

Legal Responsibility of International Economic Institutions - Labour Standards and Development Institutions -

S. Ago*

The idea of introducing labour components into the discussion of economic development was particularly highlighted in 1994 when the US government attempted to insert the social clause into the newly established WTO, but the idea of integrating labour standards and other human rights elements into the activities of international economic institutions itself is not new at all. The ILO with its mandate in labour issues obviously dealt with this question since long time by discussing social dumping. Consumer movements aiming at banning the importation of goods produced by prisoners or child labourers are also quite common since some time. One can also see a linkage, albeit of some nominal importance for the time being, between the ILO and international financial institutions from the fact that the Executive Director of the IMF and the President of the World Bank were invited by the International Labour Conference to deliver a speech. The present paper discusses the implication for public international law of the introduction of labour components into economic institutions which deal with economic development, by taking up two case studies, one concerning the introduction of international labour standards into the activities of the World Food Programme and the other concerning the relevance of labour questions to a regional development bank, the ADB.

1. Introduction of Labour Standards into the WFP Activities

There is a peculiar relationship, both a comfortable and an uncomfortable one, between the ILO and the WFP. For one of the WFP's projects called Food for Work can theoretically conflict with the ILO's standards.

1. Labour Problems in the Food-for-Work Projects

The WFP provides food assistance in broadly three projects: The first one is Food-for-Life project which is a genuine type of assistance to refugee camps and places affected by natural

* Professor of Law, Kyushu University

disasters, a project of emergency and humanitarian nature. The second one is called Food-for-Growth providing food to infants, school children, pregnant women and other categories of people who need such an aid for disease prevention. The third one is the Food-for-Work which provides food as incentives to construct dams, irrigation canals, roads etc with a view to assisting the target populations in their self-help efforts to improve their poor environments. This is to say, the project requires the target populations to provide labour in return to food assistance. The idea behind it is that those target populations do not necessarily need food for imminent survival, unlike those who are in the camps of refugees and victims of natural disasters, but the provision of additional food supply enables them to stay in villages to improve the infrastructure instead of going to urban areas during non-active periods to earn cash money to sustain their living. A typical example will be given to illustrate such a situation:

A rice farming village is located in coastal areas and it is regularly affected by typhoons. With an appropriate dam along the coast can very much improve the situation. However, due to their tight living conditions, they have no time to construct such a dam. The villagers have, instead, to go to urban areas to earn additional living during inactive periods of the year. If assistance is provided for the villagers under those circumstances, they do not need to go to cities to work, but they can stay in the village and construct the dam so that they can obtain full harvest next year even if Thphoon comes.

The implication of ILO standards here is in the fact that food is provided in this case not as a disaster relief or humanitarian aid, but as a return to a work. In other words, food is paid for a certain amount of work undertaken. In the eyes of the ILO, the situation is close to a public works project involving a wage labour. If it is constructed as a wage labour, all the relevant labour standards must be observed. That is to say the project must observe local labour laws as well as series of ILO standards on forced labour, discrimination and general conditions of work, such as safety and health standards, working hours, weekly rest etc whenever these instruments have been ratified by the country concerned. It must then be checked whether all workers work at their own initiative (non-existence of an element of forced or compulsory labour), whether discrimination is not made with respect to sex, social origin, religion etc and whether wages are properly paid. The ILO Convention No.95 on the payment of wages becomes particularly important in this context because the Convention prohibits, in principle, to make the payment of wages only in kind. What the Food-for-Work is providing is nothing but payment of wages in kind.

The WFP realizing that there may be a problem of its project in the light of ILO standards, entered into an agreement with the ILO with a view to securing the compliance of its projects to international labour standards.

2. Inter-Agency Co-operation on the Basis of a Gentlemen s Agreement

The agreement thus reached by the two institutions is not an inter-agency agreement in the strict sense of the term. As there is a document which sets out various conditions on which the inter-agency consultation takes place one could arguably maintain that it is a sort of administrative agreement reached by the two institutions. However, absence of signatures of the heads of the both institutions suggests that the document was not meant to establish legal obligation on both sides.

