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## Session 5: The role of international labour standards in rebalancing globalization

### A legal perspective on the role of international labour standards in rebalancing globalization

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#### Abstract

International Labour Standards (ILS) have always played a key role in ensuring that economic and social progress go hand in hand. Beyond recent policy statements which have reaffirmed this role, are ILO member States translating the commitments they voluntarily adopted under ratified Conventions into concrete actions? Is the ILO sufficiently responsive to its Members' needs, assisting them in taking measures that are commensurate with the on-going challenges? The present paper outlines certain elements of a response to these questions in relation to three topical matters: the role of ILS in the context of the economic crisis identified through the comments of the ILO supervisory bodies: the current trends in increasing the outreach of ILS to workers in the informal economy; the impact of labour provisions inserted in preferential trade arrangements on the ILO standards system. Finally, the paper sketches out possible policy implications for ILO standard-setting action.



# A legal perspective on the role of international labour standards in rebalancing globalization

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## 1. Introduction

The concern to provide a remedy for what was to be labelled *social dumping* at a later time, and to find sustainable solutions to poverty and social exclusion through a certain equalization of levels of social protection among countries, lies at the origin of the creation of the ILO in 1919 (Maupain, 1997, p. 582). The intention was at the time to achieve this through the promotion of social dialogue, in the form of tripartism, and the adoption of international labour standards (ILS). The subsequent advent of globalization brought to the centre stage, with unprecedented magnitude, the same concerns that had led to the Organization's establishment. The celebration of the ILO's 75<sup>th</sup> anniversary in 1994 sparked off a series of reforms intended to revitalize ILS as the main tool through which the Organization would continue to promote its objectives. A landmark instrument, the ILO Declaration on Fundamental Principles and Rights at Work, 1998 (the "1998 Declaration"), has served to establish a global minimum social floor by promoting respect for the fundamental rights and principles reflected in the ILO's eight fundamental Conventions and boosting their ratification levels.

More recently, the eruption of the financial crisis, its socio-economic costs and new developments in the globalization process have placed ILO standard-setting action under further strain. The important role of ILS in achieving a fair globalization has received staunch support from the ILO's constituents, particularly in the form of the Declaration on Social Justice for a Fair Globalization, 2008 (the "Social Justice Declaration") and the Global Jobs Pact, 2009. However, beyond these policy statements, a number of questions have arisen: are ILO member States translating their commitments to the ILO and its standards into concrete actions? Is the ILO sufficiently responsive to its Members' needs, assisting them in taking the measures that are commensurate with the ongoing challenges? The present paper responds to these issues in relation to three topical matters: (1) the trends which can be identified through the comments of the ILO supervisory bodies as to the crisis-response measures taken by member States in the light of ratified Conventions and the related challenges; (2) the lessons learned so far on ways to increase the outreach of ILS to workers in the informal economy; and (3) the impact of labour provisions in preferential trade arrangements on the ILO standards system as well as the potential role of the ILO in this area. The common thread running through the three topics is the overriding issue of the effectiveness of ILS. In this respect, the paper points to some general implications for ILO standard-setting action.

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## 2. The role of ILS in the context of the crisis as it emerges from the comments of the supervisory bodies

The present section discusses the extent to which ILS can and have served as safeguards in the context of the crisis, paving the way for a sustainable recovery. It illustrates cases of best practices identified by the ILO supervisory bodies and discusses the way in which these bodies have approached cases of possible social regression, related in particular to the austerity measures adopted in Europe during the second stage of the crisis.

Even if ILS may appear to be a distant concern in times of crises, the fact that they are actually part of the solution has been widely acknowledged by the ILO constituents during the discussions which led to the adoption of the Global Jobs Pact, 2009. The latter includes among the principles for promoting recovery and development the “promot[ion of] core labour standards and other international labour standards that support the economic and jobs recovery and reduce gender inequality” and emphasizes the essential role of standards in preventing a downward spiral in labour conditions and building the recovery notably by maintaining social cohesion and a global social floor (ILO, 2009c, para. 14). The tripartite Committee on the Application of Standards (CAPP) – one of the cornerstones of the ILO supervisory system that functions as a standing Committee of the International Labour Conference – emphasized in 2009 that the crisis must not be used as an excuse for lowering standards; that there can be no sustainable economic recovery without sustainable and up to date labour standards; that treaty obligations, voluntarily undertaken, are to be fully respected and that ensuring respect for fundamental principles and rights at work results in undeniable benefits to the development of human capital and economic growth in general and, more particularly, to global economic recovery (ILO, 2009, para. 97). The Global Jobs Pact has listed the comprehensive set of Conventions and Recommendations which serve as minimum safeguards in the context of the crisis: the fundamental Conventions on freedom of association and collective bargaining, non-discrimination, forced labour and child labour as well as the ILO instruments concerning employment policy, wages, social security, the employment relationship, the termination of employment, labour administration and inspection, migrant workers, labour conditions on public contracts, occupational safety and health, working hours and social dialogue mechanisms (ibid).<sup>2</sup>

