

## TRADITIONAL INTERNATIONAL LABOUR LAW AND THE NEW “GLOBAL” KIND: IS THERE A WAY TO MAKE THEM WORK TOGETHER?

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*The article provides an account of how international labour law, which had previously been promulgated mostly by the International Labour Organization, has been confronted by a new type of “global” labour law that has arisen from recent changes in the structure of employment brought about by the advent of globalization and multinational corporations. These rival influences on the regulation of labour have not yet reached a stable and productive accommodation to each other, and the author identifies several points of contact and conflict between them, as well as some of the background forces that bear on those conflicts. The article also evaluates several suggestions for the way the relationship between them should be managed. Separate attention is devoted to the possibility of linkage between the application of international labour standards and international trade. To date, the negotiations on inclusion of the “social clause” in the agreements on international trade within the WTO framework have been unsuccessful. However, the author considers that the current infrequent and weak linkage of international trade agreements with labour issues is inadequate, and concludes that significant limitation of the free flow of capital from one country to another is needed in order to avoid the “race to the bottom” between developing countries that leads to the degradation of the labour rights regime worldwide.*

*Keywords: International labour standards, International Labour Organization, international labour law, international trade, soft law*

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## I. INTRODUCTION<sup>1</sup>

Since its inception in 1919 the International Labour Organisation (ILO) has traditionally been the dominant force in establishing international labour standards (ILS). Parallel to that effort, the ILO has also promulgated labour standards through the United Nations and regional international intergovernmental organizations such as the European Council and others. Nevertheless, near the end of the 20th century the effective monopoly on spreading ILS held by the "classical" international organizations began to encounter more and more competitors of other kinds: multinational corporations (MNC), international trade union associations, non-governmental organisations, and separate governments.

This article provides an exposition of the interactions between traditional norms for international labour law (ILL) and the new ILS in order to determine to what extent these two systems supplement each other or interfere with each other.

## II. GLOBALIZATION AND REGIONAL INTERNATIONAL RELATIONS AS THEY AFFECT LABOUR

One paradoxical effect of the Cold War was the positive influence it had on the establishment of social standards. The two opposing socio-political systems had an interest in showing how attractive they could be to ordinary people, and not only to their own citizens but also to the enemy camp. The familiar concept of the European welfare state<sup>2</sup> that held sway throughout Western Europe after World War II was to a large extent offered as an alternative to communist ideology. Therefore, the end of the Cold War caused some difficulties in economically developed capitalist countries. Those governments had less reason to support social standards once the alternative (communist)

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<sup>2</sup> For current approaches to the concept of the welfare state see: G. Esping-Andersen *et al.* (ed.), *Why We Need a New Welfare State*, New York: Oxford University Press, 2002; J. Lewis, R. Surender (eds.), *Welfare State Change: Towards a Third Way?*, Oxford: Oxford University Press, 2004; P. Taylor-Gooby (ed.), *New Risks, New Welfare. The Transformation of the European Welfare State*, New York: Oxford University Press, 2004; B. Jessop, *The Future of the Capitalist State*, Cambridge: Polity Press, 2005; P. Pierson (ed.), *The New Politics of the Welfare State*, New York: Oxford University Press, 2001, among others.

model of development had been discredited and the leftist opposition had nothing specific to show the powers that be. By the beginning of the 21st century national labour law had arrived at such a critical state that there was even anxious discussion of “the death of labour law”.<sup>3</sup> This weakening of social standards was also connected with the declining trend of the labour movement in economically developed countries brought on not only by globalization, but also by changes in labour relations due to the growth of the service sector and the erosion of the influential social status that the working class held during the era of industrialization.<sup>4</sup> Today’s trade unions cannot hope to spearhead labour law as they had in Western bloc developed countries during the 20th century when they could demand that governments allow them “collective *laissez-faire*” as envisaged by Otto Kahn-Freund, the doyen of German, British, and comparative studies of labour law.<sup>5</sup>

<sup>3</sup> For example: R. Blanpain, *The End of Labour Law?*, in R. Blanpain, M. Tiraboschi (eds.), *The Global Labour Market: From Globalization to Flexicurity, Bulletin of Comparative Labour Relations*, No. 65, Alphen aan den Rijn: Kluwer Law International, 2007, at 11; R. Mitchell (ed.), *Redefining Labour Law*, Melbourne: Centre for Employment and Labour Relations Law, 1995; C. Barnard, S. Deakin, G. S. Morris (eds.), *The Future of Labour Law: Liber Amicorum Sir Bob Hepple QC*, Oxford and Portland, Oregon: Hart Publishing, 2004; R. Blanpain, M. Weiss (eds.), *Changing Industrial Relations and Modernisation of Labour Law: Liber Amicorum in Honour of Professor Marco Biagi*, London: Kluwer Law International, 2003; G. Davidov, B. Langille (eds.), *Boundaries and Frontiers of Labour Law*, Oxford and Portland, Oregon: Hart Publishing, 2006; Ch. Arup, P. Gahan, J. Howe *et al.* (eds.), *Labour Law and Labour Market Regulation*, Sydney: The Federation Press, 2006; J. Conaghan, R. M. Fischl, K. Klare (eds.), *Labour Law in an Era of Globalization*, Oxford, New York: Oxford University Press, 2005; among other sources.

