



**THERE IS A WAY, CAN THERE BE A WILL?**

**SOME REFLECTIONS ON THE GLOBAL  
REGULATORY CHALLENGES AND  
OPPORTUNITIES FOR THE ILO IN ITS  
SECOND CENTURY**

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**13 JULY 2023, GENEVA GRADUATE INSTITUTE  
ON THE LAUNCH OF THE ANTHOLOGY OF ESSAYS, "SOCIAL JUSTICE AND THE  
WORLD OF WORK: POSSIBLE GLOBAL FUTURES"**



# THERE IS A WAY, CAN THERE BE A WILL?

## Some reflections on the global regulatory challenges and opportunities for the ILO in its second century<sup>1</sup>

Francis Maupain

### Introduction

I am here with you to share ideas about the future of the International Labour Organization (ILO). I owe this honour to the friendly and successful persuasion of Anne Trebilcock and Brian Langille. Their editorial undertaking whose success we are celebrating today did go far beyond my own person and specialities. I nonetheless agreed to be associated to it on the understanding that it could offer a welcome occasion to discuss the issue of the ILO future.<sup>2</sup>

The need to stimulate a discussion on the subject inside and outside the Organization seemed to me all the more necessary and appropriate in a context that unfortunately gives us little cause for optimism. It is a context in which in particular some of the essential elements of the multilateral system as it was established after WWII are being called into question.

Apart from the frustration that this subject seemed to have largely escaped the ILO's centenary celebration, my willingness to accept stemmed above all from three feelings or convictions that I am pleased to share with you to launch the debate. The first is a deep feeling of gratitude for the organisation that I have had the honour of serving throughout my working life. The second reason is to share a certainty: that the current context, inherited from the post war period, which is undermining the multilateral system, also offers the ILO an exceptional opportunity to optimize its potential for dialogue and regulation. And the third reason is to express - perhaps in the hope of dispelling it – a certain sense of disquiet as regards the apparent erosion of the tripartite will to optimize the ILO potential and comparative advantages to meet the challenge.

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<sup>1</sup> Keynote on the launch of *Social Justice and the World of Work: Possible Global Futures*. Essays in Honour of Francis Maupain, edited by Brian Langille and Anne Trebilcock (Oxford: Hart Publishing, 2023).

<sup>2</sup> In addition to the co-editors of the collection of essays to whom he owes the honour to be associated with this initiative, the author wishes to express his deepest appreciation to Valérie Berset -Bircher, SECO Swiss Ambassador to the International Labour Organization, Kitrhona Cerri, Executive Director of the TASC platform, the Graduate Institute of International and Development Studies in Geneva for providing the facilities, Jordi Agustí-Panareda, ILO Ethics Officer, for his invaluable assistance and input which made the 13 July 2023 “launch” event possible; and last but not least to Dorothea Hoehtker, ILO Research, for her much needed help in finalizing the present version of these reflections.

# 1 A matter of gratitude

I joined the ILO almost by accident, due to a vacancy in the Office of the then Director-General, David Morse, and I must confess that it was not out of deep convictions. My academic readings and in particular that of E.B. Haas<sup>3</sup>, had given me an image of the ILO that was very commendable, but far removed from the avant-garde prestige I then attributed to the European organisations which had been the subject of my doctoral thesis.

It was a former Polish ILO official, who was inconsolable at having been driven out of the lakeside paradise under pressure from his government in the early 1960s, who managed to somehow persuade me that nowhere else would I find such a "douceur de vivre". I thought I'd give it a try for a year or two. In the end I found myself associated with the organization's destiny, as a civil servant and later as a fellow at the ILO's International Institute for Labour Studies, practically from the ILO's fiftieth to its centenary celebrations!

These four + decades offered me exceptional opportunities which contributed to make me what I am and for which I remain extremely grateful.

The first opportunity was to spend my apprenticeship years in close contact with civil servants who had themselves joined the ILO in the hopeful and energetic days immediately after the Second World War.

They were driven by convictions and an extraordinary energy, which Brian Urquhart and Stephane Hessel captured well on the UN side. However, the ILO had its own specific characteristics, inherited from the pre-war period and passed on in particular by C. Wilfred Jenks. Foremost among these was the importance attached to the selection of young civil servants who would provide the backbone of the Organisation.

Jenks personally oversaw the recruitment of a number of officials who became unshakeable pillars of the ILO during the period of decolonization. This was the illustrious case of Nicolas Valticos, as well as that of Felice Morgenstern (made Dame Felice Morgenstern after her retirement), to whom Klabbers rightly pays tribute in his essay<sup>4</sup>. She was indeed a model of intellectual rigour and moral integrity and would have deserved the tribute of this collection more than anyone else.

I was not personally exposed to the intensive readings and intellectual "bottle feeding" to which, according to the testimony of those concerned, Jenks subjected new recruits in order to prepare them, technically and morally, for the discharge of their future responsibilities and to help develop their esprit de corps.

What I can testify to from my own experience throughout the happy years I spent under the benevolent, generous and very wise guidance of Francis Wolf<sup>5</sup>, is that the working environment remained deeply imbued with the humanist culture that had been part of their apprenticeship.

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<sup>3</sup> Ernst B. Haas, *Beyond the Nation-State: Functionalism and International Organization*, Revised ed. (Stanford University Press, 1964).

<sup>4</sup> Jan Klabbbers, "The Past and Future of Governance: Epistemic Authority and the ILO", in Langille and Trebilcock, *Social Justice and the World of Work*, 137.

<sup>5</sup> Who himself joined the ILO at a very young age after having fought in the ranks of the French Liberation Forces.

The second great opportunity I had was to work directly with five successive Directors-General starting from David Morse. Cheating a little, I could even say half a dozen, because I did work a lot with Guy Ryder, but it wasn't in his capacity as Director-General and so, technically, he doesn't count.

This sequence had begun rather badly: I had hardly been working for a few months in Morse's Office when he suddenly resigned. Three years later I was with his successor, Jenks, in Rome when he passed away in October 1973. I don't know whether this earned me the reputation of having the evil eye; the fact is that his successor, Francis Blanchard, who was a cautious man, quickly organised my transfer from the Director-General's Office to the Legal Department.

But it was actually from the Legal Department that I had the most direct opportunity to work with Blanchard and his successor, Michel Hansenne, until he retired in 1999.

This experience made me aware of the very special and even unique role that the Director-General plays (each in his own way, but always in the wake of the ILO's first Director, Albert Thomas, and the tradition he established) to help the Organisation remain relevant in the face of the radical changes in its environment over the century of its existence.

My third cause for gratitude was to have in the Legal Department, and later as Special Adviser to Juan Somavía, the opportunity to deal with subjects directly relevant to the adaptation of the ILO to a changing environment that suited me well.

Jordi Agustí-Panareda, to whom this "launch" event owes so much, did me a great honour by analysing my contribution from the point of view of axiology<sup>6</sup>. In , however, this contribution revolved, more often than not, around "institutional engineering" - not to say tinkering; what I mean by that is the exploration and optimisation of the potential of the ILO's Constitution and practice to respond to changing contexts and needs, and, when there was no alternative, its adaptation by means of constitutional amendments.

Five concrete examples seem of special significance from this point of view:

- The first was the adaptation of the ILO Constitution to the new realities of decolonization, further complicated by those of the Cold War. The debate turned around the existence of non-elective seats of the Governing Body and the representation of the so-called "socialist employers". The debates on this issue came to a conclusion with the adoption of the 1986 amendment to the Constitution<sup>7</sup>. The quid pro quo for the elimination of non-elective seats was the recognition that the underlying *raison d'être* (ensuring that the Governing Body would, despite its limited membership, remain sufficiently representative of economic and demographic realities to effectively discharge the functions entrusted to it) would be safeguarded under new modalities. These modalities were agreed at the price of some inevitable inconsistencies in the then prevailing context (just three years before the game changer of the fall of the Berlin Wall).