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<sup>2</sup> These instruments include notably:

- the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
- the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105);
- the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182);
  - the Employment Policy Convention, 1964 (No. 122); the Protection of Wages Convention, 1949 (No. 95), the Minimum Wage Fixing Convention, 1970 (No. 131) and the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173);
- the Social Security (Minimum Standards) Convention, 1952 (No. 102);
- the Employment Relationship Recommendation No.198 (2006);
- the Termination of Employment Convention, 1982 (No. 158);
- the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129) and the Labour Administration Convention, 1978 (No. 150);

Against this background, the adoption of a new instrument which would have established guiding principles and policies to deal with preventive crisis action and effective crisis responses was contemplated as a possible standard-setting option in the 2010 General Survey on Employment Instruments by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), i.e., the supervisory body which carries out a legal examination of the extent to which national laws and practices conform to ILS and reports thereon to the International Labour Conference (ILO, 2010b, paragraph 806). The CAPP decided not to move forward on such an option. By so doing, the ILO constituents have confirmed that the priority should fall on the effective application of the existing standards in these times of crises, in line with the guidance provided in the Global Jobs Pact, rather than move towards the adoption of yet another instrument. The role of the ILO supervisory system is key in this regard.

At the outset it bears noting that this is not the first time that the ILO supervisory bodies have had to pronounce themselves on the application of standards in situations of crisis and austerity. The Committee on Freedom of Association (CFA), a tripartite body entrusted with the examination of complaints alleging infringements of freedom of association principles, has had a long record of decisions on the need to align structural adjustment programmes with respect to collective bargaining structures and agreements. In a longstanding dictum which has been reiterated in a plethora of cases, the CFA has spelled out the fundamental principles which should underlie any austerity package if freedom of association and collective bargaining is to be respected:

“If, as part of its stabilization policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers’ living standards” (ILO, 2006, Para. 1024).

The CFA has also emphasized that in any case, a limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers’ and employers’ organizations in an effort to obtain their agreement and that consultation should aim at ensuring that the public authorities seek the views, advice and assistance of employers’ and workers’ organizations, particularly in the preparation and implementation of laws and regulations affecting their interests (*ibid*, para. 999 and 1068).

The guidance which emanates from principles of proportionality and tripartite dialogue, should underlie any effort to steer an economy through the crisis while at the same time, respecting international commitments under ILO Constitution and ratified Conventions on freedom of

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- the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143);
  - the Labour Clauses (Public Contracts) Convention, 1949 (No. 94);
  - the Occupational Safety and Health Convention, 1981 (No. 155), its Protocol of 2002 and the Promotional Framework for Occupational Safety and Health Convention, No. 187 (2006);
  - the Hours of Work (Industry) Convention, 1919 (No. 1) and the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30); and
  - the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

association and collective bargaining. It also resonates well with the Global Jobs Pact, which provides that the success of measures to avoid wage deflation crucially depends on ensuring respect for core workers' rights and building the capacity of the social partners for dialogue and agreement-making.

The immediate response by the CEACR to the emergence of the current crisis was to adopt a general observation on the application of the ILO social security standards in the context of the global financial crisis, in which it emphasized the need to avoid the risk of social regression. The CEACR also emphasized that, in the unprecedented conditions of the global financial crisis, governments must manage the skyrocketing levels of budgetary deficit in such a way not to endanger the social guarantees of the population and that measures taken by governments to salvage private providers could not be taken at the expense of cutting the resources available to public social security schemes (ILO, 2009).