<sup>4</sup> See: S. Fernie, D. Metcalf (eds.), *Trade Unions: Resurgence or Demise?*, London: Routledge, 2005; J. Harrod, R. O’Brien (eds.), *Global Unions? Theory and Strategies of Organized Labour in the Global Political Economy*, New York: Routledge, 2002; T. Boeri, A. Brugiavini, L. Calmfors (eds.), *The Role of Unions in the Twenty-First Century: A report for the Fondazione Rodolfo De Benedetti*, Oxford: Oxford Scholarship, 2001; C. Phelan (ed.), *Trade Union Revitalisation: Trends and Prospects in 34 Countries*, Oxford: Peter Lang, 2007; H. N. Wheeler, *The Future of the American Labor Movement*, Cambridge: Cambridge University Press, 2002; H. N. Wheeler, B. S. Klaas, D. M. Mahon, *Workplace Justice Without Unions*, Kalamazoo, Michigan: W. E. Upjohn Institute for Employment Research, 2004; T. A. Kochan, H. C. Katz, R. B. McKersie, *The Transformation of American Industrial Relations*, Ithaca, NY: ILR Press, 1994; among others.

<sup>5</sup> O. Kahn-Freund, *Legal Framework*, in A. Flanders, H. A. Clegg, (eds.), *The System of Industrial Relations in Great Britain: Its History, Law and Institutions*, London: Blackwell, 1954.

The collapse of the socialist system in the USSR and Soviet bloc countries brought about a crucial reconsideration of the ILO's mission going forward. Because the Cold War had ended and because a large number of ILS had already been accepted, it was argued that the continued existence of the ILO made little sense.<sup>6</sup> However, a new role for the ILO soon came to light as globalization of international relations and trade developed. Even from the end of the 1960s and up to the beginning of the 1980s societies around the world were beginning to regard the actions of MNC with growing apprehension. With the liberalization of international trade, the relative "footprint" occupied by MNC in the world economy increased many times over. Governments and trade unions were disturbed by the growing influence of MNC, the absence of any practical means to control their actions, and their discriminatory labour practices, which corporations within developing countries soon also adopted. Studies have shown that MNC try to transfer production to enterprises where there is no trade union to represent the workers and that they are willing to "tolerate" trade unions only if there is absolutely no alternative.<sup>7</sup>

Because of their immense scale and the financial resources at their disposal, MNC have been able to confront governments, as it were, on an equal footing with them. As MNC extended beyond any practical control by the standards of national and international law, a special term was coined: there was a *governance gap*.<sup>8</sup>

Although an attempt was made under United Nations auspices to promulgate rules for social policy that would be mandatory for MNC, this effort failed. In 1976 the OECD adopted the advisory Guidelines for Multinational Enterprises.<sup>9</sup> In the following year the ILO adopted its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, which

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<sup>6</sup> For more on this see: W. B. Creighton, *The Internationalisation of Labour Law*, in R. Mitchell (ed.), *Redefining Labour Law*, Melbourne: Centre for Employment and Labour Relations Law, 1995, at 96.

<sup>7</sup> W. N. Cooke, *Multinationals, Globalisation and Industrial Relations*, in M. J. Morley, P. Gunninge, D. G. Collings (eds.), *Global Industrial Relations*, London and New York: Routledge, 2006, at 343.

<sup>8</sup> See for example: C. M. Drauth, *Closing Governing Gaps Through Corporate Social Responsibility? Conditions for the Effectiveness of the OECD Guidelines, the ILO Declaration and the UN Global Compact in Ensuring Responsible Business Conduct*, Hertie School of Governance Working Papers – No. 54, August 2010. Available at: [https://www.hertie-school.org/fileadmin/images/Downloads/working\\_papers/54.pdf](https://www.hertie-school.org/fileadmin/images/Downloads/working_papers/54.pdf).

<sup>9</sup> *Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises*. Available at: <http://www.oecd.org/daf/investment/guidelines>.

disappointed many specialists in the field because of its merely advisory nature and vague wording.<sup>10</sup> Despite the passage of this Declaration in 1977, no effective means were found for international law to impose obligations on MNC in the same way that it had imposed them on sovereign states.<sup>11</sup> In the late 1990s international organizations took up the challenge of applying specific standards to MNC. The most prominent of these were the ILO Declaration on Fundamental Principles and Rights at Work of 1998 and the elaboration of the Decent Work Programme<sup>12</sup>, as well as the UN Global Compact.<sup>13</sup> The Global Compact, where it pertains to labour, promulgates the very same principles as the ILO Declaration of 1998. However, the emphasis is on having MNC rather than governments adhere to them. This programme came under attack by international trade union activists who claimed that the MNC subscribing to it were continuing to violate labour law even though they now had the “seal of approval” of the UN.<sup>14</sup>

The concept of Decent Work was later incorporated in the programmes of the ILO and was referred to as such in the ILO Declaration on Social Justice for a Fair Globalization of 2008.<sup>15</sup> As governments of developing countries took their place in the ILO, that organization put more emphasis on the problems of developing countries, including the interaction of MNC with their governments. The adoption of new ILO conventions as well as previously ratified ones ran into substantial obstacles because of the disputes between wealthy

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<sup>10</sup> B. Hepple, *Labour Laws and Global Trade*, Oxford and Portland, Oregon: Hart Publishing, 2005, at 70.

