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# *New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization*

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## **Abstract**

*The 2008 Declaration on Social Justice for a Fair Globalization was the first attempt since the end of World War II to reformulate the ILO's message. The strain placed on the ILO's core normative functions by globalization made it indispensable. The object of the Declaration is thus first to restate the ILO's mandate and objectives to highlight their relevance to the current context. This message contains three major innovations: a strategic, proactive presentation of the mission around four core objectives; the affirmation of the inseparability of those objectives; and the strengthening of the status of the fundamental principles and rights at work vis-à-vis trade liberalization. In addition, and unlike the post-World War II Declaration of Philadelphia, the 2008 Declaration introduces various procedural innovations to translate these approaches into concrete action by the ILO and its members, and increase the Organization's influence on relevant non-state actors. For the Declaration's potential to be realized, the ILO's analytical capacity must be strengthened, requiring a reshuffling of priorities or additional resources. The current crisis may help achieve this otherwise unlikely prospect.*

## **Introduction**

On 10 June 2008, almost 10 years to the day after the adoption of the Declaration

on Fundamental Principles and Rights at Work, the International Labour Conference (ILC) adopted a declaration entitled

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'Declaration on Social Justice for a Fair Globalization'.<sup>1</sup> A major breakthrough, the Declaration was hailed (before President Obama used the same words during his April 2009 speech on the economic situation<sup>2</sup>) as a 'new foundation' of the Organization according to the words of the Swiss chairperson<sup>3</sup> who presided over the two discussions of the ILC on the subject in 2007 and 2008.

Reactions to the event suggest that outsiders may lack this enthusiasm. Even

among those familiar with the Organization, there were doubts about whether this flood of declaratory text was simply a symptom of an ageing Organization which, despite the pomp of its 90th anniversary, is deeply uncertain of its future.

It is indeed difficult to appreciate the scope of this long, composite text<sup>4</sup> which proceeds from lofty principles to the more mundane changes to internal procedures and practices,<sup>5</sup> without placing its passage and development in historical perspective. The present article aims to do exactly that.

Two preliminary observations should be made. First, this was the first occasion since the post-World War II Declaration of Philadelphia on which the ILO had carried out such a broad review of the relevance of its objectives and its capacity to achieve them in the current global context. The declared ambition of the project was precisely to emulate the Philadelphia precedent, providing a broad vision of the ILO's determination and capacity to meet the new challenge of globalization.

This prompts the second observation: how could globalization represent such a 'new challenge' requiring such an ambitious exercise, when it may be said that the ILO was precisely established for that purpose?

<sup>1</sup> In the draft 'authoritative Text' submitted for the consideration of the ILC, the Office had deliberately set aside the issue of its title, so that the discussion would first focus on an acceptable content. It was however assumed that, in one way or another, a reference to the concept of 'decent work' would find its way into the title of the final text. Some, especially within the European Union, were very keen on this possibility as this concept is widely used in various EU documents (see *infra*, sect. 2C and notes 96–98). However, when work on the substance was completed, the inclusion of such a reference in the title met with adamant objections from employers (on the ground that the concept was very transient and 'fungible') as well as lack of enthusiasm on the part of some Asian countries (due to the apparent difficulty of translating this concept into Japanese or Chinese in any meaningful manner: see Provisional Record no. 13, 2008, at para. 270, available at: [www.ilo.org/global/What\\_we\\_do/Officialmeetings/ilc/ILCSessions/97thSession/pr/lang--en/docName--WCMS\\_094005/index.htm](http://www.ilo.org/global/What_we_do/Officialmeetings/ilc/ILCSessions/97thSession/pr/lang--en/docName--WCMS_094005/index.htm)). Workers managed realistically and skillfully to draw the consequences from the situation. They traded the reference to this concept against a reference to social justice, which was certainly justified by various references in the Text to the need for a better distribution of the benefits and costs of globalization, but would otherwise have been unthinkable were it not for this *impasse* and the will not to jeopardize the consensus already reached on the substance of the Text.

<sup>2</sup> Available at: [www.newsamericanow.com/2009/04/14/obama-talks-about-new-foundation-for-america-in-economic-speech/](http://www.newsamericanow.com/2009/04/14/obama-talks-about-new-foundation-for-america-in-economic-speech/).

<sup>3</sup> Ambassador Jean-Jacques Elmiger.

<sup>4</sup> The complete text of the declaration is available at: [www.ilo.org/global/What\\_we\\_do/Publications/Officialdocuments/lang--en/docName--WCMS\\_099766/index.htm](http://www.ilo.org/global/What_we_do/Publications/Officialdocuments/lang--en/docName--WCMS_099766/index.htm).

<sup>5</sup> The idea to remove a great deal of the institutional developments in the Annex which surfaced during the discussion could have solved the problem, but the pressure of time and the fear of reopening substantive discussions did not allow it to prosper.

Even if this reality has been blurred by the successive impacts of the Great Depression years, World War II, and the Cold War's fracture of the world into hostile systems, it is a historical fact that the ILO was the child of the so-called 'first globalization'. It was designed to reconcile the requirements of social justice with the realities of international competition in that context. Logically, then, rather than a new challenge, the end of the Cold War and the emergence of a new era of globalization should have represented a return to its original *raison d'être*.

The first section of this article addresses how the transition from the Cold War to globalization nonetheless presented a novel challenge to the ILO's regulatory functions, and how the need to face this challenge through an 'authoritative text' developed during two successive Conference discussions in 2007 and 2008. The second section will analyse the resulting shift in the ILO message to highlight the renewed relevance of ILO objectives and the need to promote them with greater efficacy in the very interest of a sustainable global economy. The third section will then examine the ways in which the ILO, drawing on the unique legitimacy and comparative advantage of its tripartite structure, seeks to meet doubts raised about how effectively it promotes its objectives in the context of economic globalization, reaching beyond its traditional 'legislative' function and developing new procedures to fill identified 'regulatory' gaps or deficits. Finally, the conclusion will consider the risk that the promises of the Declaration could still be frustrated if the many procedural, financial, and organizational steps called for to give effect to the Declaration are not adequately taken.

It is significant that the Declaration was completed only weeks before the major eruptions of the financial crisis. One could speculate on what might have happened if the sequence had been different. Clearly, the crisis has vindicated the emphasis placed on social justice and the responsibility of member states actively to pursue a better distribution of both the benefits and the costs of globalization.

## 1 The Need for a 'Restatement' of the ILO's *Raison d'être* in the Wake of the Cold War and the Advent of Globalization

### *A Globalization as a Shift in the Nature of the Challenge for the ILO*

The ILO has shown remarkable resilience in the face of fundamental challenges. Indeed, these challenges have strengthened it. Though World War II witnessed the collapse of the League of Nations, to which the ILO was attached, the ILO was nonetheless established as the first specialized agency of the new UN system, with a consolidated and more ambitious mandate enshrined in the Declaration of Philadelphia.

The Cold War, in turn, tested the integrity of the ILO's tripartite structure and even its very existence.<sup>6</sup> Not only did the Organization survive the Cold War, but it also played an important role in its termination, especially through the *Solidarnosc*

<sup>6</sup> Namely with the withdrawal of the US in 1977 and its efforts to entice others countries to follow suit; see Séguin, 'Preface', in F. Blanchard, *L'Organisation internationale du Travail. De la guerre froide à un nouvel ordre mondial* (2004), at 2.

episode. Tripartism – the free confrontation and reconciliation of the respective interests of genuine worker and employer representatives with the active involvement of governments – was the institutional expression of the ILO's reformist vision of social justice, and came out considerably strengthened with the demise of the rival, revolutionary model of social justice. The 2007 report to the ILC could thus claim, with some justification, that the ILO was, for the first time, in a position to achieve what it had been established to do with all the means with which it is endowed.<sup>7</sup>

However, the transition from the Cold War to globalization was characterized by unexpected contradictions, indeed paradoxes. Three aspects of this dialectical process are particularly relevant to highlight here.

### 1 Cold War as Both Threat and 'Golden Age'

First, the Cold War represented a major threat to the ILO's institutional integrity, but was at the same time a 'golden age' for its standard-setting function.

Both political and economic factors were involved. The obvious political factor was that the competing, revolutionary vision of social justice provided an incentive for reformist measures to gain the sympathy of working people around the world by, *inter alia*, supporting the development of international labour standards. The economic factor was the extraordinary economic expansion which occurred almost simultaneously with the Cold War, recently

described in the United States as the 'not quite golden age'<sup>8</sup> and known in France as the '*Trente glorieuses*'. These descriptions reflect the unique combination of fast growing prosperity (at least among industrialized market economies) and its fairly wide redistribution among all categories of workers, as evidenced by the entry of blue-collar workers into the middle class.

These two factors contributed to the fairly steady pace of 'legislative' production by the ILO and to the relative willingness of members, especially developed countries, to consider ratifying newly adopted ILO conventions.<sup>9</sup> This long period lent credence to the belief that economic prosperity and social progress are automatically linked in a kind of 'virtuous circle'.

### 2 Globalization as a Threat to the ILO's Normative Raison d'être

The second phase of the process is that, as a result of globalization, the ILO regulatory function, squeezed between two contradictory challenges and demands, was under threat.

For many inside and outside the ILO, the demise of the Soviet model and the advent of the global economy rendered the production of new standards both politically redundant and counter-productive to economic efficiency.<sup>10</sup> For others, the problem with ILO standards

<sup>7</sup> See ILC Report V, *Strengthening the ILO's capacity to assist its Members' efforts to reach its objectives in the context of globalization* (2007), at 3, paras. 9, 11.

<sup>8</sup> R. Reich, *Supercapitalism* (2007).

<sup>9</sup> And the confirmation by newly independent countries *en bloc* of ratifications made in their name by ex-colonial powers has helped solidify the illusion that this virtuous circle was equally a universal phenomenon.

<sup>10</sup> To the extent in particular that, according to this view, direct foreign investment is in most cases the best hope for increased prosperity for all and that it may arguably be deterred by over-regulation resulting from the ratification of ILO instruments.

was not that they had become unnecessary; the problem was, to the contrary, that the standards lacked the ‘teeth’ necessary to provide the universal ‘level playing-field’ demanded by a globalized economy – Member States cannot be forced to implement standards unless they have freely chosen to ratify them.