Two years later, in its 2011 General Survey on Social Security instruments, the CEACR had an opportunity to take stock of recent developments. The CEACR noted that, in 2010, several European countries took an abrupt turn from stimulus measures, adopted in consultation with the social partners during the early part of the crisis, towards austerity plans aimed at addressing public debt and budget deficits and enhancing fiscal consolidation.<sup>3</sup> The CEACR concluded that ***“it appears that in some cases the imperative need to achieve fiscal consolidation has not been balanced with sufficient concern for the social and human costs of such rapid austerity measures. Not only social cohesion will be put at risk, but in such conditions, the economic recovery may be accompanied by a prolonged “human recession”. One should also remember that governing only by financially oriented criteria may lead to an undermining of social justice and equity. Public opinion is much less ready to accept drastic austerity measures if it sees that the efforts requested are not equally distributed and shared by everyone.”*** (ILO, 2011 para., 599)

Even though the comments of the CEACR concern in particular the social security Conventions, the austerity measures may also impact the application of several other instruments. In the case of **Greece** for instance, the Greek trade unions submitted to the CEACR urgent observations alleging violations of no less than 10 Conventions. Faced with this challenge, the CEACR had a choice between pursuing its traditional approach of making comments on the conformity of national law and practice with ratified Conventions, or taking a more innovative path which would consist, for instance, in engaging in a constructive dialogue aimed at assisting the country to honour its international commitments while facing the challenge of fiscal consolidation. In its 2011 report, the CEACR invited the Government to avail itself of ILO technical assistance, in the form of a High Level Mission, so as to facilitate a comprehensive understanding of the issues before examining the impact of the austerity measures on the application of the ratified Conventions (ILO, 2011, p. 584-85)

The approach of the CEACR in this case has been in line with the integrated strategy pursued over the last few years on the basis of the decisions taken by the ILO Governing Body (e.g. ILO 2009d).

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<sup>3</sup> The CEACR referred for instance to measures taken in Iceland, Ireland, Greece, Germany, Latvia and the United Kingdom.

This strategy consists of taking advantage of synergies among all standards-related means of action, including technical cooperation, in order to strengthen the standards system and promote the effective application of international labour standards on the ground.

For such a strategy to succeed, two conditions must be met. First, it is necessary to draw upon the technical competencies of the Office as a whole with a view to offering cutting-edge technical advice and realistic policy options within the framework of ratified Conventions. Second, the obligations voluntarily undertaken under the ILO Constitution and ratified Conventions as well as the comments of the supervisory bodies on their application, should provide the necessary legal mandate and framework for the ILO to engage in dialogue with international institutions having a leading role in this domain, notably the International Monetary Fund (IMF) and the European Union (EU).

Against this background, it is perhaps unorthodox to present the crisis as an opportunity for social justice progress. Nevertheless, the supervisory bodies have noted certain significant examples where, in the framework of efforts to overcome the negative effects of the global economic downturn, the crisis has functioned as a catalyst for progress, consolidating certain advances (which had sometimes been initiated prior to the crisis). Many notable examples emanate from developing and emerging countries some of which have, by the same token, distanced themselves from the structural adjustment policies which they had previously pursued.

For instance, in the framework of the supervision of the Employment Policy Convention, 1964 (No. 122), the CEACR has noted information provided by **Brazil** on the counter-cyclical measures adopted by the Government including infrastructure projects under the Growth Acceleration Plan, entailing investments of US\$300 billion in 2009, as well as programmes to build houses for the poorest families and an expansion of beneficiaries of the *Bolsa Familia* programme that provides financial assistance to 11.1 million families. The CEACR and the CAPP have taken note of similar measures adopted in **Argentina, China, Mexico, Turkey** and **India** (notably the Indian National Rural Employment Guarantee Scheme which has been noted on various occasions as an important social safety net) (ILO, 2010b, paras 53, 63 and 620; ILO, 2011, pp. 516, 603-606; ILO 2009, p.124)

The CEACR also took note of stimulus measures and active labour market policies adopted by industrialized countries, especially during the first stage of the crisis ( e.g. in **Austria, France, United States, Germany, Italy, Japan, New Zealand** and **Canada**; ILO, 2010b, paras 560, 582, 584, 589-591).