The practice has been that the WFP would send Food-for-Work project documents to the ILO, which would go through the documents to check whether they are in conformity with a certain number of ILO instruments. ILO Convention No.95 becomes particularly relevant here and the ILO s scrutiny is centered upon this standard. While Convention No.95 principally prohibits payment of wages in kind, the WFP-ILO agreement accepted certain flexibilities because this project is a technical cooperation activity with a public nature and the work performed in the projects has a self-help element. Under the existing agreement, payment of wages in kind can be tolerated up to 50 percent of the total wages when conditions meet the criteria set forth by the agreement. Depending upon the degree of divergence of the project activities from the ILO standards, the methods of payments were to be modified or changed, or the whole project had to be reviewed.

It is understandable that this "co-operation" by the ILO does not always receive a warm welcome by some members of the WFP. For the main concern of the project staff in the field is the delivery rate of their undertakings and it is quite understandable that they wish to distribute food supply as much and quick as possible. The standards scrutiny by the ILO with a possible stop of the project as a whole obviously appears for them as an obstruction. They are also the people who live closer to the target groups usually in a dire poverty. It is not surprising that the field staff becomes sympathetic to the local people.

On the other hand, the ILO has also its position. It is not only a standard-setting body but also an institution of technical co-operation and it runs a large number of projects tagged at vulnerable groups. It knows how needy these peoples are. However, the Food-for-Work project stepped out of its initial field of activity and ventured to undertake a project which was, in the eyes of the WFP, still in its mandate but which was in fact under the purview of the ILO. It is apparent that the ILO could not overlook this situation. In other words, the conflict would not have arisen if the WFP had confined itself in the Food-for-Life and Food-for-Growth activities.

3. Legal Basis for the Inter-Agency Co-operation

The question now to be asked is whether there is really a conflict between the two institutions. Both the ILO and the WFP are independent institutions and neither one is subordinate to the

other. It appears no *prima facie* conflict exists. It is more so when one takes into consideration that Convention No.95, which is one of the key instruments at issue here, does not directly bind either institution or a country of operation which has not ratified the Convention. Is it not the international responsibility of the institutions concerned which made them to abide by certain internationally agreed norms, in this case a number of international labour standards? After all both institutions are in the so-called UN family of international institutions and they are theoretically subject to the UN Charter to a greater or lesser degree. The WFP, being an institutions set up by a UN General Assembly resolution hence reporting to the General Assembly, is fully covered by the UN Charter as well as relevant institutional resolutions of the General Assembly. The ILO, being a specialized agency of the United Nations, has an obligation under the UN Charter to co-ordinate its activities with the United Nations hence subordinate to the competence of the United Nations, the Economic and Social Council, in particular. Whether the ILO-WFP co-operation has been conducted on the belief they are subject to the UN law is not clear. It may be that they entered into the co-operation agreement just because they considered it appropriate. A writer praised this relationship as a spontaneous activity worth noting.

Another aspect must be highlighted in this inter-agency co-operation. The ILO-WFP understanding does not only look into the question of Convention No.95 on the payment of wages, but it also addresses other ILO standards, some of which have a broader scope of coverage than labour standards in the narrow sense. These are standards which are usually categorized as basic social rights Conventions, namely Conventions Nos.100 and 111, dealing with freedom from discrimination, and Conventions Nos.29 and 105, dealing with freedom from forced or compulsory labour. A Food-for Work project is subject to a review when the ILO finds in it elements of discrimination and/or forced labour. In order to answer the similar question of why the WFP abides by the principle of non-recourse to forced labour and the principle of non-discrimination, we could, here too, relegate it to the overall structure of the United Nations and see an answer in the cohesion of the UN system. We could, however, present another argument to explain the reason why the WFP observes those principles. While standards set forth in Convention No.95 on the payment of wages are specific and the application limited to its scope of coverage (payment of wages), principles of non-discrimination and non-recourse to forced labour have universal applicability and have a much broader target. These Convention can claim to be general instruments of the international protection human rights. The ILO has always classified these Conventions as "basic human rights" instruments. In other words, the principles enshrined in these Conventions have not been created by the ILO, but they reflect the existing legal principles. Principles of non-discrimination and non-recourse to forced labour are principles of international human rights law and they can be considered to form a part of customary international law. The WFP's observance of ILO Conventions Nos.29, 100, 105 and 111 can be constructed as the WFP's adherence to international custom. International institutions, those b

