion of the ‘invisible hand’⁹⁰ used to describe the character of the properly functioning market. Although he is clear in his writing that he does not see that the state should ‘direct private people in what manner they ought to employ their capitals’ he does not rule out a social function for the law.⁹¹ Of course the WTO is not a fully free trade body, although it is always aiming for this at least as far as rhetoric goes.⁹² From a realist perspective it has long been seen that states are unlikely to ever be willing to fully adopt such an economic model.⁹³ It is interesting to ponder for a moment whether the character to the ITO would have been significantly different to the current WTO. As imagined the ITO would have had a much broader remit than the current scope of the WTO. Crucially labour was one competence that it was envisaged would have fallen under the purview of the ITO. ‘Besides the commercial policy matters now in the GATT, the Charter covered employment policy and fair labor [sic] standards, economic development and reconstruction, restrictive business practices, and intergovernmental commodity agreements.’⁹⁴ Though figures like Georg Schwarzenberger

⁸⁹ Supiot, *The Spirit of Philadelphia* (2012) 23.

⁹⁰ Smith, *the Wealth of Nations* (Vols 1 & 2, 1904) Book 4, chapter 2, at 365.

⁹¹ Smith, *the Wealth of Nations* (Vols 1 & 2, 1904) Book 4, chapter 2, at 365.

⁹² Understanding the WTO: Basics. Principles of the trading system.

<https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed 5 September 2015.

⁹³ See e.g. Charnovitz, ‘The Field of International Economic Law’ (2014)

⁹⁴ Charnovitz, ‘The Field of International Economic Law’ (2014) 616.

saw areas like international labour law as being worthy of its own specialized area outside of a field of international economic law that they otherwise would neatly fit in to.⁹⁵ Nevertheless, it seems that had what was imagined at Bretton Woods in the 1940s come fully to fruition matters of labour would not have been given the cold shoulder from the dominant international trade regime as they are now.⁹⁶

Part Two – Institutions and Ideas

In Part One of this dissertation I have attempted to give a snap shot of the moments of creation of these organizations. In doing so the intention was to provide a flavour of the broader social, economic, and political thought-landscape from which they emerged. My contention in so doing is that to understand the structure of the current international economic legal regime, and crucially the nature of the trade-labour gap, it is necessary to understand something of the relevant organizations' institutional character. Clearly there is a danger, at the extreme end, of a kind of anthropomorphization of such institutions; and, perhaps, more troublingly the potential that by thinking at the structural level one misses the agency of the individual actors.⁹⁷ Whilst it is not appropriate to rehearse here the complexities of what I have been calling institutional character it may certainly be helpful to provide a little more information about what I mean by this term in the current study. This notion is perhaps best summed up by Andrew Lang and Susan Marks in their article about Martti Koskeniemi in which they suggest: 'International legal institutions manifest a "structural bias," such that

⁹⁵ Georg Schwarzenberger, 'The Principles and Standards of International Economic Law', 117 *Recueil des Cours* (1966 I), at 8., see also Charnovitz, 'The Field of International Economic Law' (2014), 618.

⁹⁶ Beyond the changes in thinking about the global economy that I've outlined here it must also be acknowledged that Perhaps this gap is also partly a symptom of the greater phenomenon of fragmentation in international law. See e.g. Report of the Study Group of the ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, (finalized by M Koskeniemi, A/CN.4/L.682, 13 April 2006

⁹⁷ See e.g. Perry Anderson, *Arguments within English Marxism* (2nd edn, London: Verso 1980); and, E.P. Thompson, *The Poverty of Theory or An Orrery of Errors* (London: Merlin Press 1995).

some preferences, outcomes, and distributive schemes are systematically preferred to others.⁹⁸ However, it is important to note that this characterization does not suggest that such biases are integral; instead there is a ‘choice’ that is made ‘to affirm the bias or to challenge it’.⁹⁹

That being so the aim now is to explore further what should have been hinted to above, that is the existence of what may be usefully called epistemic communities surrounding the creation of these organizations. The importance of this is to ground the change we have seen above in the thinking about global economic policy, from the humanitarian sensibility out of which the ILO grew; to the embedded liberal principles of the first GATT era; and then the shift to (or perhaps *back* to something much more reminiscent of nineteenth century *laissez-faire* economics) the ‘Total Market’.