In its 2011 General Survey, the CEACR has noted that, in several countries (**Belgium Chile, Germany, Japan, Netherlands, Nigeria, Singapore, South Africa**, etc.), governments involved the social partners in the shaping of stimulus packages meant to mitigate the impact of the global economic downturn on workers and enterprises and to accelerate recovery (CEACR, 2011c para. 553).

While taking note of policies pursued in the framework of Convention No. 122, the CEACR has requested the Members to evaluate their effectiveness and indicate their impact on the promotion of full, productive and freely chosen employment. The CEACR has also emphasized in its comments under Convention No. 122 that social dialogue is essential in normal times and

becomes even more so in times of crisis. The employment instruments require member States to promote and engage in genuine tripartite consultations (CEACR 2010, para. 794). An important caveat is to ensure that such measures benefit the more vulnerable and marginalized segments of society in line with both Convention No. 122 and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). This issue is also addressed below in relation to the informal economy.

The examination by the ILO supervisory system of crisis response measures and their impact is ongoing and is based on a periodic reporting mechanism. In its forthcoming sessions, the CEACR will examine information on the application by ratifying States of Conventions Nos. 94, 95, 131 and 173 on income security following a general observation it issued in 2010 in order to emphasize the need to ensure that crisis responses be fully consonant with the principles underlying these Conventions (ILO 2010c, pp.32-35). This permanent supervisory mechanism offers an opportunity to come up, in due time, with a global assessment of the extent to which the crisis response measures correspond to the international commitments of member States under ratified Conventions.

Whereas there is broad consensus on the relevance of ILS in addressing crisis situations and on the need for effective supervision to ensure their sound implementation on the ground, the ILO supervisory mechanisms are confronted with an unprecedented challenge: the European models of industrial relations and social protection which, since the inception of the ILO and its standard-setting system, were often looked upon and replicated in the developing world, are now being reconsidered and, in some cases, fundamentally revamped. At the same time, leading countries from the developing world offer new and innovative examples of how the application of ILS can be taken forward in the new conditions of a globalized world. Faced with this new environment, the ILO supervisory system has been increasingly relying on technical assistance and cooperation as a complement to its traditional function of controlling the application of ratified Conventions, in an effort to make the ILO and its supervisory system part of the solution to, rather than a distant observer of, the challenges raised by the global economic crisis. In this framework, it is important to strengthen the voice of the ILO by using ILS and the supervisory mechanisms as a platform for promoting policy coherence at all levels.

### **3. The protection of workers in the informal economy: Current trends**

While obtaining a true picture of the size and dynamics of the informal economy has proven to be a daunting task since definitions, concepts and measurement might differ depending in part on whether precision or country-comparability is sought, a recent ILO/WTO joint study has estimated that informal employment comprised about 78 per cent of non-agricultural employment in developing Asia and 52 per cent in Latin America and 56 per cent in Africa (with substantial variation between North Africa and Sub-Saharan Africa).<sup>4</sup> Most people enter the informal economy not by choice, but out of the need to survive. Especially in circumstances of high unemployment,

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<sup>4</sup> See *Globalization and informal jobs in developing countries*, A joint study of the International Labour Office and the Secretariat of the World Trade Organization, Geneva, 2009, p. 25-33.

underemployment and poverty, the informal economy provides many with job and income generation outlets because of the relative ease of entry and low requirements for education, skills, technology and capital. However, the jobs thus created often fail to meet the criteria of decent work. Workers in the informal economy have low incomes, low job security, no social protection and fewer possibilities for access to formal education and training.

From the perspective of unprotected workers, the negative aspects of work in the informal economy far outweigh its positive aspects. Workers in the informal economy are not recognized, registered or protected under labour legislation and are excluded from social protection. They are therefore not able to enjoy, exercise or defend their fundamental rights at work. Since they are normally not organized, they have little or no collective representation vis-à-vis employers or public authorities.

It should be recalled that informality is principally a governance issue. The growth of the informal economy can sometimes be traced to inappropriate, ineffective, misguided or badly designed or implemented social policies, often developed without tripartite consultations, and lack good governance for proper and effective implementation of policies and laws.

