

SECTION RECOMMENDATIONS AND REPORTS†

American Bar Association Section of International Law and Practice Report to the House of Delegates* International Labor Organization**

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association recommends that the United States continue to be an active, supportive member of the International Labor Organization;

BE IT FURTHER RESOLVED, That the American Bar Association commends the United States Government for creating and maintaining the tripartite President's Committee on the ILO, Consultative Group on the ILO, and Tripartite Advisory Panel on International Labor Standards, and urges accelerated progress

†The Recommendations and Reports are four of six developed by the Section's International Institutions Committee through its Working Group on United Nations Specialized Agencies. The other two reports—on the Food and Agriculture Organization of the United Nations and the International Monetary Fund and the World Bank Group—were published in the Summer 1996 issue of *The International Lawyer*.

*This Recommendation and Report was approved by the House of Delegates in August 1995.

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by these bodies toward ratification of those ILO conventions on human rights which are consistent with U.S. law and practice.

REPORT

This report on the International Labor Organization is one of several addressing important issues concerning the U.N. specialized agencies and the U.S. relationship to them. The reports have been developed by the Section of International Law and Practice, Committee on International Institutions, through its Working Group on United Nations Specialized Agencies, as a contribution of the American Bar Association to the 50th anniversary of the United Nations, in furtherance of the American Bar Association's Goal 8: To advance the rule of law in the world.

INTERNATIONAL LABOR ORGANIZATION

I. History and Functions

A bill recently introduced in the U.S. Senate would, among other things, prohibit the use of any appropriated funds for payment of U.S. membership in the International Labor Organization ("ILO"). Although the bill has recently been withdrawn (for failure to obtain sufficient votes to cut off debate), it could be reintroduced at any stage in its present form or in some other bill. A vote on the proposal in whatever form could then occur at any time.

The ABA has a clear interest in supporting U.S. participation in the ILO, which develops and monitors legal standards in its field worldwide.

The ILO is the oldest specialized agency in the United Nations system. Founded in 1919 (under Part XIII of the Treaty of Versailles) to abolish the "injustice, hardship and privation" which workers suffered and to guarantee "fair and humane conditions of labor," it survived the demise of the League of Nations and in 1946 became a specialized agency within the United Nations system. The ILO has continuously emphasized the importance of fair labor conditions as a means of maintaining social peace. The ILO was awarded the Nobel Peace Prize in 1969, on its 50th anniversary. It celebrated its 75th anniversary in 1994; 173 countries are members.

The ILO is unique in the U.N. system because it is the only agency in which representatives of the private sector are full and active participants, with voting rights. Representatives of employer and employee organizations participate with government delegates in ILO decision making, making it a tripartite process. This is consistent with the central feature of the modern workplace: consensus building between management and workers for greater productivity through management and union-sponsored employee involvement mechanisms. It is also consistent with the advance of democracy around the world, as workers become more involved in decisions—in the workplace and elsewhere—that affect their lives and well-being.

Although the United States actively participated in the founding of the ILO, it did not join the organization until 1934. From 1977 to 1980 the United States left the organization because of allegations of politicization, erosion of tripartism, selective concern for human rights, and disregard for due process. The United States rejoined when it was satisfied that its objections were satisfactorily addressed. Since 1980 the United States has been an active and committed member of the Organization. United States participation demonstrates the concern in this country for the economic and social stability of nations, the rights of children and minorities and the achievement of a level playing field for international commerce.

Much of the current focus of the ILO is on human rights issues in the employment context—especially discrimination in employment, equality for women workers, forced labor, child labor and freedom of association, as well as issues related to stimulating employment opportunities. The ILO has always recognized that there is a linkage between the rights of workers and international trade, since inadequate labor standards lower the cost of production by shifting risks and expenses to workers, thus artificially lowering the cost of goods produced and giving them an unfair advantage in international trade. Recently the ILO Governing Body has begun to consider how the sanctions procedure could be strengthened in order to address unfair advantages created by this linkage. It has to do with a level playing field, which is an important matter for the United States, as demonstrated during the recent NAFTA debate.¹

The ILO establishes its international labor standards by adopting conventions (treaties) and recommendations. The conventions are binding only on countries that choose to ratify them; recommendations are not binding. The ILO also provides technical assistance on employment matters to member countries that request it.

