

The U.S. Legal Role in International Labor Organization Conventions and Recommendations

I. Introduction

A. PUBLICIZED U.S. ACTION TOWARD INTERNATIONAL ORGANIZATIONS

“Budget cuts!” “Withdrawal of membership!” These are the perennial headline themes generated by media blitzes when crises arise in international organizations and when the United Nations convenes its General Assembly each session. The Government of the United States of America has embraced these concepts as appropriate approaches in attempts to solve problems it confronts in international organizations. Most recently, Congress has cut the U.S. budget to international organizations, and the Reagan Administration has withdrawn U.S. membership to the United Nations Educational, Scientific, and Cultural Organization (UNESCO). The United States previously has taken such a decisive stance by withdrawing its membership from the International Labor Organization (ILO).

*B.A., 1975, Barnard College, Columbia University; J.D., 1978, University of Pennsylvania Law School; LL.M., 1979, Cambridge University, Trinity College; Certificate, 1979, United Nations International Law Seminar. Counsel, International and Special Risk Law Department, CIGNA Corporation. Formerly Attorney, Division of Labor-Management Laws: Litigation, Opinions, and International Affairs, Office of the Solicitor, U.S. Department of Labor. Executive Committee, International Law Committee, Young Lawyers Division, American Bar Association; Executive Committee, Young Lawyers Section, Philadelphia Bar Association.

B. UNDERPUBLICIZED U.S. ACTION TOWARD INTERNATIONAL ORGANIZATIONS

Less heralded and well-known, however, are the day-to-day legal efforts of the United States in fulfilling its obligations as a member of an international organization. In doing so, the United States assists in achieving the goals that the international organization is striving to accomplish. An interesting case in point is how the United States complies with the legal standards of the ILO, an international organization from which it voluntarily withdrew its membership in 1977 and voluntarily regained membership in 1980.

C. THE ILO

The ILO was formed in 1919 as part of the League of Nations system. Accordingly, it became one of the first international organizations in the United Nations system in 1945. The United States was never a member of the League of Nations, but became a member of the ILO in 1934. The ILO's paramount mission is to improve the working and living conditions of workers throughout the world, primarily through the formulation of international labor standards, which its member nations ratify, and through monitoring their application. Its unique distinction is that its operations are based on the principle of tripartism in which representatives of employee groups, employer groups, and governments of member nations participate equally in attempting to attain the aspirations of the ILO.

D. REASONS FOR UNITED STATES' WITHDRAWAL FROM THE ILO

Notwithstanding, on November 1, 1977, the United States withdrew its membership from the ILO. Its principal reasons for withdrawal were three-fold: the interference of some governments with the independence of employee and employer groups undermining the principle of tripartism; the tendency by the annual ILO conference to cite non-Soviet bloc member nations of violations of conventions concerning human rights without using established ILO procedures; and the increase of political debates on issues irrelevant to the ILO.¹

E. REASONS FOR UNITED STATES' REENTRY INTO THE ILO

Following the United States' withdrawal, the ILO made efforts to alleviate the concerns of the United States. The results included: the adop-

1. COMPTROLLER GENERAL OF THE UNITED STATES, SUSTAINING IMPROVED U.S. PARTICIPATION IN THE INTERNATIONAL LABOR ORGANIZATION REQUIRES NEW APPROACHES, S. REP. NO. 55, 98th Cong., 2d Sess. 8 (1984).

tion of conference resolutions to strengthen the tripartite system of decision making; the censure and scrutiny of complaints against Soviet bloc member nations; the adoption of a procedure for secret ballots; the defeat of an anti-Israeli resolution and the absence of further ones; a process to screen out resolutions violative of ILO procedures; and a decrease in political meetings. In light of these developments, on February 18, 1980, the United States regained membership to the ILO.²

II. The Labor Department, ILO Conventions, Recommendations, and Reports

The three federal agencies concerned with relations between the United States and ILO are the U.S. Department of State, U.S. Department of Labor, and U.S. Department of Commerce. Each of these agencies has attorneys that work on United States relations with the ILO. The Labor Department, however, has the primary responsibility in taking the lead on United States international labor matters since it is the premier federal agency on domestic labor affairs. Thus, this article focuses on what the attorneys of the Labor Department do to comply with the legal obligations of the United States to the ILO.

The Division of Labor-Management Laws: Litigations, Opinions, and International Affairs, Office of the Solicitor (the Division), in Washington, D.C., does the Labor Department's legal work on the ILO. In this regard, its principal task is to prepare the annual reports of the United States on conventions and recommendations of the ILO. Such conventions and recommendations constitute the substance of international law. They are standards of conduct promulgated by international organizations that their member nations voluntarily agree to follow. ILO conventions ratified by the United States have the force of law in the United States of America. The United States has ratified the following ILO conventions:

- No. 53 Officers' Competency Certificates
- No. 54 Holidays with Pay (Sea) (this convention has not yet come into force, however)
- No. 55 Shipowners' Liability (Sick and Injured Seamen)
- No. 57 Hours of Work and Manning (Sea)
- No. 58 Minimum Age (Sea)
- No. 74 Certification of Able Seamen
- No. 80 Final Articles Revision

Enforcement of U.S. statutes that come under the jurisdictions of these conventions is not handled by the Division. Instead, the Division of Fair Labor Standards, Office of the Solicitor, Labor Department, enforces

2. *Id.* at 9-10.

statutes that come under the jurisdictions of Conventions Nos. 54, 57 and 58. The United States Departments of the Navy and the Coast Guard enforce statutes that come under the jurisdiction of Conventions Nos. 53 and 74.