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<sup>6</sup> Jordi Agustí-Panareda, "International Axiologies for Social Justice at the International Labour Organization: Value-based Perspectives and Ways Forward," in Langille and Trebilcock, *Social Justice and the World of Work*, 55-64.

<sup>7</sup> Francis Maupain, "La réforme de l'Organisation internationale du Travail", *Annuaire français de droit international*, volume 33, 1987, 478-497. This amendment, while widely ratified, has not yet entered into force.

- The second, through the constitutional amendment of 1997, was to reinforce the status of the International Labour Conference (ILC) as a genuine parliament and tripartite legislator by giving it the capacity to formally abrogate instruments that no longer served their purpose and *raison d'être*; this radical step was considered necessary to overcome the obstacle arising of the so-called contractual link existing between parties to such obsolete conventions, which had been henceforth considered to be beyond the reach or interference from the tripartite legislator.
- The third was to solemnly recognize, as part of the commitments inherent in membership, a core set of fundamental principles and rights that must be respected as “enabling rights” by all members even when they have not ratified corresponding conventions; this was of special relevance for promoting a minimum “level playing field” across borders to meet the realities and needs of the emerging globalized economy that put all systems of protection in competition and at risk. This was the key object of the 1998 Declaration on Fundamental Principles and Rights at Work.
- The fourth task was to try to show that the ILO “had teeth” and was even capable of taking a bite out of the implementation of Article 33 of the constitution. This step was taken for the first time in the context of the complaint procedure initiated in 1998 under article 26 of the ILO Constitution against Myanmar for its violation of the Forced Labour Convention, 1930 (No. 29) and its refusal to comply with the recommendations of the Commission of Inquiry established to deal with this complaint. The implementation of Article 33 in 2000 provided a legitimate basis for Members to adopt coercive measures - possibly of an economic or trade nature. Alas, this was not enough – any more than subsequent EU efforts and trade measures for the reasons reviewed by Richard Horsey in his essay<sup>8</sup> – to loosen the grip of a junta and an army of half a million soldiers on the population and the economy.
- The fifth and last illustration is the 2008 Declaration on Social Justice for a Fair Globalization. The broad purpose of this text was to extend and complement the 1998 Declaration by creating a global framework for periodic review of situations and progress among members in relation to the four objectives recognized as of strategic importance. Unfortunately, its renewed emphasis on the relevance of social justice in the context of the global economy and the new concrete perspectives it was opening up – including in terms of standards – have not, in my opinion, really been exploited or even seriously explored. The chronology suggests that its regulatory potential has suffered collateral damage from the attention and priority given to negotiations of the 2030 Agenda for Sustainable Development (hereafter, “2030 Agenda”) and, subsequently, the emphasis placed on subcontracting activities of the ILO in connection with the elaboration and implementation of the Agenda, in particular Sustainable Development Goal 8. One can only hope therefore that the interest and apparent willingness expressed by the new Director-General as regards the neglected potential of this Declaration will materialize.

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<sup>8</sup> Richard Horsey, “EU Trade Preferences and Human Rights in Myanmar” in Langille and Trebilcock, *Social Justice and the World of Work*, 292. The author was for some time ILO Liaison Officer in Myanmar. He was faced with death threats inspired by the Junta as a result of the ILO’s attempts to establish a safe channel for victims of forced labour to file their complaints. He has given a detailed account of this experience in his book *Ending Forced Labour in Myanmar: Engaging a Pariah Regime*.

In the end, my only regret is perhaps that I did not have the opportunity to help fill the interpretation gap with respect to international labour conventions. In her essay, Desirée LeClerc<sup>9</sup> describes the impasse to which, in her view, the failure to establish the Tribunal provided for in Article 37(2) of the Constitution has led in the Organization and its standard setting activities. While acknowledging the possibility to refer such questions to the International Court of Justice, it seems to me that the less déjà vu solution of establishing such tribunal under realistic modalities would better fit the tripartite logic and would deserve honest and detailed consideration.

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<sup>9</sup> Desirée LeClerc, “A tale of Tripartism, a Tribunal, and Trade” in Langille and Trebilcock, *Social Justice and the World of Work*, 204-213.

## 2 A matter of conviction

Beyond blurred markers and conflicting analysis there is at least one observation that seems to be widely - and sadly - shared: the multilateral system and its credibility are in trouble. One of the most obvious manifestations of this state of affairs is the gap that has widened between promises and realities.

The promises have been made emphatically and unanimously in what was a remarkable example of the “common language of mankind”: the 2030 Agenda.

The realities are, inter alia, those of inequalities which are growing in a way that defy common sense, to say nothing of the sense of justice. The Secretary General of the United Nations (UN) himself has expressed alarm at the fact that this Agenda is “off track”; his deputy Amina Mohammed even went so far recently as to mention the urgency of “rescuing” it<sup>10</sup>.

It is true that this situation does not seem sustainable for at least two reasons:

- i. It undermines the legitimacy of the most established governments, which appear either ineffective or complicit;
- ii. It undermines the credibility of the multilateral system as a whole, insofar as it seems in complete contradiction with the expectations arising from one of the key objectives, which is to “combat inequalities within and between countries”<sup>11</sup>.

This is why, in my view, Gilbert Houngbo was entirely right, as candidate to the post of ILO Director-General, to place great emphasis on the renewed relevance of the social justice issue<sup>12</sup>.

Indeed, the ILO, whether it likes it or not, is a stakeholder in the erosion of the system's credibility since it is closely associated with the promises of the 2030 Agenda and their implementation. A number of the essays in the book - whether or not we agree with them - bear witness to this, sometimes in very blunt terms.

In these circumstances, the challenge is not so much to convince public opinion and decision-makers of the merits of the cause of social justice; the risk is, on the contrary, that such focus may give the impression that all ILO Members may not already be bound by their acceptance of the ILO Constitution and the shared commitment it has involved for over a century.

In my view, the real challenge – which is also an exceptional opportunity – can be defined as follows:

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<sup>10</sup> United Nations Development Coordination Office, “To rescue the SDGs, we need a global financing plan and a change of course”, 16/03/2023, <https://un-dco.org/stories/rescue-sdgs-we-need-global-financing-plan-and-change-cour>.

<sup>11</sup> United Nations, “Transforming Our World: The 2030 Agenda for Sustainable Development.” Resolution Adopted by the General Assembly on 25 September 2015, 42809, Article 3. <https://sdgs.un.org/2030agenda>

<sup>12</sup> International Labour Organization, Vision statement of Gilbert F. Houngbo, candidate for Director-General of the ILO, Geneva 2021. [https://www-ilo-org.ilo.idm.oclc.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/genericdocument/wcms\\_818332.pdf](https://www-ilo-org.ilo.idm.oclc.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/genericdocument/wcms_818332.pdf)

- i. To help identify the institutional roots of the disconnect between the multilateral system's proclaimed ambitions under the 2030 Agenda and the realities of persistent and worsening inequalities; and
- ii. To reactivate/optimize its institutional comparative advantages in an attempt to remedy the situation.

Skipping a few stages in my reasoning, I would like to go to what seems to me the crux of the matter and the root cause of the hiatus: the multilateral system has failed to tackle head-on, either from a methodological or institutional point of view, the contemporary realities of global interdependence. This interdependence affects all areas of the economy, technology, health and now, most acutely, the environment and climate<sup>13</sup>. The implementation of the objectives of the 2030 Agenda, in particular the fight against inequality, cannot be really effective unless this reality is fully taken on board.