Additional, more practical factors increased the impact of globalization on the ILO’s regulatory function, in particular, the erosion of membership of workers’ organizations, and of their influence at the national level. In addition, the abuse of the norm-setting function constituted a main drawback. Two kinds of ‘standards fatigue’ also played an important role. On the one hand, most concerns relating to the ILO mandate have already been covered by one or more ILO instruments, decelerating the rate of new instruments; and on the other hand, governments increasingly face a proliferation of legislative activity from universal and regional organizations.<sup>11</sup>

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But the empirical evidence is lacking (see for instance the results of the inquiry conducted by the ILO in 1996 as reflected in document GB. 267/WP/SDL/1/1, available at: [www.ilo.org/public/english/standards/relm/gb/docs/gb267/index.htm#GB](http://www.ilo.org/public/english/standards/relm/gb/docs/gb267/index.htm#GB)) or even contradictory in the case of fundamental rights (according to the OECD 1996 study on *Trade, employment and labour standards: A study of core workers rights and international trade*, available at: [www.oecdbookshop.org/oecd/display.asp?K=5LMQCR2K1M5B&DS=Trade-Employment-and-Labour-Standards](http://www.oecdbookshop.org/oecd/display.asp?K=5LMQCR2K1M5B&DS=Trade-Employment-and-Labour-Standards)).

<sup>11</sup> See, among others, B. Hepple, *Labour Laws and Global Trade* (2005), at 35 ff; Simpson, ‘Standard Setting and Supervision: A System in Difficulty’, in J.-C. Javillier, B. Gernigon and G.P. Politakis (eds), *Les normes internationales du travail: un patrimoine pour l’avenir, Mélanges en l’honneur de Nicolas Valticos* (2004), at 47 ff, also available at: [www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ormes/documents/publication/wcms\\_087423.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ormes/documents/publication/wcms_087423.pdf).

In any event, the combined effect of these factors was to discourage the ratification of conventions, and in particular – with some remarkable exceptions – the most recent ones.<sup>12</sup> The stagnation of ratifications in turn fed scepticism about the capacity of the ILO to establish a universal ‘level playing-field’ necessary to counter the pessimistic vision of globalization as a ‘race to the bottom’.

Admittedly, such scepticism did not affect other work of the ILO, developed over the years, particularly technical cooperation activities, which continue to benefit from the full support of its member states. Yet, this work could hardly substitute for the legislative function, perceived (rightly, from a strictly constitutional view) as the Organization’s core mandate. The risk was that, if the ILO appeared unable or unwilling to adjust its regulatory function to the demands of globalization, its very *raison d’être* would be undermined and the Organization would be reduced to one of many easily interchangeable agencies providing development assistance.<sup>13</sup>

This is precisely the risk which developed during the 1990s. The search for new regulatory answers led many traditional ILO ‘clients’ to turn to the regulatory mechanisms used by a rising star in the global order: the WTO. If recent efforts to create a trade–labour link have been no more successful than others since the failure of the Havana Charter, they nevertheless triggered a series of debates at

<sup>12</sup> Hepple, *supra* note 11, at 47–73.

<sup>13</sup> See on this topic the polemic analysis by Standing, ‘The ILO: An Agency for Globalization?’, 39 *Development and Change* (2008) 355.

the ILO and the WTO, ultimately providing a catalyst for the ILO to explore alternative regulatory solutions.

### 3 *The WTO Model as a Spur for Change*

The third aspect of the dialectical process is that the rival regulatory model turned out to be the indispensable spur in the successful search for new regulatory methods within the ILO.

While efforts to introduce a labour dimension into trade liberalization at the universal level started at an early stage, the dialectical interplay between debates in the GATT, WTO, and the ILO can be traced back to the attempt by some industrialized countries to introduce ‘social clauses’ during 1993’s final Uruguay Round of negotiations, which led to the establishment of the WTO. This move was echoed in the ILO Director-General’s report on the occasion of the 75th Anniversary of the ILO,<sup>14</sup> which raised the issue of extrapolating to other fundamental rights (non-discrimination and freedom from forced labour – broadly understood as covering both adult and child labour) the type of special procedure for universal monitoring within the ILO that was already granted to Freedom of Association. With the additional impetus provided by the Copenhagen World Summit for Social Development in 1995,<sup>15</sup>

the first Conference of Trade Ministers in Singapore in 1996 – following the entry into force of WTO agreements – led to the adoption of a statement expressing general support for labour standards, while sending the ball back into the ILO’s court.<sup>16</sup> Whatever the real intentions behind this statement, the ILO took it as an invitation to act, and promptly moved ahead with the idea of establishing a mechanism for the universal guarantee and promotion of fundamental workers’ rights independent of ratifications. In due course this mechanism took the form of the 1998 Declaration on Fundamental Principles and Rights at Work and Its Follow-up.<sup>17</sup> As will be described in more detail in section 3, the ILO succeeded, through this document, in identifying a ‘platform’ of universally applicable ‘rules of the game’ necessary to ensure that progress in market integration and increased economic prosperity would go hand-in-hand with social progress.

While the Ministerial Conference of Singapore provided the seed from which the 1998 Declaration and its follow up eventually sprang, it is in a way the failure of the Seattle Conference in 1999 which – distantly – lay at the origin of the 2008 Declaration. This failure was linked *inter alia* to proposals from the EU and the USA to organize discussions on the social dimension of trade liberalization under the WTO umbrella, which met

<sup>14</sup> ‘Defending Values, Promoting Changes’, ILC, 81st session (1994), ch. 3. It is interesting to note that this report was published before the Marrakesh Conference (in April 1994) but was discussed after it (in June 1994).

<sup>15</sup> In particular the call on governments contained in para. 54 of the Programme of Action (available at: [www.un.org/esa/socdev/wssd/text-version/agreements/index.html](http://www.un.org/esa/socdev/wssd/text-version/agreements/index.html)), that when they are parties to conventions relating to ‘basic workers rights’ they should fully implement them, and when this is not the case they should ‘take into account the principles embodied’ therein.

<sup>16</sup> See *infra*, the relevant extract of the Singapore Ministerial Declaration in sect. 3B2.

<sup>17</sup> ILO Declaration on Fundamental Principles and Rights at Work – ILC, 86th Session, Geneva, June 1998, available at: [www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms\\_099766.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_099766.pdf)



with radical opposition from most developing countries.<sup>18</sup>

The obvious alternative to a WTO-convened discussion on the social implications of trade liberalization was a symmetrical discussion within the ILO framework. And again the ILO was quick to seize the opportunity. The idea of establishing a Commission<sup>19</sup> to write an independent report on the social dimensions of globalization, intended not only for the ILO but for the UN system and beyond, was thus submitted to the Governing Body<sup>20</sup> by the Director-General, Juan Somavia, and accepted after considerable discussion.

While the report of the World Commission contained only passing references to possible constitutional implications for the ILO, one of its major concrete achievements was to trigger a new awareness within the Organization that the challenge of strengthening the social

dimension of globalization first and foremost implied a need for the ILO itself to reassess its institutional capacity to achieve its own objectives.

In such a context, the idea gradually emerged of placing an item on the agenda of the ILC to open a formal debate in a legal framework suitable for the discussion and adoption of an 'authoritative document'.<sup>21</sup> This fundamental step was achieved (though not without difficulties) in November 2005.

### ***B A Debate on the Capacity of the ILO to Promote its Objectives Focused on the Relevance of its Message and the Efficacy of its Methods in the Context of Globalization***

The convoluted title of the item eventually placed on the ILC agenda to accommodate a debate on this matter<sup>22</sup> reflected the uncertainties relating to the scope and limits of a possible 'authoritative document'.

Nonetheless, the emphasis placed on the ILO's 'capacity' opened up three

<sup>18</sup> See an elaboration of this result in Charnovitz, 'The International Labour Organization in its Second Century' [2000] *Max Plank Yrbk UN L* 147, at sect. II (6).

<sup>19</sup> The Commission, composed of prestigious personalities – including a Nobel Prize winner in Economics – was established in Feb. 2002 and released its final report in Feb. 2004. Although it would be excessive to claim that this report was more successful in shifting the course of globalization than many others which appeared either before or after, its analyses were instrumental in raising awareness within the UN system and beyond about the urgent need to achieve greater 'policy coherence' between economic and social concerns within and among members. And it contained warnings about the 'unsustainability' of the present trend of financial globalization which have now been vindicated by the crisis.

<sup>20</sup> See GB.282/WP/SDG/1, available at: [www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/sdg-1.pdf](http://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/sdg-1.pdf), and GB.282.12, available at: [www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/gb-12.pdf](http://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/gb-12.pdf) Geneva, Nov. 2001.

<sup>21</sup> While the strategy of decent work has already been the topic of several discussions in the ILC since 1999, the nature of these discussions (discussion of the Director-General's report or budgetary debates) was too limited to enable the formulation of a new ILO statement on this concept. For a summary of the different steps see ILC Report V, *supra* note 7, p. v, n. 1.

<sup>22</sup> The title for the 2008 session read as follows: 'Strengthening the ILO's capacity to assist its Members' efforts to reach its objectives in the context of globalization: Continuation of the discussion on strengthening the ILO's capacity and possible consideration of an authoritative document, possibly in the form of a Declaration or any other suitable instrument, together with any appropriate follow-up, and the form they may take.'

broad fields of investigation: the continued relevance of the ILO's objectives and message in the context of globalization; the relevance of its legal and financial means of action to achieve these objectives in the new context; and, finally and more prosaically, its 'governance', i.e. the efficacy of its long established institutional practices in promoting these objectives.

For obvious reasons, entering into a debate about the relevance of the ILO's constitutional means of action was a non-starter.<sup>23</sup>

This is why the various informal documents and formal reports which framed the two successive discussions of this subject at the ILC in 2007 attempted to focus on the remaining issues: 'reformulating' or 'repackaging' the message and objectives; and modernizing the ILO's governance through a detailed review of deeply enshrined institutional practices, in order to establish a clearer and more systematic link between members' needs and ILO activities.

However, even this more limited and pragmatic scope of debate raised divergent objections. Some agreed that the ILO could update and modernize its message through a Declaration built upon the dynamics implied by the concept of decent work, but disputed the need for a broader review of governance and institutional practices, considering these issues to be sufficiently addressed through the implementation of 'result-based management' techniques. Others were in favour

of extrapolating the system of global review and reporting applicable to fundamental rights to other strategic objectives, both to rationalize the work and agenda of the ILC and more generally to improve the governance of the Organization; they objected, however, to the 'repackaging' of the ILO's message to the world as an unnecessary and potentially divisive exercise, likely only to highlight latent contradictions.<sup>24</sup>

Ultimately, these diverging concerns balanced each other out, opening the way towards a Declaration with unprecedented scope: its reformulation of the ILO message is as sweeping as the Declaration of Philadelphia; but, unlike the latter,<sup>25</sup> it is also operational, including provisions for follow-up and continuous monitoring of impact. Moreover, like the 1998 Declaration, it is complemented by an Annex detailing the steps to be taken – in particular by the Office, by the Director-General, and by members themselves – to give effect to its content.