There is no doubt that tailor-made and effective responses to the incidence and growth of the informal economy after the crisis can only be devised at national and local levels with the full participation of the social partners and with special focus on vulnerable groups like women, children, migrant workers, indigenous peoples, rural workers, domestic workers, etc. ILS can provide the roadmap upon which such responses and appropriate policy mixes might be based. Such a roadmap would place emphasis on reinforcing the application of the eight fundamental Conventions which contain the basic enabling rights instrumental to progressively breaking away from the informal economy and poverty. It would also rely on the four Conventions most important from the view point of governance, which serve to promote active labour market policies, ensure appropriate law enforcement and oversight from the public authorities and encourage the common search for solutions through tripartite dialogue. The effective application of these twelve instruments at national level constitutes, in and of itself, the basic groundwork for a progressive exit from the informal economy.

In addition to these basic instruments, certain additional standards are particularly relevant to the informal economy. Several of them contain essential policy tools to address the informal economy, others explicitly include within their scope of coverage workers in the informal economy while some others are intimately related to the condition of workers in this economy. Naturally, they overlap with the instruments which are an integral part of the recovery from the financial and economic crisis.

The belief that workers in the informal economy are outside the scope of application of ILS is a common misconception. In fact, most ILS are relevant to those in the informal economy. It should be stressed that the fact that international labour instruments may not be widely applied in practice in the informal economy does not mean they are not relevant to it. Several Conventions and Recommendations have provisions referring specifically to the informal economy, while a number of ILO instruments apply explicitly to “workers” rather than the legally narrower term “employees”, or do not contain language limiting their application to the formal economy (Trebilcock, 2004, p. 590). For instance, ILO fundamental Conventions on freedom of association (Nos. 87 and 98)

explicitly state that all workers without distinction whatsoever, including workers in the informal economy, enjoy the fundamental rights which flow from freedom of association. Thus, workers in the informal economy have the right to organize and engage in collective bargaining (where there is an employer). They may freely establish and join trade unions of their own choosing for the furtherance of their occupational interests and may carry out their trade union activities (elections, administration, formulation of programmes) without intervention from the public authorities. Most importantly, they have the right to represent their members in various tripartite bodies and social dialogue structures.

It was during the 2002 International Labour Conference that a conceptual framework of employment in the informal sector was presented in the context of the discussion on decent work and the informal economy.<sup>5</sup> The ILO's supervisory bodies thus decided to address issues relevant to the informal economy in a more systematic manner in their comments after the 2002 discussion at the Conference. For instance, the CEACR has formulated comments concerning themes such as freedom of association, discrimination or labour administration, in particular with regard to the scope of application of these instruments. But, the majority of the Committee's comments relate to the Conventions on child labour and, to a lesser extent, employment policy. In fact, under Conventions Nos.138 and 182, the Committee has systematically pointed out to governments that the situation of children working in the informal economy deserves special attention. The Committee has also regularly pointed out that Convention No.122 provides that measures to be taken in relation to employment policy should take fully into account the experience and views of the social partners with a view to securing their full cooperation in formulating and implementing employment policies, including the opinions of those working in the rural sector and the informal economy. There are also numerous situations identified by the Committee as cases of forced labour that are taking place in the context of the informal economy and for which it has asked governments to take measures. For instance, a number of comments relate to human trafficking for sexual exploitation, cases of bonded labour or forced labour for vulnerable categories of workers such as migrant workers, domestic workers or indigenous workers, which often occur in the context of the informal economy.<sup>6</sup>

The CAPP has for its part emphasized in recent years the importance of a cooperative framework between the ILO and its member States to deal with the informal economy's lack of labour rights protection. The CAPP has insisted on the need for labour inspectors to be better trained to enhance communication with the informal economy's actors and has stressed the need to collect better statistical data related to this sector in order to give a clearer definition of the informal economy. Another key element emphasized by the CAPP is the fact that in order to address workers' issues in the informal economy, governments have to ensure that employment, as a key element for poverty reduction, is at the heart of macroeconomic and social policies.

Furthermore, those who work in the informal economy may bring a complaint to the CFA if they feel that their freedom of association rights have been infringed by their Government (or by a

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<sup>5</sup> See Conclusions concerning decent work and the informal economy, International Labour Conference, 90<sup>th</sup> Session, 2002, *Record of Proceedings*, vol. II, p.25/53, para.2.