The problem is that, quite on the contrary, the 2030 Agenda is still marked by an approach that is essentially one of a juxtaposition which prevails at all three relevant levels: A) the goals to be achieved; B) the efforts expected of States to implement them; and finally, C) the support that inter-governmental organizations (IGOs) are supposed to provide to achieve them.

The problem is that, as I will try to show, the realities of global interdependence now seem to require a radical change of perspective at all three levels.

## **2.1 Goals level: From the fight against inequality to the promotion of an acceptable sharing of the benefits and constraints of global interdependence as of the sustainable development essence**

What I would like to suggest first of all is that social justice, although it is not mentioned anywhere in the 2030 Agenda, is co-substantial to the concept of sustainable development. The challenge that this consubstantiality raises, however, goes far beyond the promotion of a “Social Justice Coalition”: It presupposes first a genuine paradigmatic shift; and, as a result, it requires the ILO to reactivate its role as universal tripartite legislator after having essentially acted as subcontractor in the implementation of the 2030 Agenda.

- i. **A paradigmatic shift: From the fight against inequalities to the establishment of conditions suitable for an acceptable sharing of the benefits and burdens of sustainable development in a context of interdependence.**

Let us return to the link between the erosion of the credibility of the multilateral system as a result of the growing gap between its proclaimed ambitions and the fact that, having already travelled more than halfway towards 2030, these ambitions are being denied by the development of inequalities that make a travesty of what the Agenda promises – despite the

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<sup>13</sup> It is important to emphasise that the benefits and constraints arising from global interdependence are no longer chosen, as it was once the case because of market openings. They just have to be faced. This is particularly obvious when it comes to the dissemination of technologies, the environment, the climate and epidemiology.



fact that this phenomenon goes hand in hand with a remarkable reduction (by half?) in global poverty.

The central question is then to identify the institutional root of this gap. I would argue that it is both a matter of methodology and focus.

First, a matter of methodology: there is a fundamental contradiction between the proclamation of the “integrated and indivisible”<sup>14</sup> nature of the various goals, and the fact that the fight against inequalities is de facto treated as one goal among all the others and indeed not the most pro-eminent (number 10). It is the subject of a series of fairly routine recommendations, including (10.3) to “ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard.”

A matter of focus: The way the goal is defined, as well as the remedies proposed, do not go to the root of the problem I have tried to identify: Making the distribution of the benefits and constraints of a global interdependence, which is increasingly burdensome, acceptable to all concerned. This seems more obvious as the weight of these constraints, particularly in environmental matters, is likely to fall increasingly on the weakest, and there is no reason to think that they would continue to accept this ever-heavier burden forever.

This is why this goal cannot be treated as just one among others. It is a more fundamental issue that relates to the very sustainability of the development process, which is precisely the subject of Agenda 2030 and of the present reflections.

This however begs the question of what the concept of sustainability really means. According to Tonia Novitz who has given some thought to the subject in her essay<sup>15</sup>, the success of the concept of sustainability is due in large part to its ambiguity.

She may well be right. But it is precisely this convenient ambiguity which may have contributed to blur or conceal what makes the specificity and true meaning of the concept: the fact that it associates two necessary and indivisible components:

- Ecological compatibility: For example, ensuring that the process of interdependent development, through the increasingly rapid positive and negative transformations that it generates (or that generate it) within and across borders, remains compatible with the preservation of nature, the environment and, in a word, life itself.
- Social acceptability: For example, ensuring that both the benefits and the burdens – particularly in terms of the measures to be taken to protect the environment and the climate – are distributed in a way that makes the continuation of the process and the burden of interdependence acceptable to all stakeholders<sup>16</sup>.

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<sup>14</sup> United Nations, “Transforming Our World: The 2030 Agenda for Sustainable Development.” Resolution Adopted by the General Assembly on 25 September 2015, 42809. <https://sdgs.un.org/2030agenda>

<sup>15</sup> Tonia Novitz, “Sustainability as a Guide for the Future Development of International Labour Law?” in Langille and Trebilcock, *Social Justice and the World of Work*, 89-98.

<sup>16</sup> There are countless examples of measures designed to safeguard the environment, which have been the object of popular rejection in developed countries, precisely because they appeared to weigh more heavily on the less affluent.

The condition for this acceptability thus boils down to ensuring fairness in the sharing of common benefits and constraints of this global interdependence. This is what social justice – as applied to the globalization phenomenon – is all about.

Against this background, the fact that there is no mention of social justice under goal 10 or indeed anywhere else in the 2030 Agenda appears as a striking anomaly<sup>17</sup>. And, from this point of view, it would indeed make some intellectual and practical sense if the object of the Social Justice Coalition were explicitly to re-establish the social justice church or mosque at the centre of the sustainable development village.

At the same time however, and for the reasons I have sketched out, such a move would be of no practical consequence unless the institutional and normative framework necessary to translate it into concrete realities of global interdependence was established. And it so happens that the ILO is the only organization which has competence and is institutionally equipped to draw such consequences, except that it would require simultaneously a shift in the conception of the role it has so far assumed in connection with the implementation of the agenda.

**ii. A shift in the ILO institutional role: from sub-contractor back to tripartite legislator**

The challenge which, in the light of the above, the ILO is facing goes far beyond the role it seems to have been assigned until now in the implementation of the 2030 Agenda, which is essentially that of a subcontractor for the implementation of Goal 8 on Employment and Decent Work and related targets.

Firstly, the ILO needs to persuade all its Members that, in the interest of their long-term legitimacy, they must address head-on the issue of the fair sharing of the benefits and burdens of global interdependence within the framework of a comprehensive social and environmental policy. Secondly, the ILO needs to provide them with common guidelines to help them, as concretely as possible, to establish the necessary institutions and develop such coherent global policy, while also taking account the idiosyncrasies and legitimate preferences of their populations. This is a major challenge, but the ILO has both a clear mandate and the relevant instruments to meet it.

It has a clear mandate under the Declaration of Philadelphia<sup>18</sup> and the solemn obligation to work towards ensuring “a just share of the fruits of progress” to all. In their essay Ewing and Hendy rightly return to this provision in detail<sup>19</sup>. Two points in particular deserve to be emphasized in this respect.

Firstly, despite its somewhat one-sided focus on sharing benefits<sup>20</sup>, the increased relevance of this clear mandate.

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<sup>17</sup> All the more so since - contrary to what happened for the Millennium Development Goals - the ILO was closely involved in the drafting process (see Novitz, 90). And what is even more astonishing is that the 2008 Declaration was formally approved by the UN General Assembly.

<sup>18</sup> Known as the Declaration of Philadelphia (1944), the Declaration concerning the aims and purposes of the International Labour Organization was annexed to the ILO Constitution by virtue of its Article 1.

<sup>19</sup> Keith D. Ewing and Lord Hendy KC, “‘A Just Share of the Fruits of Progress’: What Does It Mean?”, in Langille and Trebilcock, *Social Justice and the World of Work*, 65-76.

<sup>20</sup> Granted that the question is no longer merely one of participating in the accumulation of wealth brought about by open borders and the spread of new technology across borders. However, it is also a question of bearing a fair

And secondly, the legally binding nature of this mandate. As pointed out in several essays, the objective spelled out in this provision is not just wishful thinking or a slogan. It is an authoritative statement of the ILO 's mandate, which is binding on its members, and even the UN<sup>21</sup>.

The question is: how to discharge this mandate realistically? The answer seems fairly straightforward: making a more inventive use of what makes the ILO's specificity – its standard-setting function. The ILO possesses the relevant legal instruments.