2. The Regional Development Bank (ADB) and Labour Standards

1. Labour Dimension in Bank Activities

While regional development banks are international financial institutions whose basic functions resemble those of ordinary commercial banks, they differ greatly from ordinary banks in that they are inter-governmental institutions of a public nature. It is, therefore, natural to see a wider interpretation of their mandate that is not restricted to the function of a pure resource providing and interest yielding nature. Article 2 of the Agreement Establishing the Asian Development Bank in paragraph(ii) states that the Bank utilizes its resources to contribute to the "harmonious economic growth" of the region. This implies that the Bank's mandate is to achieve "sustainable development", a notion which did not exist at the time of the adoption of the constitutional instrument but which developed later to become an established concept for the interpretation of economic development in a wider context. The 1998 New Year's Message from the President is also very clear when it states that the Bank is concerned with "economic growth on a sustainable basis". The President goes on to indicate that the Bank "must accelerate its transformation from a project financier to a broad-based development institution". Labour standards can play an important role in achieving this goal of the Bank. It is often argued that the raising of labour standards contributes to higher productivity and lower social costs, which is beneficial to the overall objectives of the Bank's activities. The Bank has already transformed itself to a considerable extent into a "broad-based development institution" by introducing a number of initiatives containing social dimensions. Reference is made to the five items listed under the Strategic Development Objectives, namely promoting economic growth, reducing poverty, supporting human development (including population planning), improving the status of women, and protecting the environment. The transformation can be seen in the restructuring of internal administrations and in various policy statements, partic

The incorporation of labour standards has also been discussed in other international economic institutions. OECD published a report on the relationship between labour standards and international trade in 1996 and the WTO discussed the same topic at various occasions. As labour standards have economic implications, their discussion at international economic institutions is relevant. However, as the OECD report seems to suggest, the so-called basic human rights standards, such as those establishing trade union rights, have no immediate effect on trade. WTO's Ministerial Meeting in 1997 was more explicit in stating that labour standards should be dealt with in the ILO and not in the WTO. The social clause, an arrangement in international economic agreements by which economic sanctions are imposed upon a country which does not abide by certain labour standards, is highly controversial and it is an open-ended question. The Bank would duly take these discussions into consideration but would not be in a position to put

conditionality of labour standards into its operation, unless they are directly relevant to its activities. At the same time, the Bank cannot maintain its narrow mandate and conduct various activities irrespective of efforts undertaken by other international institutions in the field of social development. As long as labour standards are an important element of social development and in the light of the Bank's mandate to promote sustainable development, it is proposed that labour standards be incorporated into its activities in a positive and meaningful way. A great part of the International Labour Standards, or International Labour Conventions and Recommendations, adopted by the ILO since its establishment in 1919, occupy a crucially important place in this respect, because they are internationally agreed upon legal instruments and the members of the Bank are mostly also members of the ILO. One can also add that certain principles enshrined in the ILO instruments have gone all the way up to a level on.

Looking from a different angle, taking labour standards into consideration has positive and practical impacts on the Bank activities. The viability of Bank-funded projects will be considerably strengthened by the uplifting of general labour conditions and the increase in productivity deriving therefrom. In other words, sustainability of projects is strengthened. Raising labour standards and observance of basic social rights contribute to a decrease in the risks of the projects, or more generally to the achievement of better governance. Secondly, the general trend in international society which pushes the Bank to address also those issues, which have so far been not regarded as part of the core mandate of the Bank, can be best met by explicitly referring to International Labour Standards at various phases of its activities.

2. Elements of Labour Standards Already Incorporated in Bank Activities

While it was not explicitly mentioned in the constitutional instrument of the Bank, elements of labour standards are implicitly introduced into various phases of Bank activities.

A brief look at a few on-going loan projects and technical co-operation activities quickly reveals that the Bank, in fact, has been addressing and promoting a number of issues related to labour either consciously or unknowingly. It goes without saying that all the Bank activities related to gender questions and indigenous peoples have a direct bearing on a few important ILO Standards, such as Convention No.138 on minimum age, Convention No.100 on equal remuneration, Convention No.111 on equality in employment and occupation and Convention No.169 on indigenous peoples. Other more technical projects do sometimes contain highly labour relevant elements, such as occupational safety and health, social security and vocational training which are addressed by numerous ILO Standards.