Epistemic Communities and the Trade-Labour Gap

To say ideas matter appears almost too obvious a statement to make for anyone engaged at all seriously in academia. However, from the perspective of one looking at how particular regime relations in international economic law impact the structure of the global economy the ideas behind these relations are important.¹⁰⁰ The aim here, then, is tie together some of thematic threads that have emerged. I therefore want now to explore in a little more detail what I mentioned at the beginning of this study, that is epistemic communities; and the special role these have played in what may be considered to be the structure of certain legal

⁹⁸ Lang and Marks, ‘People with Projects: Writing the Lives of International Lawyers’ (2013) 444; obviously see also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (first published 1989, Cambridge: CUP 2005) this theme is discussed variously throughout the text e.g. 563 - 64, 604.

⁹⁹ Lang and Marks, ‘People with Projects: Writing the Lives of International Lawyers’ (2013) 444

¹⁰⁰ See e.g. Lang, *World Trade Law after Neoliberalism* (2011) 182.

organizations within the global economy. Moreover I want to consider what traces have been left on the organizations at the heart of the trade-labour gap. I suggest that not only are the individuals directly involved in the creation of the organizations important but that these individuals have often inherited certain ethics from broader thinking about the preferred organization of the global economy. In order to make sense of this claim I want first to consider the term epistemic communities.

Before starting however it is perhaps important to make clear that the very thought of there being an epistemic community relies on the interlocutor being at home with an epistemologically constructivist position.¹⁰¹ Such a position takes as a starting point, the belief that the human world is a product of social action and thus the thoughts, institutions, and systems that make up the human world are not fixed and natural but rather a product of social relations. Here I turn to Ruggie's original definition of the term:

I have borrowed this term [epistemes] from Michel Foucault, to refer to a dominant way of looking at social reality, a set of shared symbols and references, mutual expectations and a mutual predictability of intention. Epistemic communities may be said to consist of interrelated roles which grow up around an episteme; they delimit, for their members, the proper construction of social reality.¹⁰²

The final part of Ruggie's definition is particularly useful for the current discussion. It has been my contention from the outset of this essay that the gap as it exists almost as a matter of inevitability and certainly represents a fundamental difference between what might reasonably be referred to as the two organizations perception of 'the proper construction of social reality'. In this case, that is social reality is the global economy. This divergence of

¹⁰¹ On interpretivist epistemology and constructivist ontology and the role in thought in the social science research see here: A. Bryman, *Social Research Methods* (3rd edn, Oxford: OUP 2008) 15 & 366 and 19

¹⁰² J. G. Ruggie, 'International Responses to Technology' (1975) 29 *Intl Organization* 557 - 583, at 569 - 570.

perception about how the global economy should be structured has resulted, I suggest, in the current trade-labour gap.

When thinking about these shared thought groups my aim is not to concentrate on the current groupings of ‘an epistemic community of trade experts with a common expertise,’¹⁰³ rather I am interested in whether we can reasonably characterize the origins of the ILO and WTO as resulting from epistemic communities. Coming, as I do, to international law from anthropology it is perhaps unsurprising but nevertheless what I have always found fascinating is the way in which structures within society (in this case international society) which become foundational to or at least help shape the world in which we live often arise from very personal motivations. That is to say, despite the whole being greater than the sum of its parts, the whole may nevertheless carry traces of the ethical sensibilities of those who first imagined it.