I have tried to tentatively sketch out in the Box (below) some of the building blocks that could be made part of a normative instrument to encourage and help ILO Members to establish relevant institutions and develop a global and coherent social and environmental policy to meet the challenge of ensuring a more socially understandable and acceptable sharing of the benefits and constraints of global interdependence. One thing must be made clear at the same time: this box is only meant to make the discussion more concrete and does not prejudge in any way the possible content of such instrument. Four key points need to be highlighted in this respect.

First, it should be stressed that the path towards such a global and integrated policy has already been cleared by the 2008 Social Justice Declaration; Director-General Houngho has rightly pointed out the importance and relevance of this Declaration<sup>22</sup>. Subject to the adaptations necessary to meet the current context and, in particular, the growing importance of the “environmental justice” dimension of the subject since 2008, this Declaration could help provide some of the “building blocks” for a future instrument. The Outcome of the General Discussion on a Just Transition of the 2023 session of the International Labour Conference (ILC)<sup>23</sup> may also provide some additional input, even though the conclusions have been framed in a debatable “transition” perspective<sup>24</sup>.

Second, there is a precedent for the type of global integrated document envisaged: the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117). This instrument does remain relevant in its principle – even though its objective and content were designed to accompany the accession to independence of the former colonial territories rather than regulate global interdependence.

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share of the burden of safe guarding the climate and the environment and of alleviating the consequences of the sometimes-traumatic transformations imposed among others by the cross border spread of new technologies and the deterioration of the environment.

<sup>21</sup> Jenks, who knew what he was talking about as the co-author of the text, considered that “The Declaration ...is substantially more than the name ‘declaration’ implies. It is a fundamental part of the fundamental Charter of the ILO, binding upon the Organization, binding upon its member States and binding upon the United Nations as a statement of the recognized competence of the Organization”. See *Social Policy in a Changing World: the ILO Response –Selected Speeches by Wilfred Jenks, Director-General of the International Labour Office, 1970-1973* (Geneva: International Labour Office, 1976), 64.

<sup>22</sup> International Labour Organization, “Advancing social justice”, Geneva ,2023. [https://www-ilo-org.idm.oclc.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_882219.pdf](https://www-ilo-org.idm.oclc.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_882219.pdf)

<sup>23</sup> International Labour Organization, Plenary sitting: Outcome of the work of the General Discussion Committee on a Just Transition, Record of Proceedings No. 7C, International Labour Conference – 111th Session, Geneva, 2023. [https://www-ilo-org.idm.oclc.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_887247.pdf](https://www-ilo-org.idm.oclc.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_887247.pdf).

<sup>24</sup> It seems to me that the structural nature of the global interdependence problem calls for a corresponding structural/ institutional response.

Third, this normative undertaking would admittedly require a long and complex process. However, it is at the same time the very complexity of this process which may represent its key added value for reaching a genuine common understanding and commitment. The normative process does indeed allow for iterative development, with a succession of written consultations with stakeholders and a double (possibly triple) discussion at the ILC. To strengthen the relevance of this process, the legitimacy of its future content as well as global policy coherence, these consultations could and should associate international governmental organizations (IGOs) whose mandates cover adjacent matters.

Fourth, the promotion of a global integrated policy would seem perfectly consistent with the UN Deputy Secretary General's recent reflections, which call for the 2030 Agenda to be “rescued” and for the “goal to goal” approach to be overcome<sup>25</sup>. This would also seem perfectly in tune with the views recently expressed by the World Trade Organization (WTO) Director-General in a July 2023 issue of *Foreign Affairs*<sup>26</sup>. In this article she urges WTO members to introduce active labour market and social policies “... to ensure broadly shared gains from trade and technology”. (NB: the burden and constraints which are the inevitable companions of trade and technology are again studiously omitted!).

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<sup>25</sup> United Nations, Press release, Deputy Secretary General Amina Mohammed on 9 May 2023 (DSG/SM/1848), <https://press.un.org/en/2023/dsgsm1848.doc.htm>

<sup>26</sup> Ngozi Okonjo-Iweala, “Why the World Still Needs Trade. The Case for Reimagining—Not Abandoning—Globalization”, *Foreign Affairs*. June 8, 2023. <https://www.foreignaffairs.com/world/why-world-still-needs-trade>

Last but not least, the adoption of a new instrument of this type would not only have the advantage of providing a common frame of reference and guidance for Members; it would also help fill the gap in the 2030 Agenda with regard to an essential condition for the effectiveness of their implementation: the necessary reciprocity that must exist between Members with regard to their efforts to implement the common good faith commitments to which they are supposed to have subscribed.

### **Possible objective and content of a global integrated social and environmental policy instrument**

It should be noted first that, as the precedent of the Social Security (Minimum Standards) Convention, 1952 (No. 102) shows, there is nothing that prevents the use of normative action to urge members to adopt a (global) policy, rather than to implement one of the more specific objectives listed in the ILO Constitution.

Special emphasis should be placed on the fact that a standard-setting policy instrument would provide Members with a common frame of reference, while leaving them the necessary space to take account of legitimate preferences and national idiosyncrasies.

That said, a certain number of "building blocks" seem to have a natural place in it to establish the necessary conditions and institutions for all citizens to have their fair share of the benefits and constraints inherent in interdependent development:

- To promote the "empowerment" of all citizens in order to develop their ability to cope with changes in the environment brought about by technology, climate or other factors, in their own best interests and in those of the community as a whole;
- To help them, by means of an appropriate system of social protection, to cope with the contingencies of life and with foreseeable or unforeseeable changes in the environment in a dignified manner;
- To provide them with the necessary means and, recognizing their fundamental rights and labour rights to assert, both individually and collectively, the fair compensation for their contribution to sustainable development and the common good.
- Last but not least, to enable them to express themselves individually and collectively on the subject of these arrangements.

This normative action could, at least initially, take the form of a Recommendation accompanied by sui generis monitoring, in which the "adjacent" IGOs could be involved.

## **2.2 Making solidarity and reciprocity mesh**

As I have already pointed out, the implementation of the Sustainable Development Goals is supposed, according to the logic the 2030 Agenda, to be ensured by the mere juxtaposition of the individual efforts expected from States to implement their parallel commitments, subject only to a "Global Partnership", which according to paragraph 39 "[...] *will work in a spirit of*

*global solidarity, in particular solidarity with the poorest and with people in vulnerable situations”.*<sup>27</sup>

The problem is that the willingness of States to give effect to these commitments is thwarted by the behaviour of other States, which may prefer to escape their social or environmental commitments to gain a competitive advantage in an open international market - including to attract or retain capital flows.

As will be seen below, this “free rider” behaviour was made inevitable by the progressive (and deliberate) rigidification of the multilateral system and its compartmentalization in order to provide inter alia a sanitary cordon around the free movement of capital.

The 2030 Agenda has not modified the situation. It does in fact take the existing multilateral system and its compartmentalization for granted. It even insists on the need to achieve a “genuine liberalization of multilateral trade”.

This logic has been overtaken by events. It is a fact that not long after the adoption of the Agenda, the main architect of the system started to take liberties with its trade regime. It is also a fact that with successive COPs [Conference of the Parties under the Paris Agreement on Climate Change] free rider behaviour appeared increasingly problematic from the viewpoint of environment protection.

It thus seems clear that even with a strong call for greater solidarity between developed and developing countries, the juxtaposition approach to the implementation of common goals is not enough to ensure their effective implementation and to dissuade free rider behaviour. Their efforts to achieve Global Goals and shared commitments need to go hand in hand for that purpose with a formal recognition of the necessary reciprocity that must exist between their respective efforts to achieve their shared commitments and goals<sup>28</sup>.