<sup>6</sup> See *Digest of comments of the ILO's supervisory bodies related to the informal economy – Extending the scope of application of labour laws to the informal economy*, ILO, Geneva, 2010.

person and their Government has not taken the necessary measures to ensure the free exercise of freedom of association). Complaints relating to issues linked to the informal economy have already been submitted to the CFA in recent years, e.g., **Argentina, Guatemala and El Salvador**.

In terms of legislation, it bears noting that, in recent years, several countries have adopted laws and regulations which specifically address the issue of informality for workers. For instance, **Burkina Faso** adopted in 2008 a Decree concerning the adoption of particular statutes for the Assistance Fund for the Informal Sector. The Fund was established in order to provide direct loans and guarantees to creators of micro-projects. It is administered by the Ministry of Employment and the Ministry of Economy and Finance and aims to promote employment and combat poverty by creating jobs through micro-projects, and in particular by providing training, follow-up and advisory services for the receivers of micro-credit loans. Another example is Egypt which, already in 2003, adopted a Decree promulgating the regulation on employment in the informal sector. This decree establishes a Commission on employment in the informal sector charged with studying and formulating policy on workers in the informal economy. It provides for the registration of workers in the informal economy and the issuance of registration cards. It also forbids employers to hire workers in the informal economy through non-authorized employment services. For its part, India adopted in 2008 the Unorganized Workers' Social Security Act, which provides for the establishment of social security schemes for workers in the informal or "unorganised" economy and applies to the whole of India. For the purpose of the Act, an unorganised worker is defined as a "home-based worker, self-employed worker or a wage worker in the unorganised sector". The Government may formulate and notify suitable welfare schemes for unorganised workers such as provident fund, employment injury benefit, housing, educational schemes for children, skill upgrading of workers, funeral assistance and old age homes. Another country which has adopted legislation addressing this issue is Papua New Guinea, which adopted in 2004 the Informal Sector Development and Control Act. This Act provides the facilities and encourages the development of informal businesses in urban and rural areas. It regulates and controls the development of informal businesses, including through the establishment of inspection and sets out rules for the protection of public health and safety. Finally, one last example is Portugal, which adopted in 2009 the Law establishing the legal regime for domestic work. This law regulates the creation of an activity, without legal subordination, in the home or residence of the worker. This includes when a finished product, following the purchase of the raw materials, is provided for a specific price to the salesperson.<sup>7</sup>

To promote decent work, it is necessary to eliminate the negative aspects of informality while at the same time ensuring that opportunities for livelihood and entrepreneurship are not destroyed, and promoting the protection and incorporation of workers and economic units of the informal economy into the mainstream economy. Addressing the informal economy is thus a central aspect of strategies for an exit from the crisis. Based on the guidance provided by ILS, appropriate responses and policy mixes should be decided upon at national and local levels with the full participation of the social partners and with special focus on vulnerable groups.

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<sup>7</sup> All these laws and regulations are available on the NATLEX database at the following address: [http://www.ilo.org/dyn/natlex/natlex\\_browse.home?p\\_lang=en](http://www.ilo.org/dyn/natlex/natlex_browse.home?p_lang=en)

#### **4. The nexus of ILS and labour provisions in international preferential trade arrangements: addressing current knowledge gaps to promote coherence**

This section briefly raises the main issues arising from labour provisions that are included in unilateral, bilateral and regional trade arrangements (the Generalized System of Preferences (GSP) schemes and trade agreements), which refer to the 1998 Declaration and ILO Conventions. The considerations set out below may be relevant to the labour provisions in trade arrangements relating to the enforcement of domestic labour legislation, which necessarily incorporate provisions of any relevant ILO Conventions that the countries concerned have ratified. Further, the distinction between these two types of trade-related labour provisions is tending to diminish in practice.

The proliferation of labour provisions in trade arrangements – involving not only North-South trade agreements but also a growing number of agreements between developing and emerging economies (IILS, 2009, p.77) - could constitute an important leverage towards the realization of the ILO objectives. To date, however, while the phenomenon has been the subject of a number of analyses, the ILO contribution to this analytical work has been limited.