<sup>23</sup> First, such controversy could have caused a constitutional and political deadlock. Secondly, as will be further elaborated, its voluntary means of action were perfectly congruent with the nature of the objectives.

<sup>24</sup> 2007 Report, chapter 1, paras 26 ff, available at: [www.ilo.org/public/english/standards/relm/ilc/ilc96/pdf/rep-v.pdf](http://www.ilo.org/public/english/standards/relm/ilc/ilc96/pdf/rep-v.pdf); 2008 Report, para. 37, available at: [www.ilo.org/global/What\\_we\\_do/Officialmeetings/ilc/ILCSessions/97thSession/reports/lang--en/docName--WCMS\\_091586/index.htm](http://www.ilo.org/global/What_we_do/Officialmeetings/ilc/ILCSessions/97thSession/reports/lang--en/docName--WCMS_091586/index.htm)

<sup>25</sup> There had been some attempt to complement the Declaration of Philadelphia with some regular review by the ILC of relevant developments (including in the economic field), but it met with resistance and a convenient excuse, namely the establishment of ECOSOC. See E. B. Haas, *Beyond the Nation State: Functionalism and International Organisations* (1964).



## 2 Meeting the Challenge of Greater Relevance to the Globalization Context by Rearticulating the ILO's Message and Objectives

The ILO's objectives are stated in its Constitution's Preamble and in the Declaration of Philadelphia.<sup>26</sup> Their phrasology does not necessarily resonate with the aspirations and anxieties arising from the rapid, constant, and apparently unpredictable flow of changes inherent in the global economy. In view of the Organization's broad mandate the general public should feel directly concerned by its successes and achievements, and it was therefore essential to the ILO's very efficacy to mobilize public support. For that purpose, the ILO had to adjust its message to highlight its modern relevance. The following pages will examine both how the 2008 Declaration managed to make such an adjustment possible, and the scope of the adjustment made.

### *A Reformulating the Message without Changing the Constitution: the Declaration Device*

There is a *prima facie* difficulty in resolving the 'mismatch' between contemporary realities or expectations and the phras-

eology of the Constitution.<sup>27</sup> It is clear from past experience that amending the Constitution to that end would not be feasible.<sup>28</sup> The use of a 'Declaration' provided a way out of this apparent dilemma.

A Declaration (previously utilized on four occasions in the ILO, including the 1963 Declaration on Apartheid<sup>29</sup>) has been described by the UN Legal Counsel as a 'formal and solemn instrument suitable for *rare* occasions when principles of lasting importance are being enunciated'.<sup>30</sup> Though formally correct, this characterization far from exhausts the legal richness of the device.

<sup>27</sup> Art. 36, ILO Constitution: '[a]mendments to this Constitution which are adopted by the Conference by a majority of two-thirds of the votes cast by the delegates present shall take effect when ratified or accepted by two-thirds of the Members of the Organization including five of the ten Members which are represented on the Governing Body as Members of chief industrial importance in accordance with the provisions of paragraph 3 of article 7 of this Constitution'.

<sup>28</sup> The record demonstrates that, as a result of the demanding conditions enumerated in Art. 36 of the Constitution, constitutional amendments have failed to be passed, save for a few procedural amendments, changes which aim to reduce the obligations of members, and in extreme situations, such as those encountered following World War II. The difficulty is, so to speak, aggravated by the fact that from a formal point of view the Constitution cannot even be modified through interpretation, as the ICJ is the only entity entitled to give its opinion as to its meaning. The Constitution, like any treaty, could however be modified through the agreement of all member states (parties).

<sup>29</sup> Declaration concerning the Policy of 'Apartheid' of the Republic of South Africa, ILC, 8 July 1964.

<sup>30</sup> Referenced in Report VII (1998), available at: [www.ilo.org/public/english/standards/relm/ilc/ilc86/rep-vii.htm](http://www.ilo.org/public/english/standards/relm/ilc/ilc86/rep-vii.htm) (emphasis added). Very similar language was used to justify the use of this device with respect to Apartheid in 1964: *ILC Record of Proceedings* (1964), at 484.

<sup>26</sup> They inevitably also bear the mark of contemporary concerns (e.g. the Bolshevik threat for the former and post-war reconstruction for the latter instrument).

While it has been compared to a ‘genetically modified recommendation’ (i.e. a recommendation with a built-in follow-up), the Declaration device cannot be reduced to a normative instrument. The two are fundamentally different, not only as a result of the distinct procedures followed for adoption, but also in their respective objects. Normative instruments are a one-way tool through which the ILO provides guidance to its members about the steps recommended to implement its objectives. A Declaration is the joint expression of the views and commitments shared by the Organization and its members within the framework of the ILO’s universal organ: the ILC. This dual characteristic is essential to an understanding of the legal nature of the Declaration.

It explains in particular that the Declaration (even though it obviously cannot modify nor even formally interpret the Constitution; the latter is the exclusive prerogative of the ICJ) nevertheless entails important legal consequences *vis-à-vis* the Organization and its members. As will be further elaborated below, it imparts legal meaning to the concept of ‘decent work’ within the ILO. Its unanimous adoption by all members would make it difficult – if not formally impossible – to challenge the restatement of the ILO’s objectives contained therein on grounds of variance with the provisions of the Constitution or the Declaration of Philadelphia.

### **B *The ILO’s Message and Objectives Revisited***

Three layers of questions may conveniently help compare the ‘message’ enshrined in the Constitution’s Preamble

and in the Declaration of Philadelphia to that elaborated in the Declaration. The first is related to the ‘why’ of the ILO’s mandate; the second is related to the ‘what for’, which refers to the scope and limits of that mandate; and the last is related to the ‘how’, i.e. the method and means by which the ILO is meant to fulfil its mandate.

#### *1 Why the ILO? From the Bolshevik Threat to the One of an Implosion in the Globalization Process*

The justifications for the creation of the ILO and its mandate as presented in the Preamble to the Constitution are organized into two themes. The first is the moral (some say ‘altruistic’) duty to promote social justice, thereby remedying the situation of workers which resulted from successive industrial revolutions. In that respect, there is a striking continuity of inspiration in and adherence to humanist values between the original text and the motives expressed in the 2008 Declaration, reflected for instance in its reaffirmation that labour is not a commodity or the affirmation that all individuals should be able to achieve their personal fulfilment and contribute to the common well-being.

The second is of a more practical and self-interested nature. It relates to the risk of revolutionary agitation and contagion, should that situation continue unabated. This was very much in the minds of the founders, and is reflected in the ‘unrest so great that the peace and harmony of the world are imperilled’ referred to in the Preamble. As previously noted, the disappearance of the Bolshevik threat after the Cold War and the advent of globalization not only reduced the drive for the setting of new standards, but, according to some

more extreme views, may have made the very existence of the ILO redundant. The Declaration reverses the claim that globalization would be the magic formula to bring about prosperity and social progress for all without toil. While recognizing in its Preamble the progress made possible by the process of economic integration and cooperation, it makes clear that the very sustainability and survival of the global economy may be 'imperilled' (to use the original Versailles language) if the ILO objectives and the social justice perspective in globalization are not actively promoted. This claim is reflected in the very title of the Declaration.<sup>31</sup> And the financial crisis which developed a few weeks later provided a powerful support for this claim.

However, be it for moral or self-interested motivations, no member can effectively remedy these evils alone. This is the 'prisoner's dilemma' reflected in the famous statement of the Constitution's Preamble according to which 'the failure of any nation to adopt human conditions is an obstacle in the way of other nations which desire to improve'. It provides the main justification for collective actions within the framework of the ILO. But it inevitably raises the question – to which we shall return in section 3 below – of the means at the ILO's disposal to make sure that Members do not opt for 'free rider' logic.

## 2 What For? From an Essentially Corrective to a More Strategic and Proactive Vision of ILO Objectives

It is not easy to get a precise global vision of the ILO's objectives from existing constitutional texts. The Preamble to the

Constitution provides a non-exhaustive and somewhat random enumeration of subjects<sup>32</sup> while the 'extraordinarily ingenious'<sup>33</sup> reformulation contained in the Declaration of Philadelphia is so broad that all economic and social matters could potentially fall within its mandate. While this situation provides greater flexibility to adapt to new challenges, this situation does not evoke a clear image among the general public. The 2008 Declaration, building upon the decent work concept, thus tried to project a more dynamic and progressive vision of the ILO objectives.

- From random enumeration to strategic presentation of ILO objectives
- The first noticeable change is that the subjects randomly and non-exhaustively spelled out in the Preamble are now covered by four essential 'themes', recognized some 10 years ago within the ILO as the Organization's four 'strategic objectives',<sup>34</sup> and which together form the 'decent work agenda'.

Moreover, the order in which these 'strategic objectives' now appear is determined by their respective functions and links to each other. Thus, employment is mentioned first because it is impossible to have decent work without adequate work opportunities. Next comes social protection (understood in a broader meaning as will be discussed later), which is required for these quantitatively adequate opportunities to qualify as qualitatively decent.

<sup>32</sup> It goes from working hours to unemployment, living wage, workers compensation, child labour, migrant workers, equal remuneration, etc.

<sup>33</sup> Haas, *supra* note 25, p. 159.

<sup>34</sup> It might be more appropriate to speak of the 'four pillars' of the constitutional mandate in view of the fact that strategies can change.

<sup>31</sup> See *supra* note 2.

Social dialogue comes third, as it is the process whereby the quantitative and qualitative conditions of decent work can be achieved in the framework of national realities and preferences. Finally, fundamental rights end the list, not because they are less important but, quite to the contrary, because they are the *sine qua non* for achieving the other objectives in conditions of freedom and equality.

- From a corrective to a proactive approach to their content

This new proactive approach can be illustrated with respect to each of the four strategic objectives as follows.

*From unemployment prevention to the promotion of employment:*

The Preamble to the 1919 Constitution refers to the ‘prevention of unemployment’ among various other subjects: e.g. to maximum hours of work, or to a guaranteed salary which ensures adequate living conditions. The Philadelphia Declaration, strongly influenced by Keynesianism, reflects a more dynamic perspective and proclaims simultaneously in section III (a) the objective of ‘full employment and the raising of standards of living’ and in paragraph (b) the need to ensure at the same time the quality of the occupations thus made available.