II. Structure

The *International Labor Conference* is the ILO's plenary body. Each member country is represented by four delegates: two from the government, one representing employers and one representing workers. Each of them has voting rights.² The employer and worker representatives are chosen from the most representative organizations in each country. American employers are represented by the United States Council for International Business; American workers by the AFL-CIO. The Conference, which meets in June of each year, adopts new conventions

1. The Business Roundtable, comprised of chief executive officers of leading American corporations, has called on the United States to upgrade its participation in the ILO. Among other things, the Business Roundtable said the United States should promote efforts to improve the ILO's supervisory machinery. Business Roundtable Statement, International Trade and Investment and Labor: Constructive Approaches (May 9, 1995).

2. ILO Constitution art. 3.

and recommendations to be submitted to member countries, and monitors the application of existing labor standards. In addition, each second year it adopts a biennial budget, and each third year it elects the Governing Body.

The *Governing Body* is the executive body of the Organization. It currently consists of 56 members: 28 government representatives and 14 representatives each from employers' and workers' organizations.³ It meets three times a year. Under the current ILO Constitution, the United States holds its seat on the Governing Body as one of ten countries of chief industrial importance. (A pending amendment to this provision has not received enough ratifications to enter into force.) Representatives of other member countries are elected at the Conference every three years, taking into account geographical distribution. The employers and workers elect their own representatives.

The present *Director-General* and head of the *International Labor Office* is Michel Hansenne of Belgium. Two Americans, John Winant (1939-41) and David Morse (1948-70), have served as Directors-General. The Office is the permanent secretariat of the Organization. It employs about 3000 persons at its headquarters in Geneva and in 40 field offices around the world. Approximately half of its employees are now working in the field.

III. Activities

The work of the ILO is carried out primarily through:

- (1) The setting of international labor standards in the form of conventions (subject to ratification by member countries), recommendations and guidelines;
- (2) The monitoring of these standards by independent or tripartite committees of the Organization;
- (3) Technical assistance to member states relating to labor and employment matters;
- (4) Research on issues relating to employment and labor.

A. STANDARD-SETTING

Since its founding, one of the most important activities of the ILO has been the setting of international labor standards. The standards, in the form of conventions, recommendations or guidelines, are intended to provide international benchmarks for national action. The 176 conventions adopted to date and the accompanying recommendations are referred to collectively (and somewhat misleadingly) as the "International Labor Code." It is not a true code, since the conventions are binding only on countries that have ratified them and the recommendations are not binding.

3. ILO Constitution art. 7.

The conventions to which the ILO has devoted special attention, and which have received the highest number of ratifications, are the ten dealing with human rights. They relate to freedom of association, collective bargaining, forced labor, child labor, discrimination in employment and equal pay.

Other conventions cover a wide range of subjects, including vocational training, occupational safety and health, maternity protection, social security, protection of categories of workers such as seafarers, nursing personnel, indigenous peoples and plantation workers. In recent years, conventions on part-time work, on chemical accidents and on night work have been adopted. Some of the conventions have flexibility provisions designed to make it possible for states that could not meet stringent standards to ratify the conventions. The number of ratifications varies from convention to convention.⁴

The participation of governments, employers and workers in the drafting of conventions increases the likelihood that all relevant interests will be taken into account. This in turn increases the likelihood that conventions will set realistic standards that can be complied with. Further assurance is provided by the long gestation period for a convention or recommendation—usually about five years from the time when the subject is chosen, during which time the text is carefully reviewed and representatives of all the relevant interests are consulted.

B. SUPERVISION OF STANDARDS

The ILO has developed an extensive system for the monitoring of ratified conventions. It includes submission of reports by member countries on how well their law and practice conform to ratified conventions and recommendations; evaluation of the reports by an independent Committee of Experts composed of experts on labor relations, labor law, international law and constitutional law;⁵ further evaluation by a tripartite committee of the Conference (called the Committee on the Application of Standards) and in some cases by the Conference itself;⁶ a complaints procedure allowing a country that has ratified a convention to seek appointment of an independent Commission of Inquiry to consider whether another ratifying country is complying with the convention; a similar procedure for complaints by employers' or workers' associations or delegates to the Conference; and a practice of informally contacting member countries about infractions.

In the field of freedom of association and trade union rights, the Governing Body has established a Committee on Freedom of Association. Like the Governing

4. The conventions and recommendations adopted up to 1991 may be found in ILO, *International Labour Conventions and Recommendations 1919-1991* (2 vols. 1992).