Traces in the Whole: Embodying the Spirit of an Organization

Ideas once planted are powerful things. As John Maynard Keynes said: ‘The difficulty lies, not in the new ideas, but in escaping from the old ones, which ramify, for those brought up as most of us have been, into every corner of our minds.’¹⁰⁴ Although Keynes was not directly involved in setting up the ILO it is my suggestion that the goal of social justice in economic affairs that was a founding notion of the ILO is best represented by the epistemic community of Keynesian economics. In his State of the Union address given in January 1941 US President Franklin Roosevelt spoke of the ‘Four Freedoms’ (freedom of speech, and of religion, and freedom from want, and from fear) that would guide America through the war. Supiot

¹⁰³ JE Alvarez, ‘The WTO as Linkage Machine’ (2002) 96 AJIL 146 - 158 at 148.

¹⁰⁴ John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (London: MacMillan 1936) preface.

suggests that the final two freedoms recounted ‘were the most innovative’.¹⁰⁵ Indeed, the freedom from want, he suggests, ‘inspired by Keynes and the experience of the New Deal, linked social justice inextricably to economic prosperity, where “want” had the sense both of man’s [sic] *needs* and of *demand* on the markets.’¹⁰⁶ As mentioned above the spirit of these ideas would come to inform the Atlantic Charter of 1941, that wartime Charter that as we have seen already set the scene for much of the post-war global economic policy.¹⁰⁷ The Keynesian epistemic community ethos fed into what we have already seen Lang describe as ‘legal imagination’.¹⁰⁸ Noting the discussion above of ‘legal imagination’ we see that it relates to the ideas that shape how, the relevant community, thinks about the legal regulation of the global economy. When this is considered in the context of the revival of the ILO in 1944 with the Declaration of Philadelphia it is possible to see how the Keynesian spirit of the ILO may be claimed.

The Protective Function of Law

There has been a good deal of discussion above about the function of law and regulation in the global economy. When thinking about the function of law I am suggesting that it is greater than just that which provides the “rules of just conduct”.¹⁰⁹ It has much more to do with the manifestation of the ethics of a culture. And to be clear this is, I suggest, precisely one of the ways through which we may capture the spirit of the organization; and even glean something of the nature of the epistemic community that has informed it. The protective function of law has been mentioned above most notably perhaps in the context of protecting social rights

¹⁰⁵ Supiot, *The Spirit of Philadelphia* (2012) 10.

¹⁰⁶ Supiot, *The Spirit of Philadelphia* (2012) 10 emphasis in the original.

¹⁰⁷ Supiot, *The Spirit of Philadelphia* (2012) 10 - 11.

¹⁰⁸ Lang, *World Trade Law after Neoliberalism* (2011) 181.

¹⁰⁹ Alain Supiot, *Homo Juridicus: On the Anthropological Function of Law* (London: Verso 2007) 199

from the full extent of an unfettered market. However, we have also discussed this in relation to the WTO conception of the protective function of law which amounts to protection from protectionist trade policies. And also how this conception goes together with the idea of systematic deregulation. The road to this deregulation starts with the type of movement we saw at the inception of the WTO, i.e. the dominance of ‘the price system’.¹¹⁰ Interestingly Friedrich Hayek was discussing this as the indispensable in 1945.¹¹¹ As we’ve seen above the ideas of ever greater free trade arrangements were in place in the Bretton Woods discussions. To make it clear the point is not that free trade is necessarily an obstacle to social justice but that it is the certain type of ideology about the function of the market and law, which Hayek represents, that has proven to be problematic for social rights. When this occurs it is the sustainability of the market that is threatened by this deregulation. ‘There is no such thing as the Free Market, but instead a range of *legal instruments underpinning different types of markets*, depending on the nature of the products and services exchanged, but *also on the specific histories and legal cultures involved*.’¹¹² Thus whatever the market type and which epistemic community underpins it the need for legal regulation is ever present. The question what type and what purpose lies behind that regulation.