The 2008 Declaration aims at conditions for increasing the creation and development of work, the ability of individuals to benefit best from changing possibilities as well as employment opportunities. It also goes further than any of the existing constitutional texts by recognizing the essential role played by enterprises and entrepreneurship (private and public) in job creation, and the necessity of creating an environment conducive to their sustainable development.

*From protection against risks to ‘active security’:*

For internal administrative reasons, the strategic objective of ‘social protection’ brings together ‘decency’ elements relating to labour conditions (working time and wages), social security, and safety at work. Great care had to be taken not to lose or undermine any of the principles or objectives established in the founding documents, including former Article 41 of the Constitution containing the so-called ‘Universal Labour Charter’ (which spelled out basic requirements as regards, *inter alia*, maximum working hours, weekly rest, and wages), whilst bearing in mind the new realities and aspirations of an Organization which had become much more universal (and genuinely tripartite) than in 1919 or 1944.<sup>35</sup> Although the express reference to the 1919 Universal Labour Charter which appeared in the Office’s draft was not kept, the definitive Declaration text quite literally integrates the main points of Philadelphia.<sup>36</sup>

The question also arose of introducing the idea of a ‘dynamic security’, which is sometimes referred to as ‘positive social protection’,<sup>37</sup> in order to anticipate

<sup>35</sup> The Office tried to ‘reactivate’ the Universal Labour Charter which was the subject of Art. 41 of the pre-war Constitution and which *inter alia* proclaimed as being of special and urgent importance ‘the payment to the employed of a wage adequate to maintain a reasonable standard of life as this is understood in their time and country’ and ‘the adoption of an eight hours day, or a forty-eight hours week . . . where it has not been attained’, as well as the adoption of ‘the weekly rest of at least twenty-four hours’.

<sup>36</sup> Even to the extent of maintaining the discrepancy between the English and French versions!

<sup>37</sup> A. Giddens, *Europe in the Global Age* (2007), at 96 ff.

unprecedented and largely unpredictable changes provoked by technological, psychological, and other factors such as the present financial crisis. The three essential elements of this dynamic security, which can be found in the Declaration, are:

*first*, the shaping and enhancement of individual skills and abilities;

*secondly*, social security which grants the security of professional careers in a context in which the usual would be less a job for life, than a case of several jobs, which, in the interest of economic efficiency, must be possible with minimal individual and collective trauma; and

*thirdly*, conditions pertaining to payment and other elements representing a fair share in the benefits of progress (added by the 1998 Declaration) to which the workers have contributed.<sup>38</sup>

*From protecting tripartism to promoting social dialogue:*

No explicit reference is made to 'social dialogue' in the ILO's Constitution. The concept, which was already familiar in other *fora*, was initially introduced among the four 'strategic objectives' of the ILO for reasons partly related to the rationalization of the internal administrative structure of the Office. A resolution adopted by the ILC in 2002 further consolidated its status<sup>39</sup> (without expressly providing a

definition), but it did not stop the sometimes heated debates about its real meaning and implications.<sup>40</sup>

By tying the concepts of social dialogue and tripartism together, the 2008 Declaration makes it clear that they are complementary and jointly perform an essential function in the implementation of other 'strategic objectives'.<sup>41</sup> This common function goes far beyond the prohibition of state interference with freedom of association and collective bargaining; it is instead a positive and dynamic function related to the necessity of 'adapting the implementation of the strategic objectives to the needs and circumstances of each country', taking into account the requirements and guarantees enshrined elsewhere in the text as regards the freedom and representation of the organizations concerned. As noted below, the discretion accorded to the members when performing this function is confirmed and framed by the provisions of Section I C of the Declaration to avoid arbitrariness in the selection.

<sup>38</sup> This essential requirement, which was already included in the Philadelphia Declaration and explains the recognition of the 'particular significance' of fundamental rights in the 1998 Declaration, is used again in Section I A (ii) of the new Declaration and justifies its title (even though the latter, as noted in the introduction to this article, is in fact the result of a negative choice). See *supra* note 2.

<sup>39</sup> Without really providing a clear definition, except to suggest that the range of actors-interlocutors involved in social dialogue is wider than those concerned by tripartism: *ILC Record of Proceedings* (2002), at 21, 24–26.

<sup>40</sup> See *supra* note 14. On the one hand some have argued that to the extent that it is supposed to develop between representative organizations of employers and workers that are directly targeted by the ILO's objectives, social dialogue overlaps with the promotion of freedom of association and collective bargaining as already covered by the objective 'fundamental rights'. If, on the other hand, social dialogue is supposed to reach beyond the abovementioned organizations, others have worried either that it may be impossible to make sure that these other organizations are truly relevant and representative from the perspective of the objectives or that it may contribute to further undermining the role of genuine workers' and employers' organizations.

<sup>41</sup> This innovative approach to the function of social dialogue is accompanied by a prudent but significant provision in the Preamble regarding cross-border negotiation between social partners.

*A strengthened, unequivocal status for fundamental rights:*

One of the most significant innovations of the 2008 Declaration relates to fundamental principles and rights at work. This may seem redundant, considering these rights are the object of the 1998 Declaration and Its Follow-up. However, the adoption of this earlier Declaration was possible only because it included a significant concession: the addition of text based on a paragraph in the ministerial declaration of Singapore whereby Ministers of Trade expressed their rejection of ‘the use of labour standards for protectionist purposes’.<sup>42</sup> This formula was inserted with some adjustments into paragraph 5 of the 1998 Declaration.<sup>43</sup>

This ‘extraordinary’ wording has provoked some indignant comments.<sup>44</sup> It has to be recognized that the formula is somewhat ambiguous. But any shade of ambiguity is now removed by Section I A (iv) of the new Declaration according to which:

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

When read with reference to the *chapeau* of the paragraph, which refers to fundamental rights ‘as both rights and “enabling conditions” that are necessary for the full realization of all of the strategic objectives’, the idea behind this statement becomes perfectly clear. While it makes sense, as stated in Singapore, that labour standards should not be invoked for protectionist purposes insofar as they are contingent upon the level of development and capacities of members, this is not true with respect to fundamental rights to the extent that they are also enabling conditions for furthering other rights. Failure to ensure the application of these rights cripples the ability of those concerned to claim and obtain, on an individual or collective basis, their fair share of the additional wealth their contribution has generated, in the form of better working conditions and wages. This logic may have far-reaching consequences for the strengthening of these rights *vis-à-vis* ‘trade disciplines’, as will be examined somewhat more in section 4.

*3 How? Not a question of additional means of action but of adopting a new integrated approach*

*Existing means of action fit the nature of the objectives:*

As noted in the Introduction, the question of the ILO’s capacity inevitably calls into question the voluntary character of its means of action, and in particular of its standards. This voluntary approach was a deliberate choice intended to ensure

<sup>42</sup> See WTO, Ministerial Conference of Singapore 1996, ministerial declaration, WT/MIN(96)/DEC, 18 Dec. 1996, at para. 4, available at: [www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/singapore\\_declaration96\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf).

<sup>43</sup> ILO, Declaration on Fundamental Principles and Rights at Work (June 1998), at para. 5, available at: [www.ilo.org/public/centrocarib/convenciones\\_12.shtml](http://www.ilo.org/public/centrocarib/convenciones_12.shtml).

<sup>44</sup> See for instance Charnovitz, ‘Trade, Employment and Labour Standards: the OECD Study and Recent Developments in the Trade and Labour Standard Debate’, 11 *Temple Int’l and Comp LJ* (1997) 131, at 156–157; Langille, ‘The ILO and the New Economy – Recent Developments’, 15 *Int’l J Comp Labour L and Ind Relations* (1999) 225, which refers to the ‘extraordinary article 5’; and La Hovary, *supra* note 29, at 59–62. It was criticized in particular for blindly following in the footsteps of the WTO, although these criticisms may not be entirely justified in light of a more careful exegesis. See also I. Daugareilh (ed.), *Mondialisation, travail et droits fondamentaux* (2005), at 29–30.



that adopted standards would not simply reflect the lowest common denominator, as would have been inevitable had the course of a binding international legislation initially envisaged been followed.<sup>45</sup>

Historical experience has confirmed that the *sustainable* implementation of social justice requirements is rooted in the collective choices and preferences of the parties concerned, i.e., on the result of free and genuine tripartite dialogue.<sup>46</sup> Based on the report and discussion in 2007, the 2008 Declaration made it clear that the implementation of ILO objectives through tripartite discussions is inherent to their very nature. This however begs the question of the basic 'rules of the game' required to ensure that those concerned can express their preferences without coercion or interference, thus making such tripartite discussion both possible and meaningful. This will be further elaborated in section 4.

*The shift from juxtaposition to an integrated approach to strategic objectives as reflected in the 'decent work' concept:*

To a modern student the random juxtaposition of ILO's objectives in the Preamble

to the Constitution and as further elaborated through conventions and recommendations could leave the impression that they are independent and unrelated, reflecting what Professor Supiot once dubbed a 'self-service approach'.<sup>47</sup> Such an approach is increasingly at odds with the realities of globalization, which have made the linkage between the various strategic objectives more evident. Thus, to achieve real efficiency in promoting any of these objectives it is not enough to state what ought to be done with respect to each of them; it is necessary to take into account the fact that these objectives interact and to understand better the way in which they do. While the issue is certainly not a new one in the ILO,<sup>48</sup> there was no clear and authoritative statement on the matter,<sup>49</sup> either in ILO standards or elsewhere.

The concept of 'decent work', coined by J. Somavia in 1999,<sup>50</sup> a year after the

<sup>45</sup> J.T. Shotwell, *The Origins of the International Labour Organization* (1934), i, 145–154; M. Guerreau, *L'organisation permanente du travail* (1921), at 266 ff; Alston, 'Labour Rights as Human Rights: The Not So Happy State of the Art', in P. Alston (ed.), *Labour Rights as Human Rights* (2005), at 1, 13.

<sup>46</sup> In this regard, Report V, submitted to the 2007 Conference, *supra* note 7, at para. 12, noted that '[t]here are no readymade formulas for social justice. This is particularly apposite in the complex world of rapid technological and commercial change driving major and constant adjustments in the world of work. Progress is more likely and more sustainable where it is achieved through free discussions between those concerned'.

<sup>47</sup> Supiot, 'Du nouveau au self-service normatif: la responsabilité sociale des entreprises', in *Études offertes à Jean Pélissier. Analyse juridique et valeurs en droit social* (2004), at 541 'Du nouveau au self service normatif', *Analyses juridiques et valeurs en droit social*, in Dalloz, *Mélanges en l'honneur de J. Pelissier* (2004).