<sup>11</sup> K. D., Ewing, *International Labour Standards*, in M. J. Morley, P. Gunningle, D. G. Collings (eds.), *Global industrial relations*, London and New York: Routledge, 2006, at 246.

<sup>12</sup> The first reference to the term “decent work” was in the following report: *Decent Work. A Report of the ILO Director General to the International Labour Conference*, Geneva, 1999. Available at: <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>.

<sup>13</sup> See: The ILO’s Decent Work page (<http://www.ilo.org/global/topics/decent-work/lang-en/index.htm>); United Nations, Global Compact (Labour) (<http://www.unglobalcompact.org/Issues/Labour/>).

<sup>14</sup> TRAC—Transnational Resource & Action Center. For more detail on this line of criticism see: *Tangled Up In Blue: Corporate Partnerships at the United Nations*. Available at: <http://s3.amazonaws.com/corpwatch.org/downloads/tangled.pdf>.

<sup>15</sup> See: [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms\\_100193.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_100193.pdf). For more detail on this see: J.-M. Servais, *A New Declaration at the ILO: What For?*, *European Labour Law Journal*, Vol. 1, No. 2, 2010, at 286 – 300.

and poor countries. These arose from the differing motivations of developed and developing countries as they dealt with constructing a suitable relationship between MNC and government. The problem of squaring acceptance of standards for ILL with protectionist tendencies is still with us. Developing countries often accuse economically developed governments of using ILS to erect barriers to international trade.<sup>16</sup>

Some authors have suggested linking adherence to ILO norms to international trade in order to increase compliance with ILO standards.<sup>17</sup> To a certain extent, this sort of linkage is already a part of international practices that are independent of ILO activity.<sup>18</sup> Other specialists, on the contrary, criticize the ILO because it intervenes with its own direct mandates and meddles in issues that are the proper responsibility of other international organizations.<sup>19</sup> This critique gains its force from paragraph II(d) of the 1944 Declaration of Philadelphia to the effect that the ILO is "... to examine and consider all international economic and financial policies and measures in the light of this fundamental objective."<sup>20</sup> The basic activity of the ILO – to secure the adoption of ILS and ensure compliance with them – would be severely restricted by this interpretation.

In addition, a rather large number of international organizations involved in human rights issues exist within both the UN and the ILO, although most of them fall within the UN. There is the UN Development Programme (UNDP), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Economic and Social Council (ECOSOC), the International

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<sup>16</sup> On this topic see: J. M. Salazar-Xirinachs, *Should There be Enforceable International Labor Standards: The Perspective of Developing Countries*, comments presented at the Fifth Annual Conference on Public Service and the Law at University of Virginia School of Law, February 28, 2004. Available at: [http://www.oas.org/en/sedi/desd/trade/pubs/STAFF\\_ARTICLE/jmsx04\\_Univ\\_VA\\_comments.pdf](http://www.oas.org/en/sedi/desd/trade/pubs/STAFF_ARTICLE/jmsx04_Univ_VA_comments.pdf).

<sup>17</sup> Ch. Barry, S. G. Reddy, *International Trade & Labor Standards: A Proposal for Linkage*, New York: Columbia University Press, 2008; among others.

<sup>18</sup> For example, in the systems of trade preferences in use by the USA and the EU, about which see below for more detail.

<sup>19</sup> W. R. Simpson, *Standard-setting and Supervision: A System in Difficulty*, in *Les normes internationales du travail: un patrimoine pour l'avenir - Mélanges en l'honneur de Nicolas Valticos*, Geneva: BIT, 2004, at 59 – 61.

<sup>20</sup> As it is stated in the same clause, the fundamental objective of the ILO is ensuring that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".

Social Security Association (ISSA), the World Health Organization (WHO), and many others. The ILO works hand in hand with most of them.

However, it would not be very useful to require that the ILO limit its scope to questions directly concerned with the establishment and observance of ILS and yet completely refrain from addressing economic and political issues. For a long time – and with heightened intensity from 1996 to 1999 – debates have gone on about how what has been called the “social clause” pertains to the ILO’s challenges in regulating international trade within the World Trade Organization (WTO) framework for international trade unions, associations of employers, and the governments of both developed and developing countries. At the 1996 WTO Ministerial Conference in Singapore all the participants gave their support to a general agreement to adhere to fundamental labour rights and principles as they were understood by the ILO. However, as the final Declaration of the Conference stipulated, labour standards may not be used to further protectionism. Without questioning the economic preferences accorded to less wealthy countries, the Declaration indicated that the WTO and ILO should continue to cooperate. Hence, the Singapore Declaration of 1996 did not put labour matters on the WTO agenda.<sup>21</sup> The basic argument of those who oppose linking trade and labour standards under the WTO is usually called the “Christmas tree” argument.<sup>22</sup> It maintains that the process of globalization impinges on a great many social issues so that linking each of them to free trade is like hanging too many ornaments on a Christmas tree: the system of international trade agreements would simply collapse. This argument among others has appeared in a joint statement by three former general directors of the WTO.<sup>23</sup> In addition, advocates of economic liberalism maintain that open markets lead to accelerated economic growth in developing countries and that this will in the end lead to improved conditions for labour.<sup>24</sup>

<sup>21</sup> Singapore Ministerial Declaration, 1996. Available at: [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm).