At the same time however, one of the lessons of the Glasgow COP 26 was that there is no State or group of States which is not in some way or another (in particular from an historical point of view) the free rider of some other State or group of States. This is the case with industrialized countries which claim to fight pollution beyond their borders while they have to a large extent reached their present state of affluence through cross-border pollution.

It is thus of the utmost importance that this necessary reciprocity of efforts does not imply or is understood as implying in any way an equivalence of outcomes. The efforts that any Member may expect from any other Member must be a function of the possibility and specific conditions prevailing in the said member.

What can the ILO do without departing from its mandate to help reach such delicate balance? Two things that are far from negligible: on the one hand, ensuring that each Member has the reciprocal possibility to know and assess the efforts made by others to promote their shared commitments to social and environmental justice – as they may be enshrined in a future social and environmental policy instrument; and on the other hand, conferring legitimacy to the

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<sup>27</sup> United Nations, “Transforming Our World: The 2030 Agenda for Sustainable Development.” Resolution Adopted by the General Assembly on 25 September 2015, 42809. <https://sdgs.un.org/2030agenda>

<sup>28</sup> It is of some relevance that in his contribution to the book, Routh (see Langille and Trebilcock, 182) criticizes Rawls for not including in his Law of Peoples (as he calls it) a reciprocity that must exist between the efforts members have made to implement their shared goals and commitments to sustainable development.

efforts of Members willing to undertake additional commitments towards shared objectives in a more restricted circle.

**i. Providing an institutional framework for guiding, encouraging and ensuring reciprocal access of all Members to their respective efforts towards their shared social and environmental justice objectives**

One thing is clear from the final recital of the preamble to the ILO Constitution: “*the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations...*”

It is the recognition of the necessary interdependence and reciprocity between the Members’ efforts “to adopt humane conditions of work” as a condition of progress and as the *raison d’être* of ILO membership. In his essay<sup>29</sup>, Liam McHugh-Russell rightly reminds us that this logic is so pervasive that the Permanent Court of International Justice placed it at the heart of the definition of the ILO’s competence.

This logic of reciprocity permeates the supervisory system. Apart from the reciprocity of obligations which bind parties to the same convention, the Constitution provides for the universal monitoring of the action taken by all Members to follow up on conventions even when they choose not to ratify them: in such case Article 19(5)(e) of the Constitution requires them to make known at appropriate intervals “the extent to which effect has been given[...] to any of the provisions of the Convention...”. There is a symmetric requirement in Article 19(6)(d) as regards the effect given by members to recommendations. Taken together, these provisions fulfil a double function: (i) encouraging all Members and monitoring their efforts towards the objectives set out in Conventions or recommendations; (ii) providing on a universal basis specific information to Members as regards the said steps/efforts.

This allows for a leverage which, according to the then Director-General Michel Hansenne in his 1997 report to the ILC on Standard Setting and Globalization, this mechanism “*has no equivalent amongst other international organizations*”<sup>30</sup>.

The adoption of a possible ILO normative instrument designed to promote an integrated approach to social and environmental policy would allow for a more acceptable sharing of the benefits and burdens of global interdependence within and between countries could thus offer such leverage. Even if such instrument were initially to take the form of a Recommendation, the reporting system under art Article 19(6)(d) of the Constitution would make it possible to encourage, and assess the efforts made by any member towards the objective of the said social and environmental policy. Such instrument could in addition be accompanied by a *sui generis* monitoring system, and even – for those States willing to submit to it on a reciprocal basis – a “peer review” system (to which reference was actually made in the 2008 Declaration<sup>31</sup>). This possibility offers an illustration of the second possible “benefit” resulting from such normative course of action.

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<sup>29</sup> Liam McHugh-Russell, “After ‘Subsistence Work’: Labour Commodification and Social Justice in the Household Workplace”, in Langille and Trebilcock, *Social Justice and the World of Work*, 337-348.

<sup>30</sup>International Labour Organization, Standard Setting and Globalization. Report of the Director-General to the 85<sup>th</sup> Session of the ILC (Geneva, 1997), 14.

<sup>31</sup>International Labour Organization, Declaration on Social Justice for a Fair Globalization, 2008, Annex D (ii).

## ii. **Conferring legitimacy to additional inter se relevant steps/efforts**

The second and possibly even greater added value of a possible social and environmental policy instrument is indeed that by its very existence it could confer greater legitimacy upon the commitments and efforts accomplished by Members wishing to take additional steps towards the objective in a more restricted circle, on the basis of reciprocity.

The unexpected impact of the 1998 Declaration on Fundamental principles and Rights at Work on bi- or multilateral trade agreements is that it has highlighted the role and importance that the legitimacy of a text emanating from the ILC as universal tripartite legislator can play in facilitating and justifying trade agreements which, subject to specified social/environmental commitments over and above their universal commitments as World Trade Organization (WTO) members, involve specific reciprocal benefits or concessions between the parties

The proliferation of such multi-lateral, and occasionally “mini-lateral” agreements<sup>32</sup>, is a further cause for concern for the coherence and sustainability of the global multilateral trading system. The adoption of an ILO standard-setting instrument spelling out common guidelines as to the social and environmental policies to be developed to promote sustainable development in a context of global interdependence would have the advantage of offering a common authoritative reference for countries wishing to take among themselves additional steps and commitments towards these shared objectives.

## **2.3 Optimizing the role and institutional legitimacy of the ILC to improve global policy coherence within the multilateral system**

The compartmentalization of the multilateral system through the juxtaposition of international organizations and their separate mandates is no accident. As already noted, it was intended by the principal architect of the post-war multilateral system, none other than the United States. Despite original intentions<sup>33</sup>, a succession of restrictive developments (the torpedoing of the Havana Charter<sup>34</sup>, the adoption of the Washington consensus and finally the establishment of the WTO and its Dispute Settlement Mechanism) meant that this “compartmentalization” resulted in the de facto precedence of economic, financial and finally trade objectives over social and related objectives.

This process was by no means fortuitous. As clearly established by the historian Quinn Slobodian (to whom several essays make reference<sup>35</sup> – it was designed in particular in the mind of its so-called “Geneva school” instigators to protect investments and their free movement from the threat of “deviant” national policies which, under the banner of progress or social justice – but more often than not in response to corporatist interests – would undermine this

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<sup>32</sup> To use the concept coined by Steve Charnovitz in his essay “Reforming the WTO to Better Promote Social Justice”. See Langille and Trebilcock, *Social Justice and the World of Work*, 199.

<sup>33</sup> As recalled by Perulli in his essay “Social Justice and Reform of Capitalism”, in Langille and Trebilcock, *Social Justice and the World of Work*, 34.

<sup>34</sup> Referred to by Supiot, in Langille and Trebilcock, *Social Justice and the World of Work*, 26.

<sup>35</sup> See essays by Perulli, Kohivama and Liebv, as well as by Fudge and Mundlak, in Langille and Trebilcock, *Social Justice and the World of Work*, 24, 143, 252.



freedom. Their revered model was the CJCE (Court of Justice of the European Communities, now European Union)<sup>36</sup>.

However, the picture changed quite radically with the realization, within the country that was its “principal architect”, of the boomerang effect of the free movement of American investment in search of skilled, cheap labour abroad on the accession of US blue-collar workers to the middle class, with all the consequences that this entailed for the country's governance, the fabric of society and its social balance. This phenomenon is a harsh reminder that it is not the satisfied consumer but the frustrated citizen who puts a ballot in the box<sup>37</sup>.