<sup>48</sup> See for instance the debates and Declaration of Principles and Programme of Action of Tripartite World Conference on Employment, Income Distribution and Social Progress and the International Division of Labour (1976), GB.201/3/2.

<sup>49</sup> This reticence is becoming all the more problematic since other organizations do not show any such inhibitions. And their vision of the relationship between economic and social objectives reflects at best a diachronic view, whereby the size of the pie must be increased in order to increase the shares, rather than an integrated view of that relationship.

<sup>50</sup> 'Decent Work', report of the Director-General to the ILC, 87th session, Geneva, 1999, as well as 'Reducing the decent work deficit: a global challenge', report of the Director-General, ILC 89th session, Geneva, 2001.

adoption of the Declaration on Fundamental Principles and Rights at Work, was a decisive step towards the formalization of this issue, providing a synthesized and non-controversial (except perhaps in some academic circles)<sup>51</sup> view of the ILO's objectives and programmes, while avoiding sensitive subjects which could reopen the North–South divide, such as the social clause issue. The notion did indeed prove to be highly consensual and has enjoyed unquestionable success inside and outside the Organization.<sup>52</sup> The paradox, however, was that the concept lacked clear legal standing and meaning within the framework of the ILO itself.

It was not easy to remedy the situation. To a large extent, the success of the decent work concept was due to its malleability.<sup>53</sup> As a result, the idea of elaborating its content or meaning in one way or another met with staunch resistance. Thus, employers promptly drew a 'red line' that should not be crossed with respect to the issue of a possible 'authoritative text', on the ground that its content must be left to each country to determine

with reference to its own specificities and preferences.<sup>54</sup>

Three main steps, developed in successive documents, helped overcome these objections while consolidating the added value of the concept. The first step was to take the heat out of the definition issue by underlining that axiomatically the concept of decent work could neither modify nor increase the scope of the constitutional obligations binding the ILO or its members.

The second step was to specify that decent work is not about new content but rather a new approach to existing objectives. Its 'added value' is thus: (i) to give synthesized expression to these objectives so that they could intuitively appeal to constituents and the public at large without modifying their nature or scope; (ii) formally to recognize, for the first time, an essential common feature of these objectives – that of being inseparable parts of a coherent whole.

This is succinctly put as follows in section I B of the Declaration: '[t]he four strategic objectives are inseparable, inter-related and mutually supportive. The failure to promote any one of them would harm progress towards the others'.<sup>55</sup>

<sup>51</sup> It proved to be somewhat controversial for those who saw it as a further confirmation of the selling off of standards-related action. See Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime', 15 *EJIL* (2004) 457, at nn 143–146. Also see Standing, *supra* note 13.

<sup>52</sup> It was even the slogan for the World Day for Decent Work on 7 Oct. 2008.

<sup>53</sup> This has especially been proven correct in the field of technical cooperation, where the concept has been able to provide a convenient heading behind which projects can be developed which respond in reality to priorities motivated by considerations other than internal politics: see Report V, *supra* note 7, at para. 67.

<sup>54</sup> See ILC Report VI (2008), at para. 26. A certain number of governments including that of the US also expressed misgivings about losing some of the flexibility they had enjoyed in financing *à la carte* decent work technical cooperation projects which focused on issues of special interest to them.

<sup>55</sup> After considerable discussion within the 'drafting group' of the competent Conference Committee, the adjective 'inseparable' was found preferable to 'indivisible', which had been used in the Office's draft, in order to avoid a connotation that was too 'human-rightist'. This seems to reflect a tripartite desire to stick to the logic of the ILO mandate and maintain the proper balance between considerations of principles and functional considerations of practical efficiency which are built into that mandate.

The third step was to introduce appropriate guarantees that this recognition, while entailing some quite concrete consequences, would not encroach on each member's legitimate responsibility to make a final adjudication as regards the relative weight to be given to each of these objectives. The text makes it clear that there is no question of imposing a uniform formula as regards the manner of combining these objectives in practice. Thus, the affirmation of the inseparable nature of the objectives is in itself inseparable from the recognition that each state has discretion to compose a 'cocktail' that is best suited to national circumstances and the social partners' collective preferences.

Although the proportions of the ingredients for the 'cocktail' cannot be imposed, governments are not free to invoke national tastes as an excuse to get rid of the ingredients they may not fancy. The Declaration provides two key safeguards in this regard. The first is that those concerned must have a say in the determination of alleged national preferences or specificities through their representative organizations. This may go as far as their involvement in the approval of a 'national strategy'.<sup>56</sup> The second, which can be found in section II B (iii), requires members to review their track records in terms of ratification of ILO conventions, not only with a view to raising the overall ratification level, but also to

progress towards the various strategic objectives in a more balanced way.<sup>57</sup>

From the viewpoint of the ILO's perspective, this re-articulation of the organization's purpose, objectives, and strategies forms a coherent framework which must guide the activities, priorities, and institutional practices of the Organization. It establishes the foundation for specific reforms of institutional practices so as to translate these paradigm changes into methodology, and also provide guarantees that allow the Conference, with the close collaboration of the Office and the Governing Body, to determine and supervise whether these are effectively being carried out.

### **3 Meeting the Challenge of Greater Efficacy in the Globalization Context through New Regulatory Approaches**

The modernized presentation of the ILO's objectives in the 2008 Declaration was intended to improve the visibility, credibility, and relevance of its message among decision-makers and the general public. The obvious objection is, however, that this exercise is unlikely to bear fruit, and could even sow frustrations if the ILO is not endowed with appropriate new means of action for that purpose.

<sup>56</sup> Which goes much beyond their involvement in action to be taken with respect to ILO instruments as provided for under the Tripartite Consultation (International Labour Standards) convention (no144), and even the related recommendation (no 152) the scope of which extends to other 'activities' of the ILO.

<sup>57</sup> Special emphasis is placed on certain instruments considered of special significance 'from the viewpoint of governance', and this reflects a striking change in attitude made possible by the spirit of mutual understanding that developed over these long negotiations.

There are very important financial implications to this question.<sup>58</sup> Notwithstanding the diversity and flexibility of other means of action<sup>59</sup> available under the ILO Constitution, the debate on the ILO's efficacy inevitably tends to focus on its most symbolic means of action to attain its objectives, i.e., 'its standards and their perceived limits'. On the one hand, the standards express, with an unparalleled legitimacy and authority derived from their tripartite discussion and adoption, the desired content and concrete implications of ILO constitutional objectives, taking into account members' diverse circumstances and realities at any given time. But, on the other hand, it must be objectively recognized that this form of regulatory action suffers from three main constraints which significantly increased with the impact of globalization.

The first is that implementation is subject to ratification in the case of conventions and to incorporation into national law in the case of both conventions and recommendations. In other words, implementation is subject to the goodwill of members. The ILO does not lack the 'teeth' needed to enforce the standards;<sup>60</sup> yet, especially in view of the free movement

of capital and other factors of the global economy, their universal application cannot be guaranteed. The second is that these standards provide compartmentalized guidance to the achievement of the objectives, whereas globalization has made it increasingly obvious that those objectives are interdependent and interactive. The third constraint is that these instruments and related supervisory procedures are intended primarily for state implementation, whereas globalization has witnessed the emergence and proliferation of new actors, public and private, as well as the increasing influence on social matters of international organizations competent in financial, economic, or trade matters.

How do the new regulatory approaches of the 2008 Declaration address these problems?

### *A Meeting the Challenge of Universality through Guaranteed 'Enabling Rights' and Recurrent Reviews of Progress towards Strategic Objectives*

The perception that the ILO is unable effectively to contribute to the promotion of a universal 'level playing-field' has in a way been created by the ILO itself, through its traditional emphasis on the ratification of conventions as a proxy for the achievement of its objectives.<sup>61</sup> It was

<sup>58</sup> See Conclusions, *infra*.

<sup>59</sup> Although existing means of action have proved to be quite flexible: for instance Art. 10 of the Constitution describing the functions of the International Labour Office has traditionally offered a basis for dynamic and innovative adaptation to changing needs and circumstances which is far from exhausted.

<sup>60</sup> Indeed the Myanmar experience has shown that through Art. 33 of the Constitution, the ILO can go very far in ensuring (progressive) compliance. See Maupain, 'Is the ILO Effective in Upholding Workers' Rights? Reflections on the Myanmar Experience', in Alston (ed.), *supra* note 45, at 112 ff.

<sup>61</sup> It was characteristic of this persistent confusion that within the drafting group of the Committee of the Conference entrusted with the task of examining the draft Declaration, some members expressed concern that international labour standards linked to fundamental rights for the purpose of the internal administrative structure of the Office would no longer be mentioned among the strategic objectives in this draft. The ensuing discussion affirmed that international labour standards are an essential means of translating and implementing *all* strategic objectives.

therefore inevitable that the declining rate of ratifications compared with the Cold War years would be seen as further evidence of failure.

The realities of social and economic progress are, however, much more complex. As noted in the report submitted to the ILC in 2007, universality is not uniformity as far as these rights are concerned. The challenge of globalization, a dynamic and constantly evolving phenomenon, is the challenge of achieving universal, continuous progress by persistently encouraging and accompanying the efforts of all the ILO's members (including those who have not ratified the corresponding instruments) with all means at its disposal. Undoubtedly, the ratification of conventions remains the fast track – if not the sacred way – towards accomplishing all strategic objectives. But ratification remains somewhat of a toll road, which members may or may not choose as the ideal route to the objectives elaborated in those instruments. The fact that this toll road exists does not relieve the ILO of its duty to guide and encourage members which cannot yet afford or are not yet willing to pay the toll to get to the destination by alternative routes.

Thus, as pointed out in the 2007 report to the ILC,<sup>62</sup> the real test of universality for the ILO is its ability to maintain with all its means of action dynamics of progress towards all its objectives among all its members, including those which have not ratified relevant instruments.<sup>63</sup>

This responsibility requires the establishment of a framework in which this

dynamic can be developed. To that end, the 2008 Declaration introduces two very important innovations: the first relates to the strengthening of the basic 'rules of the game' necessary for the dynamics to take place; and the other to the establishment of a new procedure of recurrent reviews of trends and needs related to each of the strategic objectives.