5. Each year this committee publishes its report under the designation, *International Labour Conference, Report III, Part 4A: Report of the Committee of Experts on the Application of Conventions and Recommendations*.

6. The debates and action of the Committee on the Application of Standards, and of the Conference itself, are published each year in the *Record of Proceedings of the International Labour Conference*.

Body itself, the committee is tripartite—composed of representatives of governments, employers and workers. It meets three times a year. By now it has considered more than 1500 cases involving complaints of violations of freedom of association standards by member countries, and has published its opinions.⁷

C. TECHNICAL ASSISTANCE AND RESEARCH

In recent years, the ILO has emphasized technical assistance. It has recognized that in many cases, countries simply lacked the means or expertise to improve labor practices. They needed external assistance. ILO programs provide assistance on vocational training, occupational safety and health, drafting of labor legislation, labor inspection, employment programs and workers' education. Most funds for these programs come from the U.N. Development Program or voluntary contributions from member countries.

The ILO also carries out a number of research programs on matters relating to employment policy and other labor issues.

IV. The United States and the ILO

As mentioned previously, the United States has been an active participant in the ILO since 1934, with the exception of 1977-1980. Two Americans have served as Directors-General; the United States has always been represented on the ILO Governing Body; and U.S. employer and worker organizations participate regularly in ILO activities. A number of eminent Americans have served on the ILO Committee of Experts which monitors ratifying countries' compliance with conventions. These Americans have included Benjamin Aaron, Archibald Cox, Paul Herzog, Frank McCulloch and Earl Warren. Janice R. Bellace, Deputy Dean of the Wharton School of the University of Pennsylvania, is currently a member of the Committee.

The United States has ratified only 12 of the 176 ILO Conventions, including only one of the major ILO human rights conventions. Most Western European countries have ratified more than 60 ILO conventions, including all of the human rights conventions.

In the United States, since 1980 a Tripartite Advisory Panel on International Labor Standards (TAPILS), a legal subgroup of the President's Committee on the ILO, has examined ILO conventions to determine whether there are any legal obstacles to ratification. TAPILS membership consists of legal advisers representing the Departments of Labor, State and Commerce, the United States Council for International Business, and the AFL-CIO. TAPILS has recently reviewed several conventions and found no substantial obstacles to ratification.

7. The opinions of the Committee on Freedom of Association are published in the ILO Official Bulletin, Series B.

The ABA Committee finds the work of TAPILS useful and encourages it to work expeditiously to determine whether or not the United States could ratify more labor conventions.

V. Achievements

The main contribution of the ILO is in the area of social peace. The ILO as always recognized that it is necessary to establish and protect basic rights of workers in order to maintain social peace. Since social unrest in one country can spread to other countries, the ILO effort on behalf of the rights of workers helps to maintain international peace.⁸ And since employers' groups are represented in the ILO, the effort necessarily takes their interests into account as well.

A. THE ILO SUPERVISORY SYSTEM

The bulwarks of the ILO supervisory system are the independent Committee of Experts, which meets once a year to review reports submitted by governments regarding their compliance with ILO conventions they have ratified, the tripartite Committee on the Application of Standards, which meets during each annual session of the International Labour Conference, and the Governing Body's tripartite Committee on Freedom of Association, which—as noted above—meets three times a year to consider complaints within its domain. These supervisory bodies have operated even-handedly and in some instances quite courageously.

During the cold war, for example, the ILO Committee of Experts maintained steady pressure on the Soviet Union regarding its noncompliance with the Forced Labor Convention of 1930, which the Soviet Union had ratified. The Forced Labor Convention requires each party to suppress forced labor, subject to some exceptions such as one for the normal civic obligations of citizens. The Russian Republic was directing individuals to perform specific employment if—in the eyes of Russian officials—they were not performing “socially useful work”; another regulation prohibited farm workers from moving out of a collective farm without the consent of a management committee. Both the Soviet Union and its constituent Russian Republic gradually eased these rules as the Committee of Experts maintained its watch over them.⁹

The Committee of Experts and the Conference Committee on the Application of Standards have sometimes kept a critical eye on Western governments as well, but the Organization has maintained a sense of just how far it should or should not push. For example, the Committee of Experts has been critical of the British

8. The link between social justice and international peace has been recognized since the inception of the ILO in 1919. It is expressly set forth in the ILO Constitution's preamble, which refers to unjust labor conditions on such a scale that they can imperil the peace and harmony of the world.