The Constitution of the ILO mandates legal reports from its member nations. Article 19 requires them for recommendations and unratified conventions.³ Article 22 requires them for ratified conventions.⁴ Article 23 of the Constitution requires member nations to send copies of such reports to representative organizations of employers and workers in their countries for review and any comments the organizations wish to make.

The format of a report on a convention or a recommendation is basically the same, and the information required by the ILO is comprehensive and all encompassing. The general format of a report consists of four main parts:

Part I requests a list and copies of the legislation and regulations concerning matters that are dealt with in the convention or recommendation and documents on the effect given to the provisions of the convention or recommendation such as forms, booklets, handbooks, and reports.

Part II asks for a discussion of the information that has been requested—legislation, regulation, and practice—which will show the extent to which the provisions of the convention or recommendation have been put into effect. In addition, there may be questions on particular aspects of the convention or recommendation.

3. ILO CONST. art. 19, ¶ 7(b) in the following subparts requires federal governments:

(iv) in respect of each such Convention which it has not ratified, report to the Director-General of the International Labor Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent states, provinces or cantons in regard to the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise.

(v) in respect of each such Recommendation, report to the Director-General of the International Labor Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent states, provinces or cantons in regard to the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as have been found or may be found necessary in adopting or applying them.

4. *Id.* art. 22 states:

Each of the Members agrees to make an annual report to the International Labor Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

Part III seeks information on: (a) any modifications in the legislation or practice for giving effect to all or some of the provisions of the convention or recommendation; (b) any difficulties due to the convention or recommendation, legislation, practice, or any reason that may prevent or delay ratification of the convention or adoption or application of the recommendation; and (c) the intention to adopt measures to give effect to the provisions of the convention or recommendation that have not been covered by legislation or practice.

Part IV calls for the names of representative organizations of employers and workers to which copies of the report were given as required by article 23, paragraph 2 of the ILO Constitution,⁵ and any comments that such organizations provided.

The general format of a report also has a part for federal states. It asks the federal government to indicate which provisions of the convention or recommendation are appropriate in whole or in part for federal or state action and to provide the information as requested in Parts I, II, III, and IV for the appropriate federal and state action. It also requests information on any arrangements among the federal and state governments for coordinating action to give effect to all or some of the provisions of the convention or recommendation and any results achieved.⁶

In essence the mandate of the ILO report is to show what the legal practice of a member nation is in the areas within the purview of the particular convention or recommendation. The task is formidable because the various aspects of the substantive area in question are within the jurisdictions of many different U.S. agencies. The quest of the attorney who prepares the report is to bring the needed information together in a coherent whole by massive legal research, investigating which departments are involved, contacting them to identify people with whom the attorney can meet and seek leads, and if fortune is particularly generous, attend hearings to obtain firsthand information. Two examples follow.

First, consider the 1985 ILO Report of the Government of the United States of America on the Equal Remuneration Convention and Recommendation. The preparation of this report involved contacting seven different U.S. agencies. In addition, the attorney had to research twenty-seven federal statutes, regulations, executive orders, and/or caselaw,

5. *Id.* art. 23, ¶ 2 states: "Each member shall communicate to the representative organizations recognized for the purpose of article 3 copies of the information and reports communicated to the Director-General in pursuance of articles 19 and 22."

6. See International Labor Office Report Form for each of the ILO conventions or recommendations. Examples are the International Labor Office 1983 Report Form for the Labor Inspection Convention, 1983 Report Form for the Labor Inspection (Agriculture) Convention, 1984 Report Form for the Equal Remuneration Recommendation, and 1980 Report Form for the Minimum Age (Sea) Convention.

twenty-five brochures, reports, Senate and House of Representatives Bills, Presidential Proclamations, American Federation of Labor-Council of Industrial Organizations (AFL-CIO) resolutions, an amicus brief, and other evidence to demonstrate the extent of U.S. law and practice in the area of equal remuneration.⁷

The second example concerns the 1984 ILO Report of the Government of the United States of America on the Labor Inspection (Agriculture) Recommendation. A boon in any investigation is being able to obtain primary evidence firsthand. When this report was being prepared, the Occupational Safety and Health Administration (OSHA) of the Labor Department had a proposed rule on field sanitation for agricultural workers, which would provide them with drinking water and hand washing and toilet facilities while they work in the fields.⁸ Beginning in May 1984, OSHA held nationwide public hearings with bilingual Spanish and English interpreters for the first time to allow agricultural workers, many of whom are Spanish-speaking, as well as farmers, scientists, physicians, and other interested members of the public to testify on conditions of occupational safety and health in the fields.⁹ This firsthand information was of considerable impact and advantage in preparing the final report.