*Strengthening the basic 'rules of the game' (enabling conditions) for universal progress:*

The guarantee of the basic 'rules of the game' was accomplished in two steps. Concerning the first step, the 1998 Declaration made two main contributions to the effective recognition of the fundamental rights. First, it spelled out why the universal implementation of fundamental rights was 'of particular significance in that it *enables* [italics added] the persons concerned to claim freely, and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate and to achieve fully their human potential'.

The second contribution was the creation of a procedure to lay out the concrete consequences of this universal recognition and its obligations to the Organization and the members. Building on the Freedom of Association precedent, it formally recognized that, on the one hand, there was an obligation inherent in membership of the Organization to 'respect, promote, and realize' the principles concerning freedom from forced labour, child labour, and discrimination (in addition to freedom of association and the right to collective bargaining, already covered by existing procedures) and further elaborated in relevant conventions. On the other hand, the Annex

<sup>62</sup> Report V, *supra* note 7, at para. 9.

<sup>63</sup> *Ibid.*

established a promotional mechanism for making these rights effective.<sup>64</sup>

This development has been subject to contradictory commentaries outside the ILO. Many welcomed the promptness with which the ILO occupied the space opened by the Singapore Declaration. Others saw this as evidence of the ILO's 'neo-liberal retreat' to a minimalist neo-liberal interpretation of its much more extensive constitutional mandate,<sup>65</sup> ultimately endorsing a *soft law* approach which privileges vague principles to the detriment of specific, detailed provisions found in classic standard-setting instruments.

Whatever the intrinsic merits, inconsistencies – or sometimes sophistry – of these arguments which have been discussed elsewhere,<sup>66</sup> the 2008 Declaration pro-

vides a definitive response to them. By applying a mechanism of cyclical reviews of workers' rights outside fundamental rights (which reflects *mutatis mutandis* the same rationale as the global reports) the new Declaration confirms that the logic of the 1998 Declaration was not one of withdrawal but of expansion<sup>67</sup> of the capacity of the ILO to promote all its objectives with respect to all its members.<sup>68</sup>

It is important to underline that, as previously noted, the 2008 Declaration clarified and strengthened the status of these rights *vis-à-vis* trade considerations. The question which inevitably follows is whether the ILO's rephrasing of the 1998 statement is in return likely to have repercussions on the WTO's legal order, a complex question which cannot be given justice here. The possible establishment of a violation of fundamental workers' rights from the viewpoint of international trade law has often been considered under the exception clauses contained in Article XX of the GATT, and more specifically the 'public morals

<sup>64</sup> It deviates from the freedom of association procedure in that it is not a complaint-based system, since it combines annual reports on the situation of the fundamental rights in countries which have not ratified the conventions dealing with those rights with a global study of the situation which addresses each of the rights in turn.

<sup>65</sup> Alston, *supra* note 51; Langille, *supra* note 44, as well as Langille, 'The true story (Reply to Alston)', 16 *EJIL* (2005) 409; Hepple, *supra* note 11, at 57 ff. For a global view of these various opinions see Dubin, *supra* note 29, at 163 ff and the thesis by Claire La Hovary, *supra* note 29.

<sup>66</sup> However, two essential points must be raised: first, this tendency of seeing two conflicting approaches is based on a false presumption that they are alternatives, rather than complementary to one another; furthermore, secondly and more particularly, it prevents one finding an answer to three essential questions: (i) whether detailed provisions have a dissuasive effect on ratification (bearing in mind that the details in the case of fundamental instruments are not found in the texts themselves but in the relevant jurisprudence); (ii) whether a ratification does not in fact sanction the conformity of the instrument (and its detailed provisions) with national legislation rather than *vice versa*; (iii) to what extent the detailed provision might render the instruments obsolete. See F. Maupain, 'Revitalization not Retreat', 16 *EJIL* (2005) 439, at 452–454.

<sup>67</sup> This 'logic creep' was built into the rediscovery of and new impetus given to Art. 19 of the ILO Constitution through the review mechanism of the 2008 Declaration. See Daugareilh (ed.), *supra* note 44, at 25, in which the author observes that the solution put in place based on Art. 19 could perfectly be extrapolated '*aux différents aspects du "travail décent"*'.

<sup>68</sup> That being said, it is equally important to highlight again that this extension, which was so to speak already put in the pipeline by the 1998 Declaration, might never have seen the light of day without the new helpful 'kick' which the WTO unintentionally gave to it: i.e. the 1998 Declaration was part of a process following the Copenhagen Declaration, not solely the result of debates generated within the ILO itself.



exception'.<sup>69</sup> The 2008 Declaration suggests that violations are also relevant to the very achievement of WTO objectives. This may in turn imply that, even if these violations are not violations of specific obligations under the WTO framework, they should nevertheless be entertained as 'non-violation' situations under Article XXIII(c) of the GATT 1994.<sup>70</sup>

*A new mechanism for reviewing and promoting universal progress towards all strategic objectives:*

While strengthening the status of fundamental rights, the new Declaration

makes it clear that their universal application as 'enabling rights' is a necessary but not sufficient condition for the universal promotion of the remaining three strategic objectives. This is why the Declaration provides a mechanism for systematically reviewing, within the universal and tripartite framework of the ILC, actual progress with respect to each objective for all its members, and encouraging them in their efforts with all the means at its disposal. The review system is thus designed to fulfil a twofold function: development of knowledge and information; and evaluation of past ILO action combined with formulation of future responses.

The first aspect, that is the development of knowledge and information, deals with the dissemination of impartial information relating to the implementation of ILO objectives. This is explicitly one of the tasks assigned to the International Labour Office under Article 10 of the Constitution. And it is to this key function that the first ILO Director, Albert Thomas (especially after his unsuccessful ratification campaigns), attached almost as much importance as to the standard-setting function.<sup>71</sup> Perhaps it is not too early for the ILO, as it approaches its centenary and has greatly expanded over the years,<sup>72</sup> to start seriously implementing one of its founding missions by providing a succinct, reliable, and recurrent panorama of trends on subjects of organizational concern.

<sup>69</sup> This question is indeed no longer merely a matter of speculation because embargo measures taken by the US against Myanmar expressly referred to the resolution adopted by the ILC by virtue of Art. 33 of the ILO's Constitution, and this embargo was not challenged through the dispute settlement procedures of the WTO. See Maupain, *supra* note 60.

<sup>70</sup> As noted above, the logic of the reformulation of the statement in the 2008 Declaration is that the violation of fundamental workers' rights cannot constitute a valid comparative advantage because it inhibits the possibility of improving other working conditions. This rationale seems entirely consistent with WTO principles and objectives which, as provided in the Preamble to the GATT, includes 'raising standards of living'. It is clear indeed that for most people the 'raising of the standards of living' means first and foremost the improvement of their working conditions, including wages. Although it does not violate any specific obligation under relevant Agreements of WTO, the violation of fundamental rights at work could thus, in light of the Declaration, be invoked as a 'non-violation' situation under Art. XXIII(1)(c) of GATT 1994. This possibility could be all the more significant given that under para. (2) of that Art. the procedure for the consideration of representations under the above provisions may involve consultations with ECOSOC and other appropriate intergovernmental organizations. See the complete Art. at: [www.wto.org/english/docs\\_e/legal/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal/gatt47_e.pdf).

<sup>71</sup> See Haas, *supra* note 33, at 143 ff.

<sup>72</sup> The ILO is now endowed with a budget of half a billion dollars; it has over 2,500 civil servants and experts; they are present in over 40 countries with different types of offices and produce millions of pages a year in documents and reports of all sorts.

The preparatory discussions for the new Declaration indeed confirmed that, on the whole, the constituents were convinced that this important gap remained to be filled. Most of them were also satisfied that the system of recurrent items will rationalize Conference agenda-setting, which in recent years has increasingly been a confusing, costly headache. However, some had doubts about the current capacity of the International Labour Office to produce the kind of reports that would allow for meaningful discussion and useful outcomes. What seems clear, in any case, is that the Office must now build up for each strategic objective the critical mass of information necessary to ensure that such reports can be produced with sufficient credibility.

The second aspect of the twofold function relates to the evaluation of the activities conducted over the past cycle by the ILO with the means of action currently at its disposal to assess the extent to which they have been adequate to meet the members' needs as they can effectively express them in the universal framework of the ILC.

Such an evaluation would include an important standards dimension, which gave rise to some concerns during the debate,<sup>73</sup> but which should now come as a relief to those who were concerned that the ILO was turning into a mere development agency by limiting its normative

function to fundamental rights. This standards dimension, based on Article 19 of the Constitution, relates to the systematic and reliable gathering of information regarding the impact (or lack thereof) of ILO instruments on the evolution of national legislation and practices concerning the different strategic objectives. Irrespective of the ratification of relevant instruments, on the basis of the information thus collected, the ILC will be able to draw conclusions for future standards-related action.<sup>74</sup> Tripartite discussion on the basis of the report prepared by the Office is intended to lead to a plan of action setting out priorities for ILO programmes for each strategic objective in the next cycle, though this plan of action would not amount to a decision, but rather provide guidance to the Governing Body and the Office, which have the constitutional responsibility of submitting programme proposals to the ILC.<sup>75</sup>

While the cyclical reviews under the 2008 Declaration will draw upon the experience of global reports under the follow-up to the 1998 Declaration, there are some major differences between the two mechanisms. Apart from the emphasis placed on the plan of action, the format of the debate at the level of the ILC will change quite radically to have a concrete impact

<sup>73</sup> These concerns were aggravated by the terminology originally used for this mechanism which refers to 'cyclical reports'. It led to the suspicion among certain countries, particularly in Latin America, that the ILO was trying to emulate the model of 'Universal periodic reviews' of the UN Human Rights Council. The change of terminology as well as the explanations given helped dispel this confusion. See *Provisional Record* no. 13, *supra* note 1, at para. 123.

<sup>74</sup> This was the original intent of Art. 19 which had somehow been lost through the constraints of general surveys as they developed. See ILC Report VI (2008), Annex I, 'Guidance note on General Surveys and possible synergies between General Surveys and cyclical reviews'.

<sup>75</sup> The Governing Body would not however be free to ignore the plan of action adopted at the ILC, because the next cyclical review would allow the competent ILC committee to review the actions taken to give effect to that plan as well as its impact in order to draw any appropriate conclusions.

on the guidance of financial aspects.<sup>76</sup> This should therefore help to avoid a repetition of the rather disappointing lack of impact experienced with the global reports under the 1998 Declaration.<sup>77</sup>

Should this new model replace the format provided for global reports under the 1998 Declaration when the subject of the recurrent item on the Conference agenda concerns fundamental rights?<sup>78</sup> This issue was raised during the discussion of the Declaration, but will have to be considered in more detail by the Governing Body, together with the modalities of the cyclical reviews, including the length of the cycle and whether the vast social protection objective should be split into sub-objectives.