<sup>22</sup> For more detail on this topic see: N. Lyutov, *Vsemirnaya torgovaya organizatsiia: perspektivy uchastiia v mezhdunarodnykh trudovykh standartov* [WTO: Prospects for its Participation in Establishing International Labour Standards], *Trudovoe pravo* [Labour Law], No. 7, 2009, at 80 – 84.

<sup>23</sup> A. Dunkel, P. Sutherland, R. Ruggiero, *Joint statement on the multilateral trading system*, dated 1 February 2001. Available at: [http://www.wto.org/english/news\\_e/news01\\_e/jointstatdavos\\_jan01\\_e.htm](http://www.wto.org/english/news_e/news01_e/jointstatdavos_jan01_e.htm).

<sup>24</sup> F. Mansoor, *The WTO versus the ILO and the case of child labour*, *Web Journal of Current Legal Issues*, No. 2, 2004. Available at: <http://webjcli.ncl.ac.uk/2004/issue2/mansoor2.html>.

The recent experience of “shock therapy” in Russia provides ample testimony that accepting these arguments leads only to economic devastation and misery, and so does the fact that all the currently developed states began their economic surge during the era of industrialization while zealously protecting their internal markets from imports. The familiar phrase *laissez-faire* was uttered by French merchants to Jean-Baptiste Colbert in answer to his query about how the government might help them, but it was said following an extremely long period of state protectionism.

The idea that international-legal regulation of trade relations under the WTO has nothing to do with labour relations does not correspond to reality. Under current conditions the most important way to compel governments to respect ILS is the prospect of economic pressure, not the “toothless” mechanisms of the ILO and other international organizations.<sup>25</sup> This pressure may take the form of including a “social clause” in international trade agreements or through unilateral actions such as the general trade preference systems of the USA and the EU.<sup>26</sup> For WTO member states, however, restricting imports or erecting trade barriers with respect to other member states is permissible

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<sup>25</sup> See: A. D. A. Vandaele, *International Labour Rights and the Social Clause: Friends or Foes*, London: Cameron May, 2005, at 319 – 350; J. Atleson, L. Compa, K. Rittich et al., *International Labor Law: Cases and Materials on Workers’ Rights in the Global Economy*, St. Paul: Thomson-West, 2008, at 88 – 104; Barry, Reddy, *op. cit.* (fn. 17), at 43, 184; K. A. Elliot, R. B. Freeman, *Can Labor Standards Improve Under Globalization?*, Washington DC: Peterson Institute for International Economics, 2003, at 102 – 107; G. A. Johnston, *The International Labour Organization: Its Work for Social and Economic Progress*, London: Europa Publications, 1970, at 279; K. Basu, H. Horn, L. Román, J. Shapiro (eds.), *International Labor Standards: History, Theory and Policy Options*, London: Blackwell Publishing, 2006, at 271 – 302; G. Tsogas, *Labor Regulation in a Global Economy*, London: M.E. Shark, Armonk, 2001, at 52 – 54; E. Weisband, *Discursive Multilateralism: Global Benchmarks, Shame and Learning in the ILO Labor Standards Monitoring Regime*, *International Studies Quarterly*, Vol. 44, 2000, at 643 – 666; among others.

<sup>26</sup> See: P. Alston, *Core Labour Standards’ and the Transformation of the International Labour Regime*, *European Journal of International Law*, Vol. 15, 2004, at 495 – 497; P. Alston, *Labour Rights Provisions in U.S. Trade Law: Aggressive Unilateralism?*, *Human Rights Quarterly*, Vol. 15, No. 1, 1993; L. Compa, J. S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20 Year Review*, *Comparative Labor Law and Policy Journal*, Vol. 22, 2001, at 236; K. M. Reynolds, *The Erosion of Tariff Preferences: The Impact of U.S. Tariff Reductions on Developing Countries*, at 15 – 16 (paper presented at American University). Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=763665](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=763665).

only under the conditions specified in the General Agreement on Tariffs and Trade (GATT) enacted in 1947<sup>27</sup> and revised in 1994.<sup>28</sup>

Under GATT a government may impose three kinds of restrictions on imports. The first is a complete prohibition of imports from a certain country. The second is to prohibit shipments of certain kinds of products, and the third is to prohibit import of products manufactured in a certain way. The first two restrictions are ruled out by Articles I and IX of GATT, which establish the principle of “most favoured nation”, meaning that any exporting nation that is a party to GATT must have a status that matches that for the importing nation’s most favoured trading partners (prohibition of discrimination in trade). Those articles also place limits on trading quotas. According to the regulations of GATT such trading restrictions may nevertheless be imposed if they are in response to an exporting nation’s violation of international obligations *in its relationship to the importing nation*. The problem here is that violations of an exporting nation’s obligations with respect to the ILS usually crop up in its relations with individual persons or with international organizations, rather than with an importing nation. The exceptions would be violations of obligations established *erga omnes* and the norms that are *jus cogens*.<sup>29</sup> Because of the extremely restrictive approach to applying this sort of norm to ILL, the only example at present of imposing a complete trade embargo in response to violations of labour law is the case of Myanmar.<sup>30</sup>

<sup>27</sup> General Agreement on Tariffs and Trade, 1947 (GATT, 1947). Available at: [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf).