A. REVIEW PROCESS FOR ILO REPORTS

The review process for the ILO report is extensive and thorough and ensures that the report truly represents the United States. After the attorney completes a draft of the report, it is reviewed in the Division by the Counsel for International Affairs, Deputy Associate Solicitor, and Associate Solicitor. At each of these review levels revisions can be made and drafts generated. The report is then given to the Special Assistant on ILO Affairs to the Deputy Under Secretary for International Affairs in the Bureau of International Labor Affairs, Labor Department, for review and distribution to the Tripartite Advisory Panel on International Labor Standards (TAPILS). TAPILS has a tripartite structure of government, employer, and employee groups composed of representatives from the Departments of Labor, State, and Commerce, AFL-CIO, and U.S. Council for International Business, each with its own review chain. Comments to the report are made by telephone and letter. In extraordinary circumstances, usually when major objections to the report surface, such as

7. GOVERNMENT OF THE UNITED STATES OF AMERICA, REPORT ON EQUAL REMUNERATION CONVENTION AND RECOMMENDATION 1-4 (1985).

8. Subsequently codified at 29 C.F.R. § 1928.110 (1987).

9. GOVERNMENT OF THE UNITED STATES OF AMERICA, REPORT ON THE LABOR INSPECTION (AGRICULTURE) RECOMMENDATION 4 (1984).

when the substantive area is controversial as was the case with equal remuneration, TAPILS convenes as a whole to discuss the report. The attorney who prepared the initial draft of the report incorporates the comments and changes to it, and the same review process is continued until the members of TAPILS are in agreement.

The final draft of the U.S. report is sent to the Deputy Chief of the International Labor Standards Department, International Labor Office, ILO in Geneva, Switzerland, for its chain of review of all such reports from the ILO's member nations. The information and results from all the reports are compiled and discussed at the next ILO conference, which is held in Geneva every June for approximately a month. In 1985, 150 countries with over 2,000 representatives from government, employer, and employee groups participated in the annual ILO conference.¹⁰ At the annual conference the ILO focuses on the law and practice of its member nations concerning its conventions and recommendations, which it codifies, and how much further member nations have to go to attain the ILO standard.

B. OTHER ILO WORK

In addition to the ILO reports of the United States, Labor Department attorneys prepare the U.S. delegation for the annual ILO conference. The attorneys keep abreast of pertinent legislation and current events that the ILO may act upon at the conference. For the 1986 ILO conference such preparation commenced approximately a year in advance. In addition to preparing the ILO reports, attorneys monitor private and government actions concerning such developments as apartheid in South Africa and the Union Carbide chemical accident in Bhopal, India.

Labor Department attorneys also are key figures in the United States' understanding of and relations with the ILO and ultimate ratification of ILO conventions, which then constitute U.S. law. For example, Labor Department attorneys participated in the hearing on "United States Relations with the International Labor Organization," which was held on September 11, 1985, by the U.S. Senate Committee on Labor and Human Resources in Washington, D.C. They reviewed the testimony of Secretary of Labor William E. Brock before and during the hearing and noted the testimonies of the other witnesses, which included Secretary of State George P. Schultz, AFL-CIO President Lane Kirkland, and U.S. Council for International Business President Abraham Katz.

10. *Hearings on United States Relations with the International Labor Organization Before the Senate Labor and Human Resources Comm.*, 99th Cong., 1st Sess. 5 (1985) (statement of Abraham Katz, President, U.S. Council for International Business).

C. HOW TO IMPROVE UNITED STATES-ILO RELATIONS

Most of the discussion at the hearing revolved around the theme of how to improve United States relations with the ILO. One major way may be for the United States to ratify more ILO conventions. Labor Department attorneys set the stage for this process by participating in TAPILS. The attorneys' functions include reviewing which ILO conventions are likely candidates for ratification and preparing the position letters of the Executive Branch on these ILO conventions. Such position letters are discussed in meetings of the President's Committee on the ILO, chaired by the Secretary of Labor, and presented to the United States Congress for its deliberations on ratification.

Concomitant with the U.S. Senate hearing on "United States Relations with the International Labor Organization," Labor Department attorneys were preparing Executive Branch position letters on Conventions 144 and 147, the most likely ILO conventions, if any, to be ratified by the U.S. Congress. Convention 144 requires a member nation to ensure effective tripartite consultation among government, employer, and employee representatives on ILO matters at least once a year. On April 10, 1986, President Ronald Reagan recommended to the U.S. Senate that it give its advice and consent to ratify Convention 144. Convention 147 requires legislation and regulations establishing minimum standards on working conditions on merchant ships registered in the member nation and the encouragement of appropriate collective agreements.¹¹

III. Conclusion

Such incremental and unheralded legal work on the conventions and recommendations reveals how the United States strives to satisfy its obligations as a member nation of the ILO. In doing so, the United States assists in achieving the goals of the ILO and makes a valuable contribution to the vision that it and the ILO share in developing and fostering a system of domestic and international law for improving the working conditions of all.

11. *Id.* at 8-9 (statement of William E. Brock, Secretary of Labor).