Organizational treaty regimes can be used by the powerful to impose rules on the weak (as some suggest is true of the IMF and the Security Council); they can be cartels that impose costs on nonmembers (as appears to be the case with OPEC); or they can serve as impediments to stronger action at the national level or as vehicles for legitimizing the national policies of certain patrons rather than as genuine fiduciaries for the collective membership.¹¹³

¹¹⁰ Friedrich A. Hayek, ‘The Use of Knowledge in Society’ (1945) 4 *American Economic Review* 519 – 30. <<http://www.econlib.org/library/Essays/hykKnw1.html>> accessed 5 September 2015, at VII.

¹¹¹ Hayek, ‘The Use of Knowledge in Society’ (1945), at VII.

¹¹² Supiot, *The Spirit of Philadelphia* (2012) 43, emphasis added.

¹¹³ JE Alvarez, ‘The WTO as Linkage Machine’ (2002) 96 *AJIL* 146 – 158, at 152.

In the end it is perhaps the sense of the collective that is lost. Indeed, the intellectual investment in the idea that successful economies rely on a good balance of social rights for their sustainability was a powerful (and indeed compelling one). It is the same good intentions, i.e. of improving all economies and increasing prosperity that guided the WTO architecture into being. It is ultimately the turn to experts, so-called technocrats that has shifted the balance away from social rights. For it is the technocrats (the international professional class) that moved the WTO beyond considerations of social policy in general.¹¹⁴ The move to this point was not an accidental one there was a specific move and that move came from the epistemic communities with whom the technocrats are identified.¹¹⁵ It is, thus, in the WTO that these technocrats create the spirit of the organization.

In terms of the trade-labour gap, ultimately, perhaps the divergence is one between a conception of economics in which the public realm is involved and, alternatively, one where the economic field is a broadly private concern. From embedded liberalism and a concern for social justice within legal regulation to a marketized approach. In other words the widespread acceptance that specific policy commitments to ensuring a sustainable market economy through such things as labour rights is now replaced by the expectation that states would require a tangible 'reward' from the market to ensure '*their* commitment to fundamental workers' rights.'¹¹⁶

¹¹⁴ Lang, *World Trade Law after Neoliberalism* (2011) 262 – 263.

¹¹⁵ See e.g. Alvarez, 'The WTO as Linkage Machine' (2002) 96 AJIL, at 148; also, M Fakhri, 'Reconstructing WTO Legitimacy Debates' (2011) Notre Dame Journal of Intl & Comparative Law 64-100; and Lang, *World Trade Law after Neoliberalism* (2011) who deals with the notion of an "epistemic community" variously at 181-184, 195, 284-85.

¹¹⁶ Maupain, *The Future of the International Labour Organization* (2013) 214.

The Social Clause Debate and the CLS: Communication through Time and Ideology

The theme that has emerged from the previous discussion is that of a tangible shift from a global economy regulatory system based on policy to one based on technocratic rules. The suggestion, then, is that this latter version has proven to be particularly hostile ground for the social justice aims of the ILO. In this final section I want to discuss this claim in a more concrete setting; and in particular I am concerned with the social clause debate and the shift that took place within the ILO legal regime with the introduction of the Core Labour Standards.

In the context of this discussion Hudec's notion of the 'political theatre' dimension of international economic law is brought to mind.¹¹⁷ Hudec goes on to explain that this is 'the tendency of governments to adopt laws and agreements that create the appearance of legal solutions when in reality no solution has been achieved.'¹¹⁸ This he suggests is particularly true of international agreements which 'are frequently documents which claim to solve problems, but in fact merely paper over conflicting national positions without resolving them.'¹¹⁹ In this respect CLS represent, for some, precisely this type of document. There is a wealth of literature surrounding this debate (as referred to earlier),¹²⁰ and whilst it will not be helpful to fully rehearse the ins and outs of the debate here there are a few points that are particularly useful in understanding not only the trade-labour gap but also the specific quality of the trade regime environment that has led to the cooling off of labour rights.