A review of the literature highlights three gaps in terms of information and analytical work. First, while a broad typology of labour provisions has been established (*ibid*, pp.65-66), a full (insofar as it is possible) and up-to-date picture of these labour provisions is lacking. This is mainly due to the decentralized nature and proliferation of trade arrangements, and particularly of trade agreements (*ibid*, p.75). Second, there is an absence of any study investigating what might be described as the “horizontal” impact of labour provisions, in other words their compatibility with the ILO standards to which they refer and with the corresponding provisions of the ILO Constitution. Third, although the “vertical” impact of these labour provisions, i.e., their impact on national labour rights and conditions, has been studied, robust analysis of their actual effect would appear to be scant. Most articles and reports take a narrative approach or are based on case studies, rather than attempting to make international comparisons (CARIS, 2010, p.153). Existing systematic evaluations of their vertical impact are limited to the GSP schemes adopted by the United States and the European Union. These three gaps are inter-related. Until they are filled, it is unlikely that there will be any conclusive evidence of the impact of labour provisions in trade arrangements, and thus of their role in the current globalization process.

These gaps are undoubtedly due in part to the difficulties inherent in gaining access to the relevant information, stored in various sources, starting with the websites of the relevant national actors and of the international organizations concerned (especially the WTO, UNCTAD and EU), including the ILO, which has recently created a portal on free trade agreements and labour rights. What is needed is a comprehensive, reliable and user-friendly knowledge base into which regular and up-to-date information on these trade-related labour provisions is fed. This knowledge base would not only serve as a basis for further analytical and research work, it could also be used by States in their trade negotiations, thereby ensuring that trading partners have equal access to information. It could also be used by the social partners and other representatives of civil society, who are playing an increasing role in monitoring the implementation of the respective labour provisions.

The topic of the “horizontal” impact of trade-related labour provisions has not so far been analysed. Any determination of compatibility would require an examination of the terms of trade-related

labour provisions (and their relationship with other provisions in the trade arrangement) in light of the ILO Constitution and the provisions of the Conventions ratified by the member States concerned. This analysis could contribute to addressing the issue of coordination between diverse (and perhaps diverging) labour provisions to which one country may be subject, depending on the preferential trade arrangement it has accepted (ILO, 2009, p.78).

In the case of trade agreements that envisage a dispute settlement mechanism for labour matters, there might be a conflict between two compliance systems (Kuijper, 2010, p.13). Which forum should be seized with the alleged violations of the ILO Conventions set out in the agreement: the ILO constitutional supervisory system or the trade dispute settlement mechanism? Three considerations appear relevant in this respect. First, as a matter of principle, it would not be acceptable for a trade advantage enjoyed by an ILO Member to be withdrawn for alleged failure to observe its obligations under ratified Conventions without the ILO having had the opportunity to express its views on the matter (ILO, 2007, p. 34). Second, under the ILO Constitution, a member State may be obliged to have recourse in the first place to the ILO supervisory system to determine whether another Member has failed to observe a Convention that they have both ratified, regardless of the context in which the allegations of non-observance have arisen. Third, an important practical consideration arises, as the implementation of ILO Conventions gives rise to problems of almost unlimited diversity and complexity, which therefore require time and expertise. ILO Members would need to consider whether it would be more cost-effective to have recourse to the well-established procedures and expert bodies of the ILO, rather than to an ad hoc body.

Turning now to the thorny question of impact in practice (the “vertical” impact), the appropriate tools and methodology still need to be devised for its systematic and general evaluation. To that end, appropriate recourse to the findings of the ILO supervisory bodies should be considered where the relevant Conventions have been ratified. In addition, the methodology to measure progress towards the full application of fundamental rights at work, currently developed in the ILO, could also become a relevant tool for the purpose of this evaluation. In general, if any meaningful evaluation is to be achieved, careful consideration will have to be given to the important constraints highlighted by the studies on the topic (e.g., CARIS, 2010, p. 151-188; Orbie and Tortell, 2009, pp. 672- 681; EU, 2008, pp. 59-72; Witte, 2008, pp. 43-51; Doumbia-Henry and Gravel, 2006, pp. 197 and 203; Polaski and Vyborny, 2006, p. 109 ; Elliott and Freeman, 2003, pp.75-80). For instance, assessing the impact of labour provisions is more difficult in the case of trade agreements than for GSP schemes (CARIS, 2010, p.153, Witte, 2008, p.43). This is due to the heterogeneity of labour provisions in trade agreements. A partial remedy to this problem can be found in the establishment of a reliable knowledge base, as proposed above. Moreover, dispute settlement mechanisms in trade agreements, which could shed some light on the impact of labour provisions, have rarely been used. Although the first labour rights related dispute under a regional trade agreement has been launched (the US-Guatemala labour rights dispute under the CAFTA-DR in July 2010), it remains to be seen if and to what extent the related information will be disseminated by the parties. There are other common issues relating to the labour provisions of trade arrangements. Timing is one. A number of trade arrangements are quite recent. In contrast, the achievement of progress in labour legislation and practice takes time. It will therefore be necessary to wait for a reasonable period before being able to assess the impact of the respective labour provisions. Another issue relates to the difficulty of isolating the impact of labour provisions from other important factors, such as foreign policy considerations and domestic politics, including domestic labour institutions and actors. These issues are well known in the field of labour