Generally speaking, labour issues are relevant to all Bank activities as long as the fundamental aim of the Bank is to alleviate poverty and enhance economic development of developing member countries. The basic aim of ILO Standards is to attain social justice and higher welfare through

standard-setting and technical co-operation. This rationale is clearly given in a paragraph in the Philadelphia Declaration, attached to the ILO Constitution, which says that "poverty anywhere constitutes danger everywhere" and the attainment of social justice is a prerequisite to sustained progress. Implication of ILO Standards in Bank activities is apparent in two ways: One is a situation in which ILO Standards are addressed in a direct way and the other is a situation in which various ILO Standards are implicitly involved in certain parts of the Bank activities.

3. Possible conflicts with Bank can arise when certain Bank funded projects are operated in a way to infringe some of those principles. A situation such as follows can be theoretically imagined: "A project manager of an irrigation project hires workforce by asking the village head to recruit certain number of workers. The village head or the tribal chief exercises his authority to select villagers to participate in the work. Only men are recruited, among them some minors. Some of the workers do not voluntarily accept the work but they do so because the head or the chief has a strong authority in their community. They are prevented from forming an association to represent them regarding their working conditions." This imaginary situation infringes Convention No.111 because employment of women is prevented, Convention No.138 because children are employed, Convention No.29 because forced labour element is found, and Convention No.87 because freedom of association is not observed. On the other hand, if the project manager goes and tells the village head not to discriminate women, not to hire children, to ensure that workers offer their work voluntarily and to let them unite for discussing working conditions with their employer, the situation would be completely reversed and a positive effect can even be found on the promotion of those basic social standards. Judgment about the compatibility with those principles of a project becomes difficult when the incidents of the conflicts with the basic social standards are indirect, that is to say the Bank funded activities are not directly infringing those standards, but due to the government policies, the projects concerned may lend themselves to have a negative effect on the standards. An imaginary case can be given here, too: "The Bank finances a project which develops a certain area to become an 'export processing zone'. It is well known that the borrower government intends to declare this zone a "no trade union area", among others, in order to attract foreign invest

3. International Responsibilities of Development Institutions

1. Conflict(?) between UN and Development Banks

During the 1960's when conflict arose between the UN and the World Bank concerning its loan activities to South Africa and Portugal, the latter's position was clearly expressed in its legal

office's view that the Bank is guided by its constitutional instrument and that it has no reason why it should follow the UN's decision to enforce economic sanction to those countries. The World Bank even maintained that its Articles of Agreement prohibited the Bank to intervene into "internal affairs" of the loan receiving countries.

The World Bank is a Specialized Agency of the United Nations and it enjoys privileges and immunities of UN. Regional Banks, such as the ADB, are not Specialized Agencies of the UN and therefore they are not under general obligation to cooperate with the UN. The question to be asked here is whether the financial institutions are truly immune from "political" decisions, or rather whether there is not a "legal" obligation which may be relevant to the Bank. It is, at least, sensible to ask whether an international institution with similar or even same membership (All the members of the ADB are members of the ILO, for instance) can have a work practice that is different from the other institution. One could even go one step further to inquire into the question whether there can be multiple "public interests" in a single international society.

2. Public Interest of International Law and That of Development Banks

The question of the conflict between the universal organization and development banks has been discussed more generally as an issue of a conflict between economic development and human rights. The UN's greatest operational activity organization, the UNDP, emphasizes the importance of a comprehensive human resources development as an essential part of economic development. While its independent status in the UN system is quite apparent, institutionally speaking the UNDP is a subsidiary organ of the UN General Assembly and it is obvious that it should abide by decisions taken by its superior organ and other principal organs of the UN, such as the Security Council. The World Bank is a Specialized Agency, that is to say it signed an agreement with the UN under the terms of Article 57 of the UN Charter. Even if the agreement does not provide for the supremacy of UN's decisions over those of the Bank, there is a general responsibility of the Bank to cooperate with the UN. Regional banks, such as the ADB, are not Specialized Agencies due to their regional characteristics. There is, therefore, no direct relationship with the UN. As regional banks are not dependent on the UN system, they can claim to have a different mandate in the international society. The objectives of those banks can presumably be set irrespective of the objectives of the world body. In theory and in law regional banks can assert to serve for a public interest that is not the same with the UN.