<sup>28</sup> General Agreement on Tariffs and Trade, 1994 (GATT, 1994). Available at: [http://www.wto.org/english/docs\\_e/legal\\_e/06-gatt.pdf](http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf).

<sup>29</sup> See: B. Simma, P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, Australian Yearbook of International Law, No. 17, 1992, at 82 – 108; R. Müllerson, *Ordering Anarchy—International Law in International Society*, The Hague: Martinus Nijhoff Publishers, 2000, at 1 – 387; R. M. M. Wallace, A. Holliday, *International Law*, London: Sweet & Maxwell Ltd., 2006, at 25-38; M. E. O’Connell, *The Power and Purpose of International Law*, Oxford: Oxford University Press, 2008, at 9 *et al.*

<sup>30</sup> For the EU: *European Union Council Regulation (EC) No. 194/2008 of 25 February 2008 renewing and strengthening the restrictive measures in respect of Burma/Myanmar and repealing Regulation (EC) No 817/2006. 10.3.2008*, Official Journal of the European Union L 66/1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:066:0001:0087:EN:PDF>. For the USA: *Burmese Freedom and Democracy Act of 2003, Public Law 108–61—July 28, 2003*, available at: [http://www.treasury.gov/resource-center/sanctions/Documents/bfda\\_2003.pdf](http://www.treasury.gov/resource-center/sanctions/Documents/bfda_2003.pdf). For Canada: *Special Economic Measures (Burma) Regulation, 2007*, Canada Gazette, Vol. 141, No. 26 – De-

Article III of GATT allows the third kind of trade restriction, prohibiting the import of products manufactured by objectionable means (for example, using child labour), if the restriction applies equally to any country of origin. However, for a government to apply this kind of restriction legally in accordance with GATT, it must ascertain in a certain manner what means of production are used by specific producers. One allowable way to do this is through certification of production carried out either on a voluntary or a mandatory basis at the expense of private parties or of the government. GoodWeave International (formerly Rugmark), an association of non-governmental organizations that monitors the use of child labour in manufacturing rugs, may be adduced as an example of voluntary non-state certification.<sup>31</sup> The regulations of GATT do not extend to this kind of certification so that it is beset by essentially the same sort of problems of status and application as are corporate codes of conduct.<sup>32</sup> There are also cases of voluntary certification undertaken by governments to ascertain that production conforms to ILS, for example, on the basis of the 2002 Belgian law for the promotion of socially responsible production.<sup>33</sup> But measures of this sort are controversial in view of Article III-4 of GATT because one can charge that a government is employing them to protect their own producers rather than to defend human rights. The protection of wildlife brings up analogous sorts of issues, such as the tuna-dolphin case in which the USA imposed a requirement on imported tuna that fishermen must employ expensive equipment to avoid inadvertently killing dolphins while catching tuna. A special meeting of the GATT commission found that this requirement gave an indirect advantage to US fishermen because their Mexican competitors could not obtain the necessary equipment and thus was in contravention of GATT.<sup>34</sup>

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ember 26, 2007, available at [http://publications.gc.ca/collections/collection\\_2008/canadagazette/SP2-2-141-26.pdf](http://publications.gc.ca/collections/collection_2008/canadagazette/SP2-2-141-26.pdf) at 93-105. For Australia: *Autonomous Sanctions Regulations 2011*, Australian Government Federal Register of Legislation, available at: <http://www.comlaw.gov.au/Details/F2012C00562>.

<sup>31</sup> See this organization's website: GoodWeave International, available at: <http://www.goodweave.org/home.php>.

<sup>32</sup> More on this topic is provided later in this article.

<sup>33</sup> The text in Dutch is headed: *Wet ter bevordering van sociaal verantwoorde productie 27 Februari 2002*. Available, with a link to the French version, at: [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=2002022732&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2002022732&table_name=wet).

<sup>34</sup> For more detail on this topic see: Atleson *et al.*, *op. cit.* (fn. 25), at 245 – 247.

Employing the alternative of mandatory certification is almost unworkable in practice because it would cover all production anywhere in the world.<sup>35</sup>

The discussion so far should suffice to show what is meant by claiming that international trade and the compliance of governments with ILS operate as two independent systems, but it also shows how this constitutes a serious threat to compliance with the norms of ILL.

### III. IS THERE ANY WAY OUT OF THE PROBLEM?

A large body of literature has been written about the negative consequences of financial globalization for labour standards.<sup>36</sup> Globalization has caused the production of physical commodities to be transferred to the countries with the lowest social costs for producers, a practice which empties out workplaces in developed countries as it simultaneously fosters widespread infringements of workers' rights in developing countries "racing to the bottom". In this context contemporary financial globalization is often discussed as if it were some kind of absolutely self-sufficient process that is independent of anyone's will. Of course, that is not the case. Globalization and the disproportionate growth of MNC will continue so long as liberal legal systems offer investors the privilege of redirecting the flow of funds at any moment from one country to another.

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<sup>35</sup> On this topic see: J. Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights*, Antwerp et al.: Intersentia, 2008, at 210 – 211.