legislation. They constitute the parameters within which the ILO, and particularly its supervisory bodies, have worked for years in assessing and monitoring progress (or the lack thereof) in the full implementation of ILS.

The considerations outlined above highlight the action needed to obtain credible and useful information on labour provisions in preferential trade arrangements. As such labour provisions are anchored in ILO standards, the Organization has the legitimacy and authority to take the lead in this respect. It was for this reason that the issue was raised during the preparatory work for the adoption of the Social Justice Declaration (ILO, 2007, pp.33-35). However, there has not as yet been any institutional follow-up. Trade-related labour provisions increasingly incorporate ILS and some of them envisage a role for the Organization in their implementation. It is therefore high time that the ILO take action, particularly by examining the most appropriate process, including the designation of the competent body/ies to undertake an impact evaluation. It is through such action that it could assist Members which are entering into trade arrangements or seeking advice on the implementation of the ILS contained in these arrangements. Indeed, under the Social Justice Declaration, the provision of such assistance is envisaged “subject to [the] compatibility [of the trade agreements] with ILO obligations”. By following-up on the development of labour provisions in trade arrangements and promoting appropriate coordination mechanisms between such provisions and the ILO standards system, the ILO would help to preserve the integrity of its standards and enhance their impact. In so doing, it would be acting to avert the risk of the fragmentation of its body of standards through a sort of “law shopping” (Supiot, 2009, pp. 155-158). It would also bring much needed transparency to the expansion of labour provisions in trade arrangements and lend credibility to the efforts made by its Members to promote the Organization’s principles and objectives.

## **5. Concluding remarks: possible implications for standards -setting action**

In considering the issue of the effectiveness of ILS, one should recall that the ILO normative action rests on the voluntary acceptance of ILS, creating binding obligations on States. This approach was preferred to the approach originally envisaged by the founders of the ILO and which would have consisted in entrusting the International Labour Conference with the power to adopt directly binding international labour legislation, subject to a right to “opt out” that could be exercised within specific time-limits (Maupain, 2005 p. 93). The solution which was eventually retained is a realistic approach in the field of labour legislation, but means that ILO standards-related action depends largely on the will and capacity of member States to meet their standards-related commitments. The effective implementation of ILS can be affected when member States suffer economic crises. In general, globalization has had an impact on the ability of States, under the pressure of international competition, to take up their role under the ILO Constitution (ILO, 1997, p.3).

In such circumstances, a priority for the ILO is to ensure that it has the necessary institutional capacity to: develop meaningful standards; keep them up-to-date, including, where appropriate, adapt them to changing needs, conceptions, practices and technological conditions; use all the diverse and complementary mechanisms available under its Constitution geared at their effectiveness; and provide adequate assistance to its members. In particular, the Governing Body

is about to discuss a mechanism to reinvigorate and reinforce the ILO body of standards by ensuring that they effectively provide strong protection for all workers in the workplace of today, which also implies their effective implementation. This mechanism, if adopted, would provide an ongoing programme of work in relation to standards, including for the Office as a whole. It could open a new vista for research on ILS which would be indispensable in assessing their relevance and effectiveness, and would therefore require the mobilization of all the Office's areas of expertise. Such research could contribute in establishing a valid and balanced overview of the global effectiveness of ILS. In addition to providing a basis for the review process, this research-based overview could offer a strong means of publicizing important information on the impact of ILS. The availability of information of this nature could, together with the work of the supervisory bodies, ultimately prove to be a key factor in inducing progress, not only in implementation, but also in the coherence of the positions adopted by ILO Members in respect of ILS.

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