### ***B The Challenge of the Interdependence between Strategic Objectives: New Institutional Approaches to Spur Tripartite Commitment to their Integrated Implementation***

As previously noted, the realities of globalization imply that members' efforts to

implement each strategic objective cannot be fully effective if they are carried on in isolation from each other or from economic objectives. There must be coherence between economic and social objectives in general, as implied by the decent work concept. The question is how the ILO can concretely encourage its members better to understand and draw the consequences of the interdependence and inseparability of strategic objectives in aid of greater efficiency in promoting them.

There are two dimensions to the answer provided in the Declaration. The first is a quasi normative one. As already noted, the 2008 Declaration proclaims in unequivocal terms the principle of 'inseparability' as stated in Section I.B. Therefore, the members are not free to pick and choose the objectives that suit them, even if they are not prepared to accept through ratification the specific obligations in the instruments relating to specific objectives. The idea is that, as members, they have accepted all objectives contained in the Constitution, and they are committed to promote them actively with the ILO's support. Although the Declaration is not a normative instrument, it does establish some specific consequences of this principle, in particular when it calls upon members in Section II.B to consider adopting a 'national or regional strategy'<sup>79</sup> in consultation with representative organizations of workers, and employers.

<sup>76</sup> This debate would take place over the course of several days, in the framework of a technical committee set up to discuss specific technical items placed on the ILC's agenda, and would lead to the adoption of carefully thought-out conclusions having the required degree of authority *vis-à-vis* other organs (the Governing Body and the Office) to be followed up.

<sup>77</sup> As highlighted in Report V, submitted to the Conference in 2007, *supra* note 7, this situation is in large part attributable to the treatment of those reports. Regardless of their intrinsic quality, the global reports have stimulated only relatively short discussions at the Conference which have been more like the juxtaposition of monologues than a real exchange of views which could serve as a basis for conclusions expressing a common will and would be able therefore to influence later choices made by the Office and the Governing Body.

<sup>78</sup> This might mean, for instance, that the global reports, which address each of these fundamental

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rights in turn according to a four-year cycle, would be replaced by a consolidated report covering several or all fundamental rights every three or four years.

<sup>79</sup> And the impact of this appeal will in due course be reviewed under para. C of the Declaration's Final Provisions.

The ability exists to go one step further through normative action and it was actually used in the past.<sup>80</sup> The Annex makes reference to the possible development in the future of arrangements such as ‘peer reviews’. It is clear from the *travaux préparatoires*<sup>81</sup> that the idea was to develop a sort of ‘Social Policy Review’ mechanism, symmetrical to the Trade Policy Review Mechanism of the WTO. The Annex makes it clear that this would be voluntary. Those members ready to go one step further in the implementation of a social policy based on the integrated approach would participate in a scheme of mutual review and encouragement of their respective efforts with the intention to promote the concrete and coherent implementation of the objectives. If such mechanism can be launched on an experimental, *ad hoc*, and voluntary basis with a few countries, its institutionalization would certainly require an appropriate legal framework which might or might not be an ILO instrument.<sup>82</sup>

The second is the empirical dimension. Here the idea is that the best way to overcome the ‘prisoner’s dilemma’ and to promote an integrated approach is to use the potential of tripartite discussion to

persuade members that it is in their own best interests from the viewpoints of both social progress and economic efficiency vigorously to promote the objectives as part of an overall policy, rather than in an isolated and random manner. However, this persuasion is not simply a matter of advocacy or communication.

In this respect, the ILO has sometimes been criticized for being ‘long on pious aspirations and short on rigorous analysis’.<sup>83</sup> The challenge it faces is to provide a more solid empirical basis and analysis validated through tripartite discussion to help reconcile efficiently the various objectives, taking into account conditions which vary from one country to another.<sup>84</sup>

However, strengthening the Organization’s analytical capacity may seem more difficult to achieve today than ever before. The ILO is not alone in the ‘market’ of socio-economic research and analysis. There are other financial and economic organizations often endowed with much greater resources for that purpose. And, bearing in mind the ILO’s stagnant budget, it would seem that it is ill-equipped to compete in the field of fundamental research.

On the other hand, the impact of research alone may also be of fairly limited influence if its audience consists of a small circle of specialists or technocrats,

<sup>80</sup> The adoption of a recommendation or even of a convention would have been theoretically conceivable for that purpose; there is a precedent, namely Convention No. 117 on social policy (basic aims and standards), 1962, available at: [www.ilo.org/ilolex/cgi-lex/convde.pl?C117](http://www.ilo.org/ilolex/cgi-lex/convde.pl?C117).

<sup>81</sup> See in particular Report V, *supra* note 7, at paras 83–85.

<sup>82</sup> See *infra* the ‘innovative perspectives’ that the Declaration opens in section II.B(vii) whereby members could establish agreements on a multilateral, regional basis for the purpose of mutually supporting their efforts.

<sup>83</sup> Wolf, ‘Growth requires painful choices, not platitudes’, *Financial Times*, 3 Mar. 2004, at 19.

<sup>84</sup> As pointed out earlier, the need to strengthen the International Labour Office’s analytical ability is certainly not novel. Very early on, A. Thomas deemed this function essential (if only to compensate for the workers’ organizations’ insufficient capacity in this respect).

and it does not reach a broader circle of decision-makers and stakeholders. The ILO enjoys a most enviable comparative advantage in this respect. Its tripartite structure offers potential for discussing and spreading the results of research that is unparalleled (and with respect to which officials in other organizations often express interest and even some envy).

The reforms envisaged in the 2008 Declaration and its follow-up seek to optimize this comparative advantage in two major ways. The first is to foster a better understanding of the realities of this interdependence through empirical analysis in order to guide and assist in policy decisions. To put it briefly, the idea is to detect and understand 'what works' – to use the words of the new President of the United States during his election campaign. This would be done first through in-depth analysis by the Office of the experiences of a number of countries (with their voluntary and tripartite involvement), and then through their tripartite discussions in the ILO's most appropriate framework so as to 'validate' any lessons or good practices which could be drawn from the study.<sup>85</sup>

The second is developing other more direct and immediate forms of encouragement for adopting an integrated approach. Whilst the adoption of an integrated approach should carry its own reward, at least in the long term, this does not mean that other more direct

forms of encouragement are superfluous. Technical cooperation in the framework of 'decent work country programs' should play a more important role in this respect. The coherence of these programmes, which has sometimes been the subject of some criticism, should however be strengthened as they will, from now on, have to take into consideration the principles and framework provided by the Declaration and its follow-up.<sup>86</sup> This is without prejudice to more ambitious and innovative forms of encouragement of the kind that were cautiously sketched out in Report V submitted to the ILC in 2007.<sup>87</sup>

Having said all this, the ILO's efforts at persuasion may be in vain if its members concurrently hear discordant advice from organizations which are the paragons of economic orthodoxy and efficiency. Hence the importance which exploring new approaches to expanding influence with relevant non-state actors, in particular international economic and financial organizations, can be expected to have in this respect.

### ***C The Challenge of Diversity: Influencing Non-state Actors through Tripartite Debate***

The Declaration recognized the need to improve the institutional capacity of states facing increasing pressure from

<sup>85</sup> The ILO has in fact already had some (successful) experience in this area as a result of country studies which were conducted at the end of the 1990s. See R. Torres *et al.*, *Studies on the Social Dimensions of Globalization* (2001).

<sup>86</sup> *Supra*, sect. 4B. The abovementioned possibility of a voluntary peer review mechanism could also provide some form of mutual reward as a *quid pro quo* for voluntarily accepting each other's review of steps taken to implement a 'decent work policy' on the basis of the principles and provisions contained in the Declaration.

<sup>87</sup> Report V, *supra* note 7, at para. 100.

non-state actors on their ability to conduct social policy. Yet it also attempted a response to the increasing influence of non-state actors in at least three ways.<sup>88</sup> First, with respect to intergovernmental organizations with competence in economic, financial, or trade matters, the Declaration encouraged greater ILO influence on these organizations first, by inviting Members to pursue consistency and coordination in their positions between the ILO and the organizations concerned<sup>89</sup> and, secondly, by encouraging increased exposure to the ILO's tripartite discussions by the bodies themselves.<sup>90</sup>

Secondly, the Declaration provided novel responses to the relatively new challenges represented by the proliferation of regional, multi- or bilateral coop-

eration and integration agreements.<sup>91</sup> Such agreements may entail the sort of ambivalent consequences described by WTO Director-General Pascal Lamy as a 'mixed blessing'.<sup>92</sup> First, in Section II.A(iv)<sup>93</sup> it reminds members of the need to ensure compatibility between obligations under such agreements and universal norms. It is unclear, in the light of evidence to date (especially at the European Union) whether this will suffice to avoid the risk that the integrity of universal ILO standards will be the casualty in their ongoing confrontation with trade or single-market priorities.<sup>94</sup> However, the Declaration also opens the door to more innovative perspectives. See, e.g., section II.B (vii), which encourages members mutually to support their efforts towards the implementation of an integrated

<sup>88</sup> Note that the French version of this article contains a much longer and more elaborate discussion of the nature of the strategies which the Declaration intends that the ILO will pursue in response to the international organizations, cooperation and integration agreements, and private entities.

<sup>89</sup> This includes a call to governments to behave in the various bodies in which they are represented in a way which is both coordinated and consistent with the steps they are invited to take pursuant to the Declaration; the recognition in fairly general terms of the important contribution that these Organizations can make to the implementation of an integrated approach (in part II C), supplemented by an apparently innocuous but potentially significant provision (in part III C) giving them the possibility of participating in evaluation exercises.

<sup>90</sup> Invitation to participate in the work of the Conference (or the Governing Body) can be extended even in the absence of reciprocal representation. This has been the case for instance with the WTO.

<sup>91</sup> The issue of regionalism was first raised at the ILO when it discussed the appropriateness of regional labour standards, which were deemed to take better account of the specificities of each region. The response was categorical, encapsulated in the slogan 'no sub-standards for sub-humans' inspired by Wilfred Jenks; see N. Valticos, *Droit international du travail* (2nd edn, 1983), at 225. Naturally this does not preclude the use of 'flexibility clauses' in universal standards to make them more ratifiable or otherwise applicable to all members.

<sup>92</sup> In view of the demotivating effect that the proliferation of these agreements could have on the pursuit and deepening of trade liberalization on a global scale.