<sup>36</sup> See D. Rodrik, *Labor Standards in International Trade: Do They Matter and What Do We Do About Them?*, in R. Z. Lawrence, D. Rodrik, J. Whalley (eds.), *Emerging Agenda for Global Trade: High Stakes for Developing Countries*, Washington DC: Overseas Development Council, distributed by the Johns Hopkins University Press, 1996; B. Smarzynska Javorcik, M. Spatareanu, *Do Foreign Investors Care about Labor Market Regulations?*, *Review of World Economics*, Vol. 141, No. 4, 2005, at 375 – 403; D. Kucera, *Core Labour Standards and Foreign Direct Investment*, *International Labour Review*, Vol. 141, 2002, at 31 – 69; G. Dewit, G. Holger, C. Montagna, *Should I Stay or Should I Go? Foreign Direct Investment, Employment Protection and Domestic Anchorage*, *Review of World Economics*, Vol. 145, 2009, at 93 – 110; T. Boeri, J. F. Jimeno, *The Effects of Employment Protection: Learning from Variable Enforcement*, *European Economic Review*, Vol. 49, No. 8, 2005, at 2057 – 2077; R. B. Davies, K. Chaitanya Vadlamannati, *A Race to the Bottom in Labour Standards? An Empirical Investigation*, *Journal of Development Economics*, Vol. 103, 2013, at 1 – 14; D. K. Brown, A. V. Deardorff, R. M. Stern, *Labor Standards and Human Rights: Implications for International Trade and Investment*, in Z. Drabek, P. C. Mavroidis (eds.), *Regulation of Foreign Investment: Challenges to International Harmonization*, Singapore: World Scientific Studies in International Economics, 2013; among others.

The Nobel laureate Joseph Stiglitz has written that “if globalization continues to be conducted as it has been in the past ... globalization will not only succeed in promoting development but will continue to create poverty and instability.”<sup>37</sup>

Currently the number of international trade agreements is growing rapidly. From 1995 through December 2015 the number of trade agreements about which the WTO had received notification has grown from 46 to 265. The share of trade agreements with labour provisions is also growing: almost 55 per cent of goods exported took place within such a framework in 2014, compared with 42 per cent in 1995.<sup>38</sup> However, labour provisions in such agreements will always remain a supplementary feature, at best intended to compensate partially for their own negative social effects (income inequality, unemployment, threats to collective bargaining etc.). It is quite likely that most such clauses will serve merely as a PR tool for to demonstrate the social responsibility of the parties to trade agreements.

Only when investors are restricted in redirecting capital will globalization itself, along with its negative outcomes for any but financial capitalists, be significantly restrained. In order for the ILO to fend off criticism that it is itself an “agency for globalization”<sup>39</sup> it must definitively and unambiguously state its position on the issues of international trade. This is an extremely difficult step to take both psychologically and politically because the ILO sets itself up as a universal (global) international organization and receives significant financial backing from the USA, which is the main sponsor of globalization. Nevertheless, to restore the international authority of the ILO and fulfil its mission according to its Constitution and the Declaration of Philadelphia, this is exactly what needs to be done. Such a change in policy may become more feasible following a possible adverse reaction to the wave of globalization at the beginning of the 21st century when sovereign states acquiesced in a significant transfer of their powers to the MNC. Both developed and developing economies are interested in regaining those powers and limiting the powers of uncontrolled international financial capital. The recent election of Trump in the US seems

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<sup>37</sup> J. E. Stiglitz, *Globalization and Its Discontents*, New York: W.W. Norton & Co., 2002, at 248.

<sup>38</sup> ILO, *Assessment of labour provisions in trade and investment arrangements*, Geneva: ILO, 2016, at 1.

<sup>39</sup> G. Standing, *The ILO: An Agency for Globalization?*, Development and Change, Vol. 39, No. 3, 2008, at 355 – 384.

to be one of the signs that the “motherland” of financial globalization is increasingly motivated by regaining national powers. Needless to say, other influential states would support the idea of recovering their sovereign powers.<sup>40</sup>

The ILO cannot ignore the increasing degradation of employment and labour rights around the world and pursue only cosmetic proposals and declarations in favour of improving separate minor aspects of labour or protection of particular minorities of workers while the whole system of employment and labour rights around the world is being undermined. The ILO should promulgate legally binding norms and adopt a policy that recognizes how international financial relations are intimately connected with issues of labour rights worldwide. Unfortunately, the ILO currently follows a quite different policy. In the Global Jobs Pact adopted by the International Labour Conference in 2009 as a response to the world financial crisis, one of the main points was the necessity of “promoting efficient and well-regulated trade and markets that benefit all and avoiding protectionism by countries. Varying development levels of countries must be taken into account in lifting barriers to domestic and foreign markets.”<sup>41</sup> This statement shows that international free trade has already been accepted by the ILO as an irreversible fact that allows at most a few adjustments that take social considerations into account. The ILO then seems like a “friend of the court” that is trying to “lighten the sentence” imposed on social rights by the founders of the Bretton Woods system. The ILO’s studies of the consequences of the economic crisis for developing countries have been seen as a justification for this approach.<sup>42</sup> Following the adoption of the 1998 Declaration as it started to carry out its policies on advancing fundamental principles, the ILO modified the thrust of its policies to make them less confrontational. As Tony Royle has maintained, this undercuts the effectiveness of the ILO in advancing ILS.<sup>43</sup> Similarly inconclusive and devoid of any concrete legal obligations are the ILO’s own Decent Work Programme and the

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<sup>40</sup> See, for example: V. Przhilenskiy, M. V. Zakharova, *Which Way Is the Russian Double-Headed Eagle Looking?*, Russian Law Journal, Vol. 2, 2016, at 6 – 25.