The paradox of the situation, however, is that from a strictly institutional point of view, the “compartmentalization” established under US leadership was not deemed to be watertight. The Declaration of Philadelphia, adopted in 1944 with the support of the Roosevelt administration and which has become in 1946 part of the ILO Constitution, formally recognizes that all national and international policies and measures, “in particular those of an economic and financial character”, should be judged [“and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective”]<sup>38</sup>.

Kohiyama and Lieby rightly remind us in their essay<sup>39</sup> that this provision has remained a dead letter. This is factually correct, but it begs the question of what the real object of this provision was. It may be read literally as a mere statement of principle addressed to all stakeholders and to be implemented by all of them, including States and IGOs. It does not specifically call upon or entrust the ILO with any specific responsibility to monitor the extent to which other stakeholders and in particular including IGOs whose mandate extend to financial, economic or trade matters take this principle into consideration in the discharge of their respective mandate. What it implies however is that the ILO should contribute to the realization of this principle to the best of its specificities and institutional comparative advantages. And it must be recognized that the practice has been to say the least sub-optimal from this point of view.

This is the case more specifically with the ILC and its potential to help promote this principle. Juan Somavia aptly compared this institutional framework, with its tripartite structure and the participation of NGOs, to a genuine “Parliament of the real economy”. This Parliament also has the comparative advantage of being open, upon invitation, to all IGOs concerned, even in the absence of formal reciprocal representation agreement with the Organizations concerned<sup>40</sup>.

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<sup>36</sup> The fact that this revered jurisprudence now includes what Caruso and Papa describe in their contribution as “bright pages” from the viewpoint of social progress would certainly come as a shock to them. Bruno Caruso and Veronica Papa, “Social Sustainability and Labour Rights in a Resilient EU”, in Langille and Trebilcock, *Social Justice and the World of Work*, 244.

<sup>37</sup> In this respect, it is hard not to marvel at the vagaries of history: it was United States President Bill Clinton who, by lending his support to the AFL/CIO in the midst of the WTO's Seattle Conference in 1999, definitively put the nail on the coffin of social debate at the WTO; it was the same Bill Clinton - this time under pressure from Wall Street and “capitalism in a hurry” (Perulli's words) - who triggered, with the green light he gave to China's admission to the WTO just over a year later, the exodus of low-skilled jobs, which happened to be also those with the highest unionization rates in the US.

<sup>38</sup> International Labour Organization, Declaration of Philadelphia, Montreal, 10 May 1944, II c.

<sup>39</sup> Tomi Kohiyama and Thomas Lieby, “The Resilience of Multilateralism: An ILO Introspection for a System-wide Vision”, in Langille and Trebilcock, *Social Justice and the World of Work*, 146-147.

<sup>40</sup> Which on the contrary would still be a prerequisite for the symmetrical representation of the ILO on WTO representative bodies.

The ILC thus could offer a unique forum to work toward the “decompartmentalization” of knowledge, experience and policies/recommendations, with the participation of all stakeholders including other multilateral organizations concerned with achieving greater policy coherence across specific mandates.

It is important to stress that in order to develop its role accordingly, the ILC does not need to seek support from the above provision of the Declaration of Philadelphia – whose hegemonic tone might on the contrary be dissuasive. It has full freedom to do it in the framework of its standing orders and constitutional practice in connection with the Director-General’s thematic report to the ILC or by including an appropriate question – whether recurrent or not – on its agenda. This would offer an exceptional framework to share and debate on subjects like:

- (i) Ongoing research of common interest within these organizations, which may often overlap, contradict or ignore each other, for example, on the subject of interactions or “interconnectivity” between the various goals of the 2030 Agenda;
- (ii) The concrete impact of the policies advocated by the afore-mentioned organizations in the exercise of their respective mandates on the populations who benefit or suffer from them; and
- (iii) Topical themes of common interest.

From this point of view, the treatment of the ILO Centenary theme “Future of Work” offers a perfect counter-example of a missed opportunity. As it happens, the “Future of Work” theme had been the subject of parallel, but in many respects discordant, reports by the World Bank, the Organisation for Economic Co-operation and Development (OECD) and various academic institutions, including the Massachusetts Institute of Technology; these reports could therefore have been made available to ILC delegates at the same time as the report by the experts mandated by the ILO to serve as a basis for an inter-active debate, with the high-level participation of the organizations concerned. Instead, the debate followed the usual pattern of a fairly dull succession of monologues in front of a sparse audience.

It may be objected that both the usual composition of the tripartite delegations and the time available make it difficult, if not impossible, to have such a genuinely interactive debate, which would mutually enrich the knowledge and understanding of all stakeholders at policy level of the way their respective programme and policies may interact positively and negatively and may impact progress towards shared goals.

The response to this argument is not to mistake the effect for the cause.

First, the possibility of having a truly interactive and productive debate, in the limited time available, is a matter of organization and of providing delegates with an objective synopsis of existing facts policies and relevant literature. Kerry Rittich’s essay<sup>41</sup> comparing the two reports by the World Bank and the ILO on the future of work, their respective approach and (divergent) conclusions and policy advice offer a concrete and perfect model of the kind of background document that the Office could and should produce to help frame and feed such debate, and promote a better knowledge and understanding of policy incoherence and its impact on the achievement of these (proclaimed) common goals.

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<sup>41</sup> Kerry Rittich, “Two Institutional Paths Toward the Future of Work – A View from the Edge of the Field”, in Langille and Trebilcock, *Social Justice and the World of Work*, 43-54.

Second, it is a matter of historical experience and common sense that the level and composition of delegations to the ILC, which is a key factor for such a meaningful inter-active debate to make an impact at policy level, very much depends (especially among governments) on the extent to which the subject under discussion at the ILC and the background documentation may touch upon an important practical or strategic stake for the member States.

This would certainly be the case with the subjects discussed in this chapter. At the same time, it begs another question – and concern: The ILO may well have the way and tools to address some key weaknesses of the multilateral system, but do tripartite constituents have the will to let it move ahead?

### **3 A matter of concern: An evanescent tripartite will**

The ILO is now facing a challenge, which may be more subtle but of comparable magnitude to the one it faced in the post-war period, when it had to rebuild a new international order.

I have tried to show that the ILO's Constitution and practice provide it with the tools to meet this challenge, provided they are in some cases woken up from their lethargy or routine.

The remaining question is whether the ILO can still mobilize the tripartite will to use these tools. Unfortunately, the current tripartite situation is not the same as it was in the post-war period. In her essay, LeClercq even goes so far as to suggest that the “incomparable beauty” of the ILO's tripartite structure, like a peacock's tail, weighs it down and leads it to accumulated “deadlocks”<sup>42</sup>. Let us briefly consider the hurdles for each of the tripartite constituents and how they could possibly be overcome.

On the government side, the main obstacle may be the greater diffraction and interweaving of interests between countries and groups, combined with the erosion of a phenomenon that had helped the ILO to meet the challenges of adaptation and innovation in the past: the continuity of interest and leadership – not limited to non-elective seats –<sup>43</sup> that, through some strong personalities, a certain number of countries did exercise in the government group of the Governing Body.

This continuity of interest and leadership was linked to a variety of factors. In addition to the ideological stakes that the ILO and its pluralist philosophy represented in the East-West confrontation of two rival models of social justice, there was the strategic importance of the subjects dealt with. This was the case, among others, with the issue of the so called “structure” issue, which led to the 1986 constitutional amendment; as noted, the key underlying stake was the abolition of the system of non-elective seats in the Governing Body (GB). The importance of the subjects contributed to the attractiveness of being a member of the GB (especially for those holding non-elective seats) for strong personalities. They often had sufficient authority

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<sup>42</sup> LeClercq, 212.