9. See the reports of the Committee of Experts in successive years beginning with Int'l Labour Conf., 59th Sess., Rep. III, Part 4A, at 88 (1974).

government for its refusal to allow employees at a government communications headquarters to belong to a trade union. There has been heated debate within the Conference Committee over the issue, with the Conference stopping short of censuring the U.K.¹⁰

The Governing Body's Committee on Freedom of Association has heard complaints against a great many governments. Among other things, it has criticized the government of the Peoples' Republic of China for its interference with workers' rights, including the denial of basic civil rights in connection with the Tienanmen Square incident in 1989.¹¹ More recently, it has considered serious complaints against Indonesia and Peru. The complaint against Indonesia alleges such things as denial of workers' right to establish and participate freely in organizations of their own choosing. Peru has been charged with physical violence against trade union members, repression of demonstrations, and ransacking of union premises.¹²

ILO Commissions of Inquiry have also been important components of the supervisory system. Respondents in cases submitted to Commissions of Inquiry have included Portugal, Liberia, Greece, Chile, Haiti, the Dominican Republic, Poland, the then-Federal Republic of Germany, Romania and Nicaragua.

The case against Poland arose out of Solidarity's efforts to free itself from the repression of the Communist Polish government. The government was charged with violating the ILO conventions on freedom of association, which it had ratified. The three-member Commission of Inquiry heard testimony and considered documentary evidence. It concluded that the Polish government had violated ILO Convention No. 87, by suspending and then dissolving Solidarity and other unions. The case had the effect of putting pressure on the government to ease up on Solidarity.¹³

The ILO supervisory system relies on the power of persistent persuasion and the mobilization of shame against governments that fail to live up to the obligations they have voluntarily undertaken. This has proved to be both a strength and a weakness. Its obvious weakness is the fact that it is not a sanction in the coercive sense known to domestic law. But that is also a strength: it does what can be done in an international system that would not tolerate a global sheriff with real power to punish sovereign governments for their failure to live up to accepted labor standards.

10. See Int'l Labour Conf., 71st Sess., Rep. III, Part 4A, at 193 (1985); Int'l Labour Conf., 76th Sess., Rep. III, Part 4A, at 234 (1989); Int'l Labour Conf., 76th Sess., Record of Proceedings, at 26/54 (1989); FINANCIAL TIMES, June 15, 1995, at 8.

11. Case No. 1500, 73 ILO Official Bull., Series B, No. 1, at 99 (1990).

12. WORLD OF WORK (the magazine of the ILO), May/June 1995, at 37.

13. See Report of the Commission Instituted under Article 26 to Examine the Complaint on the Observance by Poland of the Freedom of Association and Right to Organize Conventions, 67 ILO Official Bull., Series B, Special Supp. (1984). The members of the Commission were from Greece, Switzerland, and Venezuela.

The ILO does this through the use of independent and tripartite bodies that have established good track records of impartiality. They have made a difference despite the lack of any means to coerce governments into compliance. The ILO Committee of Experts reports that over the last 30 years, there have been more than 2,000 cases in which national legislation or practice was changed to meet the requirements of a ratified convention following comments by one or more of the ILO supervisory bodies.¹⁴

B. WORKERS' RIGHTS AND INTERNATIONAL TRADE

The ILO is the only U.N. organization currently examining new and more powerful mechanisms for dealing with enforcement problems caused by the relationship between international trade and inadequate working conditions. The issue has been raised in the GATT/WTO, but that organization has not yet seriously dealt with it.

The ILO was founded on the understanding that working conditions in one country are linked to those in other countries, and that minimum labor standards, universally applied, would provide basic protection to workers exposed to international trade. No single country, alone, could materially raise its labor standards without increasing its costs and thereby jeopardizing its competitive status.

The ILO's system of international supervision of voluntarily ratified labor standards is found wanting by those who would prefer trade sanctions as a more powerful tool for penalizing trading countries that violate the principles embodied in ILO standards. But sharp trade sanctions can harm consumers more than they help labor; they also often lead to retaliation. Voluntary compliance, as in the ILO, removes suspicions of protectionist intent and thus avoids the risk of retaliation.