¹¹⁷ Robert E. Hudec, 'International Economic Law: The Political Theatre Dimension' (1996) 17 University of Pennsylvania Journal of Intl Economic Law 9 – 15, at 10.

¹¹⁸ Hudec, 'International Economic Law: The Political Theatre Dimension' (1996) 9.

¹¹⁹ Hudec, 'International Economic Law: The Political Theatre Dimension' (1996) 9.

¹²⁰ See fn 52 above.

Social Clause Debate: In Brief

To say that the suggestion of the introduction of a social clause into the WTO framework, which would have the effect of making ILO labour standards ‘subject to binding arbitration’,¹²¹ was not universally well received is perhaps something of an understatement. The idea, backed in principle by some states it was roundly dismissed by others. Indeed, according to a WTO Press Briefing:

Many developing and some developed nations believe the issue has no place in the WTO framework. These nations argue that efforts to bring labour standards into the arena of multilateral trade negotiations are little more than a smokescreen for protectionism. Many officials in developing countries believe the campaign to bring labour issues into the WTO is actually a bid by industrial nations to undermine the comparative advantage of lower wage trading partners.¹²²

Thus despite the proposals, at the Singapore Ministerial Conference, from the US and Norway to embark on a project of promotion of labour standards to be reported back the issue was broadly dropped due to the controversy.¹²³ When one recalls that the decision to see labour and trade as separate (the formal creation of the gap) at the same Ministerial Conference it appears, at least as far as the WTO were concerned, the matter was at a full stop.

Clearly, however, those who originally thought that binding labour standards as part of the WTO regime was a good idea were not convinced by the outcome at Singapore. Thus despite the rejection of the new WTO provisions (as, of course, is the prerogative of a treaty based organization) the pressure now rested with the ILO to respond.¹²⁴

¹²¹ Guy Standing ‘The ILO: An Agency for Globalization?’ (2008) 39 *Development and Change* 355 – 384, at 367.

¹²² WTO Press Brief. Trade and Labour Standards.

<https://www.wto.org/english/thewto_e/minist_e/min96_e/labstand.htm> accessed 5 September 2015.

¹²³ *Ibid.*

¹²⁴ Philip Alston, ‘“Core Labour Standards” and the Transformation of the International Labour Rights Regime’ (2004) 15 *EJIL* 457 – 521, at 460.

CLS: Creative Persuasion Technique, or, Demise of Labour Rights?

It is in this context that the 1998 Declaration on Fundamental Principles and Rights at Work emerges. As Maupain suggests the need for the ILO was now to demonstrate its ‘capacity to bring about a universally applicable “level playing field” ‘ in terms of ‘workers’ rights in the globalised economy.’¹²⁵ The four CLS that emerged appeared to solve this problem and various associated ones. Described as ‘the centrepiece of ILO efforts to circumvent the limitations of traditional standard-setting in the current context.’¹²⁶ . Due to the universal nature of CLS the fact of Membership of the ILO automatically carries the ‘obligation’ of CLS¹²⁷ Thus solving in one stroke the problem of how to get those ‘fickle’ Members to ratify ILO Conventions¹²⁸ Indeed as Alston suggests this could be seen to have the added bonus that as CLS are outside ‘of the sanctions context ... By emphasizing the role of promotional techniques and in loosening the links between the core standards and the ILO’s traditional supervisory machinery, the Declaration put forward a vision of labour standards which was much more palatable to many governments and most employers in a world of ever increasing capital mobility.’¹²⁹

The actual picture of labour rights after the introduction of CLS is far from rosy. At present labour appears to be losing out to capital; and aside from unemployment the problem of the growth of ‘working poor in both developed *and* developing countries’ has caused unease for governments around the world.¹³⁰ When this is linked to ‘the persistent ‘deficit’ in the

¹²⁵ Maupain, *The Future of the International Labour Organization* (2013) 51, 53.