<sup>43</sup> Two names may help illustrate the point: that of an Italian international law celebrity, Roberto Ago, whose devotion to the ILO and institutional inventiveness knew no bounds (and which manifested itself in a rather “gory” way in his last wish that a tribute ceremony be held in the presence of his coffin in the ILO cinema); then that of Yahia Briki, formerly sentenced to death for terrorism during the war of independence in Algeria (pardoned by French President Charles De Gaulle), who became a proselytizer of tripartism and the inventor of the formula that bears his name and which enabled the 1986 constitutional amendment to be put together, at the cost of fracturing the common front between the “Group of 77” and the Eastern bloc.

and autonomy to deviate from their instructions or modify them depending on the evolution of the debates, and to win the support of their colleagues.

Among European members, the attractiveness of participation in decision-making bodies for such personalities has declined sharply as a result in particular of the importance taken by European coordination; but the same trend seems also to prevail within other regional groups as a result of the last GB reforms.

This situation is not necessarily irreversible, however. There is some reason to believe that the avenues I have outlined in the second part of this presentation could be of strategic interest, despite – or because of – their apparent modesty.

On the one hand, they can contribute to strengthening the credibility and sustainability of both the universal multilateral system and governments themselves in the eyes of public opinion. On the other hand, they can be implemented using existing constitutional tools and procedures without any need to embark on an improbable reform of the multilateral system and its constituent charters<sup>44</sup>. In other words, what could help crystallize a consensus around the exploration of these avenues is that, for governments as a whole, they represent a kind of low-cost alternative to the headache of reforming the multilateral system.

Governments should be made aware that ILO initiatives to create a universally-agreed framework for action could help correct the loss of legitimacy/credibility that they have incurred as a result of their apparent inability/impotence to manage the effects of global interdependence in an acceptable and equitable manner for all stakeholders.

And, precisely because it would be such a “low-cost” alternative, these initiatives could benefit, if not from the enthusiastic support, at least from the “benign neglect” of other relevant IGOs in the multilateral system, either because they would seem doomed to failure, or, if successful, because they could help to restore fairly painlessly the social image of the system as a whole.

On the workers' side, the risk is one of being locked into a defensive posture, focused on safeguarding the existing normative *acquis*, subject to its occasional extension to topics of “sectorial” relevance (as it was very successfully the case, but for very specific and not necessarily duplicable reasons, for maritime and domestic workers).

Not only could this prove to be a losing strategy in the medium term, as suggested by the slow progress of the so-called Standards Review Mechanism (SRM)<sup>45</sup>, but it could also mean missing out on the future of tripartite regulation of global interdependence. Workers should realize that, from this viewpoint, it would be in their best interest to breathe new life into normative action. The negotiation and adoption of a promotional instrument designed to promote the awareness and need for an integrated social and environmental policy among all Members would be of strategic relevance from this point of view. It would help to fill the regulatory gap of global interdependence and ensure an acceptable sharing of its positive and negative consequences for all stakeholders. This acceptability is, as we have seen, a *sine qua non* from the viewpoint of sustainable development. Such undertaking would thus be likely to

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<sup>44</sup> To remedy in particular, the “social deficit” of the Marrakesh agreements in the WTO, whose adoption with such fanfare did not foreshadow such a rapid decay.

<sup>45</sup> Claire La Hovary, “The Impact of the Standards Review Mechanism on the Future of International Labour Standards: Not Even Diamonds are Forever”, in Langille and Trebilcock, *Social Justice and the World of Work*, 170.

mobilize interest and support for such normative activity much beyond usual circles. And this interest and support would in turn be of key importance to help reach an acceptable balance between the institutions and the key components of the integrated policies which are necessary to achieve such acceptability, on the one hand, and the indispensable respect for national idiosyncrasies and preferences, on the other hand.

It is important, in addition, to stress that far from representing an alternative to the updating and development of the existing corpus, such an instrument could, on the contrary, provide a general framework and an impetus for modernizing and filling the gaps in that corpus. Various essays in the book offer insights concerning the gap between the existing corpus and the new realities and forms of work that would require the attention of a tripartite and universal legislator<sup>46</sup>.

On the employers' side, the risks inherent in the current situation should bring them back to the reformist vision of their role within the ILO, held throughout the Cold War in the face of competition from the "democratic centralist" model of social justice vis à vis members from the "Third World". Confronted with this competition, they chose the realistic option of taking part in the extension of the body of standards and supervisory procedures, defending the ILO Committee of Experts on the Application of Conventions and Recommendations against attacks from the Soviet bloc<sup>47</sup>.

What are these risks? At least three can be identified:

- Firstly, the danger that the discontent and frustration engendered by the multilateral system's inability to remedy the absurdly unequal sharing of the benefits and constraints of global interdependence will lead to the re-partitioning of the economic space into hostile blocs, with hard-to-predict consequences on the political, social and economic climate for business; this is the direction in which the worrying ATO (Allied Trade Organization) scheme referred to by Steve Charnovitz<sup>48</sup> seems to be pointing.
- Second, the need to meet, through new appropriate regulatory devices, newly emerging issues like the work disaffection of essential workers - as suggested by the "Big Quit" phenomenon- or workers' growing concern about respect for their private life.
- Thirdly – and perhaps above all – the danger that, in the face of climate and environmental emergencies, restrictive regulations will be imposed unilaterally on employers and workers alike, without letting them participate in the decision-making process on an equal footing as they do in the ILO framework.

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<sup>46</sup> In particular Adelle Blackett in her essay, "Learning from the past for the future," who criticizes the ILO for the "kid glove" treatment of colonial countries and calls for greater attention to issues which have been relegated to the margins (42); Shauna Olney in "Persistent Gender Gaps" (117); Kirsten Sheive "It's about time – Gender Justice and Working time Regulation and Employment and Care Work" (315); Jean-Michel Servais in "The Contemporary Quest for Social Justice" (157) Julia López López and Eusobi Colas-Neila in "Social Justice and Artificial Intelligence" (305); Flavia Souza Máximo Pereira and Pedro Augusto Gravata Nicoli in "Epistemic Secrets of Labour Law: Towards a Decolonial Turn" (327).

<sup>47</sup> For instance, the support they gave to Francis Blanchard's rejection of the "Memorandum of Socialist Countries" that called into question inter alia the role of the Committee of Experts (4 June, 1985) and two years later the fact that they joined workers and a number of governments in the ILC Committee on the Application of Standards (CAS) to reject the attacks of the same group of countries according to which the Committee of Experts had converted into a kind of supranational Tribunal. International Labour Organization, *Record of Proceedings*, ILC, 73rd Session, 1987, 24/6, para. 27.

<sup>48</sup> Which can perhaps be seen as an extreme variation on the "friend shoring" newspeak. See Charnovitz, 200.

Considering these risks, it would indeed seem quite in keeping with the realism employers manifested during the Cold War, to consider that it is once again in their best interests to be open to the proactive exploration of the ILO's potential for global social and environmental regulation as a lesser regulatory evil, that their involvement can help mitigate<sup>49</sup>.

Admittedly, that's a lot of "ifs". And these "ifs" are unlikely to materialize spontaneously. In addition to a favourable alignment of the planets, two factors seem to be undoubtedly required in my view.

The first is the pressure of external forces which are directly and positively interested in the ILO's unused regulatory potential but have no internal relay. As Routh's essay points out<sup>50</sup>, "however admirable" the ILO's claim to ensure participatory democracy through the most representative national organizations may be, this access appears far too limited to ensure adequate representation of all the relevant interests of the informal economy and the new forms of work, care work and, more generally, "all in need of [ ...] protection", as envisaged by the Declaration of Philadelphia and as further elaborated by Adrian Goldin<sup>51</sup> in his essay.