The issue thus is not just a matter of trying to enforce human rights simply because it is the right thing to do; it is also an economic matter. Since the issue potentially affects international trade, it is in the United States' interest to support a reasonable effort by the ILO to raise working standards in any trading country that has significantly lower standards than the United States has—especially if that country exports its low-labor-cost goods to the United States. Consequently, the United States government has been active in raising the issue internationally, including its efforts during the adoption of the North American Free Trade Agreement.

The ILO has not yet reached any conclusions on this issue. The Organization is currently undertaking a research project to determine what might constitute a package of minimum labor standards to which all states should adhere. Since existing U.S. standards are so much higher than those in the ILO member countries where the primary concern lies, it is unlikely that the ILO study would call for any significant change in U.S. standards. In any event, the results of the study would not result in any obligation for the United States in the absence of its consent.

14. See Int'l Labour Conf., 81st Sess., Report III, Part 4A, at 9 (1994).

C. PRIVATE SECTOR REPRESENTATION (TRIPARTISM)

As has been noted earlier in this report, tripartism in the ILO is in tune with current concepts of effective management-labor relationships. Moreover, the principle of democracy underlying the ILO's tripartism, which gives a direct, nongovernmental voice and vote to people who will be affected by what the Organization does, could well be applied to some other international organizations dealing with current problems such as environmental protection.¹⁵ In a rudimentary form, the principle is already at work in some organizations and conferences outside the ILO, but it is restricted to informal input from nongovernmental organizations who are not permitted to participate in drafting conventions and other legal instruments. Public interest groups and other private associations are actively seeking a more significant role.¹⁶ Thus the democratic principle underlying tripartism is anything but an anachronism, despite what some ILO critics have said about it.¹⁷

VI. Conclusions

The ILO, like many other large organizations, could and should be more efficient than it is. It has grown substantially over the years, and probably could now be streamlined somewhat without losing its effectiveness. To say, however, that it should be trimmed in size and made more efficient is not to say that it should be abandoned.

United States participation in the ILO cannot be assessed simply by looking at the cost of membership. It is obviously in the interest of the United States to promote social peace in the world. The ILO is dedicated to that goal, and has pursued it as evenhandedly as could possibly be expected. Its tripartite decision-making process helps to ensure evenhandedness.

Moreover, the ILO has enjoyed a significant measure of success in articulating fair and attainable labor standards, and in supervising how those standards are actually applied by countries that have agreed to them. It has built a substantial body of case law that supplies precedents for the consistent, predictable application of standards, much as case law in the United States does.

15. See, e.g., Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 280-81 (1992). Palmer is a former Prime Minister of New Zealand.

16. See, e.g., David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769 (1994).

17. The same principle underlies a recent step taken by the World Bank. The Bank has established an independent Inspection Panel consisting of experts not otherwise affiliated with it. The Panel will investigate complaints by private groups of people adversely affected by a particular Bank project, in order to determine whether the Bank has followed its own policies and procedures in designing or carrying out the project. The results of the Panel's investigations are to be made public. 1994 World Bank Ann. Rep. 74. On the need for greater public participation in the U.N. itself, see ERSKINE CHILDERS & BRIAN URQUHART, *RENEWING THE UNITED NATIONS SYSTEM* 171-81 (1994).

The case for continued U.S. support of the ILO does not rest alone on principles of social peace. There is also a strong economic reason to stay the course, and to do so vigorously. In the context of the new economic paradigm in which the Uruguay Round and NAFTA are important steps toward the elimination of trade barriers, it would be counterproductive for the United States to turn its back on the one proven international mechanism for leveling the playing field of labor costs as they affect traded goods. The principal mechanism is found not in GATT or NAFTA, but rather in the ILO. As long as the United States remains an active member of the ILO, it will heavily influence the terms of social regulation that in turn influence the terms of trade.

U.S. influence would be even stronger if it were a party to more of the key ILO conventions than it now is. Then the United States could seek compliance by other ILO members without being open to the charge that it tries to enforce obligations that it is not willing to have enforced against it.

It would be counterproductive for the United States to turn its back on the ILO. The \$64 million funding level proposed by President Clinton for the ILO for fiscal year 1996 is a small price to pay for the only international organization that not only fosters social peace in the workplace, but also seeks to redress the unfair comparative advantage some countries that exploit their own workers enjoy over the United States in international trade.

Without U.S. participation, the ILO could not hope to achieve these goals. The United States would be among the losers.

Respectfully submitted,
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