¹²⁶ Maupain, *The Future of the International Labour Organization* (2013) 51.

¹²⁷ Maupain, *The Future of the International Labour Organization* (2013) 51.

¹²⁸ Maupain, *The Future of the International Labour Organization* (2013) 52.

¹²⁹ Philip Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime’ (2004) 15 EJIL 457 – 521, at 460.

¹³⁰ Maupain, *The Future of the International Labour Organization* (2013) 35 emphasis in original.

implementation of fundamental rights'.¹³¹ The question is raised of whether the admittedly universal but possibly prosaic nature of the CLS is sufficient to really have an impact on labour rights. Maupain acknowledges that the current system of universal labour rights as represented by the CLS has yet to make a real impact.¹³² There are positives, Maupain suggests, for example the location of CLS within the broader Human Rights discourse.¹³³ Though it should be noted that for Alston the real effect of CLS is to demote rights recorded elsewhere in Human Rights instruments to mere “goals”.¹³⁴ Moreover, for him there is a long game, and for the ILO that has meant reinvention into a vehicle for persuasion.¹³⁵ In particular the persuasive capital of an ‘emerging market for social justice, [rather] than from the prospect and promises of better or free access to foreign markets.’¹³⁶

For other commentators the impact of CLS is a great deal more problematic. Whilst it is certainly seen as a reinvention of the ILO, the danger, suggests Alston, is that CLS are in danger of undermining the conventional labour standards built up through its almost hundred-year history; these standards, he suggests, ‘could ... be systematically superseded by a much less effective system for the protection of the rights of workers.’¹³⁷

Though undoubtedly pragmatic (and perhaps evidence of the ILO’s staying power) the reinvention of the ILO as a result of CLS seems only to be in one direction. As yet it does not appear that the WTO will resume any interest in a social clause. The effect of the current situation is that whilst the WTO continues to have the teeth of binding arbitration the ILO

¹³¹ Maupain, *The Future of the International Labour Organization* (2013) 35.

¹³² Maupain, *The Future of the International Labour Organization* (2013) 245.

¹³³ Maupain, *The Future of the International Labour Organization* (2013) 53.

¹³⁴ Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime’ (2004) 489.

¹³⁵ Maupain, *The Future of the International Labour Organization* (2013) 209 – 242.

¹³⁶ Maupain, *The Future of the International Labour Organization* (2013) 209.

¹³⁷ Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime’ (2004) 461.

appears to be increasingly reliant on its adaptive abilities and perhaps more worrying its capability of marketing social rights to otherwise uninterested parties. This has relegated labour rights to the status of ‘nice to have’, rather than ‘must have’ legal regulations. Indeed, in having to settle on the Declaration’s CLS instead of the social clause, ‘[s]oft law was replacing binding law.’¹³⁸

Conclusion

I started this dissertation by asserting that by building a picture of institutional characters, by considering their origin stories, it might be possible to understand a little more about the nature of the trade-labour gap. Clearly, looking into the complex history of the global economy, built during the twentieth century, and trying to gain insights into the nature of the organizations in question is a big task and inevitably that exploration has been selective. Nevertheless, in doing so the questions posed at the beginning of this essay are now, if not fully, answered at least set in context.

In exploring the spirit of these legal institutions the matter of the trade-labour gap has been considered in various lights. Firstly, we have seen from the policy history of the ILO and the thwarted aims of the ITO that the separation of labour from trade matters is a construction of the latter part of the twentieth century. Indeed, by looking at the policies of these organizations as influenced by theories of classic political economy the separation is shown to be far from inevitable. It is the impact of this separation that remains one of the most important questions in this analysis. And indeed, in that respect the question posed at the

¹³⁸ Standing ‘The ILO: An Agency for Globalization?’ (2008) 367; see also Alston, ‘“Core Labour Standards” and the Transformation of the International Labour Rights Regime’ (2004) 518.

beginning about the equivalence of the organizations has in the final section above started to emerge as problematic.