<sup>41</sup> ILO, *Recovering from the crisis: A Global Jobs Pact. Resolution adopted by the International Labour Conference at its Ninety-eighth Session*, Geneva: ILO, 2009, at 9 – 10.

<sup>42</sup> M. Jansen, E. von Uexkull, *Trade and Employment in the Global Crisis*, Geneva: ILO, Academic Foundation, 2010.

<sup>43</sup> T. Royle, *The ILO’s Shift to Promotional Principles and the “Privatization” of Labour Rights: An Analysis of Labour Standards, Voluntary Self-Regulation and Social Clauses*, The International Journal of Comparative Labour Law and Industrial Relations, Vol. 26, No. 3, 2010, at 261.

Better Work Programme that the ILO has undertaken in partnership with the International Finance Corporation (IFC), which is a member of the World Bank Group with funding from major MNC and the governments of several economically developed countries.<sup>44</sup>

There is also the view that the current global economy should be overhauled along regional lines.<sup>45</sup> This would mean creating several economic mega-regions in competition with each other without impairing the social rights of their citizens through a "race to the bottom". If this model of world development were put into practice, the problems of poor coordination of labour standards for international trade and spotty compliance with ILS would become less severe.

The ILO's approach to problems in labour relations brought about by globalization and regionalization has come under criticism in several other respects by Canadian specialist Prof Brian Langille. He charges that the ILO is insufficiently flexible in formulating ILS and concentrates on compliance with those standards without regard for regional differences and the variation in economic development between countries.<sup>46</sup> He also maintains that the ILO's actual application of ILS is a "top down imposition" whereas successful application of ILS would require greater involvement of social partners and non-governmental organizations. Our position on the flexibility of the ILO is exactly the opposite: the ILO is entirely too flexible. There are numerous cases when the ILO has criticized national laws and practices over decades for being incompatible with ILS without any consequences for the violators.<sup>47</sup> In discussing the value of modifying the application of ILS in response to regional differences it is essential to distinguish the standards that require governments to incur some sort of costs from the standards that establish regulations for interactions between the various parties to labour law. For example, it would make little sense to talk about regional factors when it comes to the obligation

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<sup>44</sup> Consult the website for this programme. Available at: <http://betterwork.org/global/>.

<sup>45</sup> On this topic see: I. Wallerstein, *The Demise of Neoliberal Globalization*, MRzine (Monthly Review Foundation), February 2008. Available at: <http://mrzine.monthlyreview.org/2008/wallerstein010208.html>.

<sup>46</sup> B. Langille, *Imagining Post "Geneva Consensus" Labor Law for Post "Washington Consensus" Development*, *Comparative Labor Law and Policy Journal*, Vol. 31, No. 3, 2010, at 523 – 552.

<sup>47</sup> N. Lyutov, *The ILO System of International Labour Standards and Monitoring Procedures: Too Complicated to be Effective?*, *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 64., No. 2, 2014, at 255 – 276.

to comply with any of the fundamental principles and rights recognized in the ILO Declaration of 1998. Excessive reliance on “soft law” and adjustment to regional factors may weaken the ILO as it contends with the negative consequences of globalization.

On whether there is substantial involvement of non-governmental organizations in ILO deliberations, Anne Trebilcock takes exception to Brian Langille’s position by noting that trade unions and associations of employers are deeply involved in the adoption of the ILO’s decrees because of its tripartite structure.<sup>48</sup> Even this objection fails to take into account the fact that the delegates from the IFC are top-echelon functionaries of the very largest associations of workers and employers who, in the first place, are seldom aware of the interests of rank-and-file workers and, second, may not be sufficiently independent from employers to protect worker interests. In addition, major official trade unions cannot be considered representatives of self-employed workers or of workers in the informal sector of the economy.<sup>49</sup> Greater involvement of non-profit organizations and trade unions in ensuring compliance with ILS is an idea worth considering and supporting, although it is quite a complicated matter to ascertain whose interests one or another non-governmental organization is representing and to what extent these organizations are motivated by upholding labour rights rather than advancing interests of their own. Specialists are examining this issue.<sup>50</sup>

#### IV. “PRIVATIZING” INTERNATIONAL LABOUR LAW: NON-GOVERNMENTAL MEANS OF REGULATING LABOUR RELATIONS VIA MNC

Apart from rather feeble attempts on the part of governments and international organizations to mitigate the negative consequence of globalization,

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<sup>48</sup> A. Trebilcock, *Putting the Record Straight about International Labor Standard Setting*, *Comparative Labor Law and Policy Journal*, Vol. 31, No. 3, 2010, at 554 – 555.

<sup>49</sup> M. Olivier, *International Labour and Social Security Standards: A Developing Country Critique*, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 29, No. 1, 2013, at 21 – 38; W. Sengenberger, *International Labour Standards in the Globalized Economy: Obstacles and Opportunities for Achieving Progress*, in J. D. R. Craig, S. M. Lynk (eds.), *Globalization and the Future of Labour Law*, Cambridge: Cambridge University Press, 2006, at 341.