There is in addition the fundamental challenge of safeguarding the interests of future or unborn generations. As Laurence Boisson de Chazournes reminds us in her essay<sup>52</sup>, the need to take future generations into account is not just a moral duty. The principle of intergenerational equity and the principle of public participation go hand in hand in the implementation of the precautionary principle.

However, the skewed representativeness of labour interests in favour of traditional forms of subordinate labour in ILO practice is neither inevitable nor absolute. It seems reasonable to expect that the growing realization outside the Organization – in particular among younger generations – of the ILO's dormant potential for change and regulation would encourage them to put pressure to be represented and to wake it up, like a Sleeping Beauty, from its regulatory slumber.

One should not overlook in this respect the possibility of widening the representation of labour interests through Article 3(2) of the Constitution. This provision allows delegates to the ILC to be accompanied by technical advisers competent to deal with technical issues on the agenda. Even if this door is narrow, it has the merit of existing. One should encourage the forces concerned, and in particular the younger generations, to push this door open by putting pressure on governments and the most representative organizations, or by establishing their own representative organizations.

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<sup>49</sup> This observation is in line with Le Clercq's observation that it is employers who would have the most to gain from the establishment of an Interpretation Tribunal under Article 37 of the ILO Constitution, offering them a guarantee of due process in the face of unilateral and fanciful interpretations of ILO instruments within the framework of trade agreements. See LeClercq, 213.

<sup>50</sup> LeClercq, 204.

<sup>51</sup> Adrián Goldin, "Social Justice for an Ongoing Theoretical Reconfiguration of Labour Law", in Langille and Trebilcock, *Social Justice and the World of Work*, 349-357.

<sup>52</sup> Laurence Boisson de Chazournes, "International Environmental Law and Social Justice: On Encounters", in Langille and Trebilcock, *Social Justice and the World of Work*, 80. In a recent book, Jacques Attali argues that the best way of legally safeguarding the interests of these generations would be to enshrine in all national constitutions a provision to the effect that the adoption of any measure that jeopardizes the interests of future generations is unconstitutional! Jacques Attali, *Le Monde, modes d'emploi : comprendre, prévoir, agir, protéger*. (Paris: Flammarion, 2023).

The second is to provide a powerful catalyst for overcoming sectoral interests within groups, which seem to be an unfortunate trend, in order to crystallize a collective will.

This catalyst exists. It is the Office and its Director-General, in accordance with the Constitution and, above all, a practice that goes back to Albert Thomas. This long-standing practice has been gradually consolidated with the assent of all the tripartite constituents, including the employers<sup>53</sup>.

Indeed, according to this tradition, it is up to the Office, under the authority of the Director-General, to make tripartite constituents aware of the new needs and challenges the Organization is facing as a result of the changing context, and to give them its vision of the necessary adaptations/evolutions, particularly at institutional level, as well as proposing the strategy and stages for their implementation<sup>54</sup>.

The crisis situation in the multilateral system gives even greater importance to this function of impetus and leadership. It is a means of reviving interest in the ILO's institutional potential and through it, of reinforcing the level of representation at the GB and the ILC among all members which is, as we have seen, very much dependent, especially on government benches, on the strategic or substantive relevance of subjects on the agenda.

The election in 2022 of a Director-General who comes neither from the non-governmental groups nor from the inner circle of the founding countries could be an asset in opening up the possibility of reviving a tradition at a time when it appears particularly critical. It would also enable him to rally the widest possible support for such an undertaking, while avoiding Gulliver's fate of letting himself getting entangled in the web of corporatist interests and sensitivities.

## 4 Conclusion

As I am talking about how lucky I've been to make a career in an organization with such great institutional originality and remarkable historical depth, some of you, particularly among the younger generation, may feel that it's all very well for me, but there's not so much to be proud of in the world my generation is leaving to them, whatever the originality of the tools they will continue to have at their disposal to cope with it.

It is true that, after the hopes and perhaps ill-considered optimism of the post-war period, uncertainty – not to say anxiety – about the future is now prevailing as a global, cross-border phenomenon. This is making the fortunes of shamans and shrinks of all denominations, and

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<sup>53</sup> A particularly significant illustration of this was given in extreme circumstances by the man who already represented employers on the Governing Body before the war, and who was their spokesman during the post-war decades: Pierre Waline. During a particularly stormy session of the ILC in June 1973, where the Director-General (W. Jenks) had to face an outpouring of criticism for having reminded the ILC to respect due process, he was one of the few delegates to intervene to defend the Director-General's right to express his point of view even though he himself disagreed with it; and he did so specifically in the name of the tradition established by Albert Thomas.

<sup>54</sup> Even if we confine ourselves to institutional innovations, examples abound.

attracting to their ranks many talents who in the past might have found employment in the production of new knowledge and wealth.

Some observers or specialists have thus come to consider that, unable to reform itself, the multilateral system should, if not being written off, at least be the object of a radical refoundation on a new basis. Among other things, this refoundation should involve non-state and cross-border peoples and players.

At the same time, Isabelle Daugareilh's essay<sup>55</sup> in particular cautions us against excessive optimism about what can be expected from non- or extra-state regulation; she warns us that the power and (ir)responsibility of multinational enterprises is likely to haunt us throughout the century – even though the ILO Centenary Declaration did not see fit to address the issue.

When confronted with such dilemma, there is a risk that as pointed out by Anne Trebilcock and Brian Langille in their introduction to the collection of essays that “our faith in our ability to do anything...is also threatened and under equal strain”<sup>56</sup>.

I hope the above remarks may help resist this temptation. Through the torn fabric of our hopes, – to use again their words – I hope you may have peered at the Sleeping Beauty which is awaiting to be awakened: she may have more to offer than the chain of improvisations that may be the response to the aggravation of the situation according to the article from the New York Times<sup>57</sup>... a chain that the current succession of summits of all nature and kinds may well illustrate.

I have tried to show you that, with its standard-setting tools in particular, the formidable cross-border and cross-sectional forum that the ILC potentially offers, and the autonomy that, in the tradition of Albert Thomas, successive Director-Generals had long been keen to claim and consolidate.

It may well be that History will in the end up proving right those who see salvation only in a complete overhaul of the multilateral system, but in what context and at what price?

This is why it seems worth, while there is still time, taking a hard look at what can readily be done with available institutional means before throwing the baby out with the bathwater. However imperfect these means may appear, they have the advantage of existing. In the case the ILO there is the additional comparative advantage of a tripartite decision-making system which does not require consensus. This leads us in conclusion to revisit Simon Deakin's concluding remark to the “Book of the Centenary” published under Alain Supiot's direction: “*What is required in present circumstances is a realistic conception of the ILO's potential - which need not be a modest one*”<sup>58</sup>.

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<sup>55</sup> Isabelle Daugareilh, “The Future of Health and Safety at Work as a Fundamental Principle and Right: Will it meet ISO and UN challenges?” in Langille and Trebilcock, *Social Justice and the World of Work*, 293-304.

<sup>56</sup> Brian Langille and Anne Trebilcock, *Social Justice and the World of Work*, Introduction, 4.

<sup>57</sup> Patricia Cohen. “Why It Seems Everything We Knew About the Global Economy Is No Longer True”. *The New York Times*. June 18, 2023. <https://www.nytimes.com/2023/06/18/business/economy/global-economy-us-china.html>

<sup>58</sup> (Translated from the French) Simon Deakin, “Justice sociale et efficacité économique: le rôle de l'OIT” in Supiot, Alain (ed), *Le Travail au XXIème Siècle* (Ivry-sur-Seine: Les Editions de l'Atelier, 2019), 349-363.



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