One of the strongest themes running throughout has been the relationship between law, economics, and the pursuit of social justice. The beginning of this journey had us look at the idea that organizations have founding myths that stay with the structure and continue to influence institutional decision-making. In attempting to understand the ethics behind these founding myths I have sought to build up a picture of the various institutional characters.

The ILO is clearly an organization that has, throughout, its history adapted to the changing global economic and political landscape and in so doing it has survived great changes. From its beginnings and the 'humanitarian sensibility' that we've seen is the ILO's ethical heritage the ILO has been sure of its place at the heart of the international economic legal structures. In reality it has never fully realized that ambition. However, its driving force has remained the pursuit of social justice and all this entails for labour rights within the global economy. The high-water mark for understanding the ILO's spirit is most clearly set out in the Declaration of Philadelphia. Riding high from the its escape from the demise of the League system this Declaration seemed to promise a great future for labour rights. Here the pursuit of social justice was firmly within the international economic system; and the standards created by the ILO though of course not universally successful were nevertheless were recognizable as standards which carried legal obligation. In this it is important to recall that the ILO has always been in a supportive role of global capitalism. The ILO's ideal role as Maupain put it is as the 'social regulator of the economy', and it is through its ability as a source of legal regulation that this end is best served. In this way the ILO has been a vital part of realizing the protective role of legal regulation which in turn, as Supiot suggested, is the way in which the global economy is made sustainable.

We have seen, through the discussion of the GATT regime, that the ILO's social regulatory aims found space within the embedded liberalism of the GATT. The compromise of that system with its acceptance of liberalism (tending towards free trade) and its acknowledgment of the need for intervention in the market to protect policy aims meant that policy and economics were not separated. Moreover, the intentions in the Havana Charter to create an ITO with competence for labour and trade matters demonstrates just how integrated the thinking was in relation to the respective roles and relationships between law, economics, and social policy aims.

The change that is heralded by the formation of the WTO had, we have seen, been in progress for some time. The shift from a domination of Keynesian economics (so at home in the embedded liberalism of the GATT) to an economic outlook that sought to exclude politics from the field: Supiot's 'Total Market'. Legal regulation remains in this picture but instead now of serving the aims of policy (including social justice) the protective force of law is focused against intervention in the market. It is this change in what Lang termed the 'legal imagination' that allows the trade-labour gap to form.

Having seen the formation of the trade-labour gap, in Part One, in Part Two the aim was to dig a little deeper into the 'structural bias' of the organizations in question. It was here that the role of epistemic communities were explored in relation to their creative role in the organizations but also their lasting traces therein. My contention here was that ideas once planted have strong roots. Thus it was that the break was identified between the broadly Keynesian economic epistemic community of the GATT era and the emergence of the neoliberal WTO. Despite the WTO appearing to fulfil the legacy of Bretton Woods, i.e. the creation of a global trade organization in many respects the specific ethic of the WTO is discovered to be hostile to that legacy.

It is finally then that I came to consider the manifestation of this change global economic narrative in the more concrete example of the failed social clause and the emergence of CLS. Through this prism it is possible to see how the type of social justice aims contained in labour rights have become a distant second to the economics of the trading system. Indeed, it seems that the soft law nature of CLS (compared to what would have been a binding social clause) may signal something less welcome than a clever compromise by the ILO. In creating the universal CLS the irony is that the ILO may have set the pursuit of social justice back. Social justice now seems to be a nice thing to have (or be able to claim) but not the integral aim of the global economic system that it once was. Of course how CLS and the pursuit of social justice will develop over time is currently unknown and there is a case for giving it more time to develop. However, it seems that it is in no small part due to the space that has opened up between the founding ethics of the international bodies responsible for trade and labour that the function of law in protecting social justice aims has diminished. Now the ILO seems to be adapting again and becoming a marketer for social justice rather than the social regulator of the economy. In the end persuasion does not amount to obligation.

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