<sup>93</sup> In section II.A(iv) which provides the possibility for the ILO to lend assistance to those members who wish to promote the strategic objectives jointly in the framework of bilateral or multilateral agreements 'subject to their compatibility with ILO obligations'.

<sup>94</sup> As was the case with respect to the Night Work (Women) Convention No. 89, ILO, 17 June 1948, available at: [www.ilo.org/ilolex/cgi-lex/convde.pl?C089](http://www.ilo.org/ilolex/cgi-lex/convde.pl?C089).



policy through agreements on a bilateral, regional, or multilateral basis.<sup>95</sup>

Finally, one option was highlighted to deal with the increasingly important role of private entities, in which the credibility of their professed sense of social responsibility and 'citizenship' could be improved through the creation of new partnerships to enlist their support for the ILO's programmes 'in any appropriate way'.<sup>96</sup>

While there is much more that can be said on the topic, it is tripartism that is able to bestow unparalleled authority on ILO debates and their outcomes. It is through tripartite discussions that members can be persuaded that it is in their own long-term interests to introduce the solutions embodied in ILO standards through the ratification of relevant conventions or otherwise, and to emulate the experience and good practices of other countries. And it is also through tripartite discussions that the ILO can exercise greater influence on non-state actors, which are beyond the reach of its constitutional means of action. Ultimately, the question of strengthening the ILO's capacity is not a question of acquiring coercive power, but of mobilizing in an integrated manner all the means of action already at its disposal, to optimize its influence on all relevant actors.

In this respect, while they may seem less inspiring to the outside reader, the

more detailed provisions of section II of the Declaration (relating to the 'methods of implementation') are no less important insofar as they provide the overall framework for a more systematic use of ILO resources and means of action in support of its members' efforts.<sup>97</sup>

## 4 Conclusions

The decision of the ILO in 2005 to embark on a review of its institutional capacity was a brave and risky endeavour. As noted, it could easily have been doomed as a result of contradictory demands and expectations.

It is particularly striking that, by contrast to less ambitious reforms that have indeed shown a frustrating record of slow progress if not plain failure,<sup>98</sup> this complex and sweeping project has been adopted unanimously<sup>99</sup> and in a relatively short period of time.<sup>100</sup> This result may be attributed to a large extent to the

<sup>95</sup> This formula is so broad that it could definitely apply to commercial preferences and could even take the form, among other possibilities, of labelling products or services if the efforts in question satisfied conditions which could derive from a common agreement.

<sup>96</sup> Which means in plain language that these partnerships should not make the ILO hostage to the marketing strategy of the partner.

<sup>97</sup> Improving its knowledge of their respective needs, mobilizing technical cooperation, sharing experience and good practices, and even getting involved in the fast-growing phenomenon of bi- and multilateral trade agreements having a social dimension of some form.

<sup>98</sup> This was the case for instance with respect to efforts to introduce more rational methods for setting the ILC's agenda.

<sup>99</sup> Whereas the adoption of the 1998 Declaration was subject to a last-minute request for a vote which narrowly escaped failure for lack of the necessary quorum.

<sup>100</sup> This may in part be explained by the fact that the broad range of subjects covered offered a greater chance of substituting 'win-win' logic for 'zero-sum' logic, which is almost inevitable in a piecemeal approach. In other words, the very magnitude of this project, which caused so much scepticism from the very start, may paradoxically have been the main reason for its success.

leadership and joint commitment that developed between the two spokespersons of the workers' and employers' groups.<sup>101</sup> This commitment was anchored in the shared realization that, beyond its well-known normative and technical cooperation function, there is something truly unique that the ILO alone can offer: a framework for gathering reliable information on relevant trends, comparing experiences, and validating 'workable solutions' through tripartite debate at the universal level.

There is nonetheless no ground for complacency. The message which has been successfully adopted is one thing, but it is quite another to translate this message and, more generally, realize the potential of the Declaration as regards the modernization of institutional practices and improving the ILO's effective impact on realities. Unless this is also done, the Declaration may remain as a new 'à la Potemkin' façade rather than a 'new foundation' as it was described. There are two main difficulties to overcome in this respect.

The first relates to the role of the Office which is vested with the main responsibility to submit proposals to the Governing Body.<sup>102</sup> It is important to note in this respect that the Declaration and its Annex were supplemented by a resolu-

tion which, to say the least,<sup>103</sup> shows some limited faith in the Office's resolve. There is indeed a risk that the potential of the Declaration is lost if an appropriate administrative structure is not settled to maintain the momentum and sense of direction, and if a 'salami approach' prevails over an integrated approach to the follow-up, as some recent documents may suggest.<sup>104</sup>

The second relates to the capacity of the constituents themselves to draw the logical consequences of the priorities they have set for themselves. As noted several times above, one of the key conditions for the Declaration to produce its full potential is to strengthen the analytical capacity of the Office. But it is not possible without some additional resources or, alternatively, without sacrificing some other priorities. The first course however bumps into the zero growth mantra professed by major contributors. It is a sobering fact that many major governments which expressed their doubts concerning the capacity of the Office to implement the objectives of the Declaration are also those which have insisted that the reforms under consideration

<sup>101</sup> Respectively Ebrahim Patel (South Africa) and Emmanuel Julien (France).

<sup>102</sup> With respect *inter alia* to the cycle of items on the ILC's agenda, setting up country per country analyses. It will then be for the Governing Body to give its approval subject to its final endorsement by the Conference in cases which fall within its competence or relate to its functioning.

<sup>103</sup> Especially when one considers that the Annex to the Declaration already contained detailed provisions for the monitoring and evaluation of the steps taken to implement it and of their impact.

<sup>104</sup> See document GB.303/SG/DECL/2, Preliminary implementation plan (see also document GB.304/SG/DECL/1(Rev.), available at: [www.ilo.org/wcmsp5/groups/public/--ed\\_norm/---relconf/documents/meetingdocument/wcms\\_099851.pdf](http://www.ilo.org/wcmsp5/groups/public/--ed_norm/---relconf/documents/meetingdocument/wcms_099851.pdf); Implementation Plan: ILO Declaration on Social Justice for a Fair Globalization), available at: [www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_103418.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103418.pdf)

should not entail any further burden either for the ILO or for themselves. The second course bumps either into the constitutional and practical impossibility of strengthening the analytical function at the expense of the normative and supervisory function,<sup>105</sup> or into the political impossibility to do so at the expense of the ILO's activities and programmes relating to its presence in the field.<sup>106</sup>

Some degree of flexibility does however exist. The first is linked to the possible synergies and rationalization between the field and headquarters which can be exploited to build up the analytical capacity within the Office.<sup>107</sup> The second

is the recent introduction of a new 'Regular Budget Supplementary Account'<sup>108</sup> which allows major contributors to finance on a voluntary basis (beyond and above their regular budget mandatory contribution) the implementation of the 'Decent Work Countries Programmes'. This arrangement may also offer a (however dubious from a constitutional point of view) way out of the dilemma once the recurrent reports and reviews have taken shape and confirmed their potential.<sup>109</sup>

Last but not least, the combination of the change in the US administration and the financial and economic crisis may have a positive impact on the attitude of the more sceptical among the governments which supported the Declaration. The financial crisis which broke within a few weeks of the adoption of the Declaration does bring a paradoxical reason for hope. It came as a sad vindication of the Declaration's content, in particular the emphasis placed on redistribution issues (through its very title) as the need to develop new forms of regulation and restore state capacity in this respect.

<sup>105</sup> First, it is the only function which the ILO is obliged under the Constitution to carry out whatever the level of its resources; and, second, this function is already under some severe constraint as a result *inter alia* of the growth of the body of standards and of a most extensive use of available procedures.

<sup>106</sup> The expansion of these activities does not follow from a constitutional obligation but from a policy choice. It may indeed be argued that the thin spread of experts in the field, combined with recurrent missions from officials at headquarters to the field and *vice versa*, is not necessarily the best and most economical way to build up or re-establish the analytical capacity which may be lacking or insufficient in certain areas. However, possible savings on this function could appear inconsistent with the emphasis placed by the Social Justice Declaration on the importance for the ILO to be closer and more responsive to its members' actual needs. Moreover, it would more generally be a political non-starter as the ILO presence in the field is extremely popular, and may in some respects have become a sort of *addictive drug* which helps members tolerate the limits of the ILO's analytical capacity.

<sup>107</sup> It is encouraging to note in this respect that the Governing Body at its most recent session expressed some frustration with an evaluation of the field structure submitted by the Office, and express reference was made to the necessary linkage with the follow-up to the Declaration.

<sup>108</sup> For further information on the RBSA, see [www.ilo.org/public/english/bureau/pardev/development/mobilization/budgetsupplementary.htm](http://www.ilo.org/public/english/bureau/pardev/development/mobilization/budgetsupplementary.htm). As already noted, there are other innovative avenues sketched out in the Declaration, such as financing from public or private non-state actors.

<sup>109</sup> As indicated above, one of the main objectives and outcomes of these recurrent reviews will be to establish priorities in the light of the debate, including the filling of gaps and lacunas which have been specifically identified in the course of the review. Major contributors may then be more inclined to provide additional funding on such a concrete basis, without prejudging their position of principle as regards the overall level of the regular budget.

Whatever forms such regulations may ultimately take, the fact is that the ILO is in a unique position and has unique legitimacy – due to the direct involvement of the actors of the ‘real economy’

in its debate – to contribute in its field of competence to providing integrated and coordinated answers to the fight against rocketing unemployment<sup>110</sup> while resisting protectionism.

<sup>110</sup> The G20 Communiqué (in particular para. 26) available at: [www.londonsummit.gov.uk/resources/en/news/15766232/communique-020409](http://www.londonsummit.gov.uk/resources/en/news/15766232/communique-020409), which calls upon ‘the ILO, working with other relevant organizations, to assess the actions taken and those required for the future’ and the declaration made by Dominique Strauss-Kahn a few days before at the Governing Body of the ILO, available at: [www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Broadcast\\_materials/B-rolls/lang--en/docName--WCMS\\_103998/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Broadcast_materials/B-rolls/lang--en/docName--WCMS_103998/index.htm), remain unclear about the role of the ILO at the source of the problem, namely the ILO guidance when implementing financial policies with the intention to promote the employment. The fact that the ILO and the Bretton Woods Institutions and the WTO do not have any formal agreement on cooperation or representation, although the promotion of employment is somehow part of their respective mandates, suggests that there is still a long way to go to attain the ‘effective partnerships’ contemplated by the Declaration.