3. International Responsibilities in General

The question to be asked is whether the foregoing argument, while seemingly true in theory and in law, can be sustained in all circumstances.

In the previous chapter we have invented an imaginary case where all sorts of situations were created in which a number of ILO Conventions were breached. We should ask ourselves whether there is no breach of international law at all if the financial institutions are aware of possible conflicts of international obligations of the loan receiving countries, such as child labour, discrimination, freedom of association and forced labour. It should be recalled in this context that the Road Traffic Law of Japan makes illegal those who invite persons to drink alcoholic beverage knowing that those persons would drive a car after drinking. To take another example, more familiar to bankers perhaps, we would here recall money laundering which is illegal in some countries. Here the financial institutions are responsible for the nature of money which they handle. They cannot simply look at the money as such without looking into the intention of the holders of the asset.

Can same not be said to international financial institutions? Is it not internationally wrong to grant loans to countries in which the financial institutions do know that the recipients will use them in a way not appropriate in terms of public international law. The financial institutions may also be in a position to foresee possible infringement of treaty obligations of the recipient countries if loans are executed in an inappropriate way. Recipient countries are usually economically under-developed and often lack sufficient technical infrastructure in government administration to foresee such infringement of their international obligations. International institutions with top-class lawyers employed in their legal departments are in a far better position to assess the international legal implication of economic development projects which they support. They would, therefore, be responsible to check the compatibility of the projects with various international treaty obligations, including ILO Conventions.

We would go another step forward and ask ourselves whether development banks should not take other situations into consideration. For international obligations do not only stem from ratified international treaties. An author, in his study on the relationship between a number of international treaties on the protection of environment on one hand and the activities of development banks on the other hand, concluded that the banks can not neglect the existence of treaties even if they have not been ratified by the loan receiving countries. What will happen if the banks do neglect the principles enshrined in those treaties is a question still to be explored. As it stands now, it is difficult to assert that development banks are legally obliged to abide by the international treaties, in as much as they cannot be signatories to those treaties themselves.

A number of ILO Conventions, which are usually referred to as "basic human rights Conventions", however, provides another aspect for a closer look. The set of Conventions dealing with freedom of association, Convention Nos.87 and 98, in particular, are equipped with a special procedure for their supervision so that ILO member states cannot get away from their observance by simply maintaining their status of not being signatories to the Conventions. The principle of freedom of association and the principle of freedom from forced labour have apparently gone all

the way down to a stage where they can possibly claim to be international customary rules. A question can be validly put here by asking development banks why they do not need to honour the non-conventional obligations ILO member states observe.

Conclusion

Regional development banks, such as the ADB, are not universal organizations, hence no obligation for co-operation with the UN can be deduced from Article 63 of the UN Charter. However, it is a fact that the ADB is an international legal person which concludes HQ agreements, international loan agreements and engage themselves in other international legal activities. In other words, they have international legal capacity. An international legal entity is subject to international law, albeit in a limited scale. Its rights and duties are usually limited to a minimum which is functionally necessary. Privileges and immunities of international officials are also granted only to the extent necessary for their discharge of functions. It is, therefore, natural that their international responsibilities are also limited according to their functions. Little has been written so far on the aspect of international responsibility of international institutions. If they were, they were usually dealt with regarding a small number of cases where the PKO inflicted damages to UN members. Hardly any discussion has been made on the status of international institutions before the general international law, that is to say on the question to what extent international institutions are subject to international custom and some rules which are considered to be general international law. The reason why little has been discussed on this issue can perhaps be found in the general belief that universal organization such as the UN would normally act in conformity with the general norms prevailing in the international society. We find in a text book on international law a statement which underlines this belief. However, with the growing importance of institutions, such as regional development banks, which are outside the control of UN, it may be a right moment to ask whether one can easily presume the international legality of activities of those entities. In other words, it may not be too wrong to assert that development banks are subject to t