<sup>50</sup> M. Weiss, *International Labour Standards: A Complex Public-Private Policy Mix*, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 29, No. 1, 2013, at 13.

the non-governmental reaction has been the only other response to the “governance gap” caused by the abruptly increased power of MNC and by the corresponding faltering of governments in their attempts to gain control over MNC.<sup>51</sup> This brings up the matter of corporate codes of conduct for MNC and an integrated social partnership. The diminishing role of governments in regulating labour relations that fall outside of their national boundaries has prompted a number of specialists to speak of a new phenomenon in ILL: their “privatization”.<sup>52</sup> The interaction of private and public actors in legal regulations that may apply beyond national boundaries has prompted the German expert, Ulrich Mückenberger, to introduce the concept of “hybrid global labour law”.<sup>53</sup>

### 1. Corporate codes of conduct and corporate social responsibility

From the close of the 1980s to the early 1990s in developed countries there were campaigns of social labelling intended to convince consumers to buy only those products marketed by socially responsible producers. These labelling campaigns depended on an authoritative non-governmental organization verifying that a product was made without infringing the rights of workers or violating ecological standards. Labels to that effect could then be applied to the product’s packaging, and consumers could purchase it “with a clear conscience”. The non-governmental organizations engaged in social labelling created an association called the International Social and Environmental Accreditation and Labelling Alliance.<sup>54</sup> Producers who wanted to qualify for social labelling had to prove not only that they observed the labour rights of their own workers but also that the items ordered from their suppliers were in turn made without infringing labour rights. This means that the currently favoured concept of corporate social responsibility has two components: the internal

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<sup>51</sup> See above.

<sup>52</sup> B. W. Burkett, J. D. R. Craig, M. Link, *Corporate Social Responsibility and Codes of Conduct: The Privatization of International Labour Law*, presented at the Canadian Council on International Law Conference, 15 October, 2004; Royle, *op. cit.* (fn. 43), at 249 – 271.

<sup>53</sup> U. Mückenberger, *Hybrid Global Labour Law*, in R. Blanpain, F. Hendrickx (eds.), *Labour Law Between Change and Tradition: Liber Amicorum Antoine Jacobs*, Austin et al.: Wolters Kluwer, 2011, at 99 – 116.

<sup>54</sup> The International Social and Environmental Accreditation and Labeling Alliance (ISEAL Alliance) website: <http://www.isealliance.org/>.

one (that applies to a producer's own workers) and an external one (that applies to its suppliers' workers).<sup>55</sup>

In order to demonstrate their social responsibility major companies have themselves adopted corporate codes of conduct that incorporate basic obligations of MNC to observe labour rights. Currently most of the major companies chartered in the OECD have some sort of corporate code of conduct that applies to labour.

At the beginning of the 21st century a new generation of these codes was adopted to answer broad criticism of the first round of codes on the grounds that they were in most cases adopted to enhance the reputation of the corporation without indicating any specific steps to protect workers' rights. Clearly companies would be quite reluctant to adopt any code that entails additional financial burdens for themselves or for their suppliers. To the extent that verification of compliance with these codes is from their inception either absent entirely or left to the good intentions of the companies that adopt them, a "fox in the henhouse" scenario comes into play, with the MNC in the role of the fox that must control itself in the worker henhouse. As a consequence international organizations and several specialized companies (mostly auditors) have adopted their own codes of conduct to which international employers may subscribe. These codes of conduct are regarded as "external" in contrast to the "internal" ones that companies themselves may adopt.

Studies have divided codes of conduct into two types:<sup>56</sup> those that are basically aspirational and intended to show a company's pursuit of certain ideals without going further toward declarations of general principles (such as fairness, a desire to contribute to social and economic development, and the like); and those that contain more concrete obligations for MNC concerning labour and ecological standards. The second concrete type usually provides for

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<sup>55</sup> On corporate social responsibility see: A. K. Chatterji, S. Listokin, *A Comment on 'Corporate Social Responsibility and Workers' Rights'*, Comparative Labor Law and Policy Journal, Vol. 30, No. 1, 2008, at 11 – 15; L. Compa, *Corporate Social Responsibility and Workers' Rights*, Comparative Labor Law and Policy Journal, Vol. 30, No. 1, 2008, at 1 – 10; *Promoting a European framework for Corporate Social Responsibility*, a European Commission Green Paper, Brussels: COMŠ2001Ć, 2001, at 32. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0366:FIN:en:PDF>.

<sup>56</sup> A. Florini, *Business and Global Governance: The Growing Role of Corporate Codes of Conduct*, published on the Brookings Institution website, available at: [http://www.brookings.edu/articles/2003/spring\\_business\\_florini.aspx](http://www.brookings.edu/articles/2003/spring_business_florini.aspx).

external verification of how well an MNC adheres to its own code of conduct. In that case it makes little difference whether the code of conduct is internal or external because external organizations that have the confidence of civil society and the ability to apply social labelling to a company's products review whether an MNC has followed through on the obligations that it accepted.

The typical content of an aspirational code<sup>57</sup> devised by an MNC itself usually stipulates more general obligations for the company<sup>58</sup> than those derived from codes developed by non-governmental organizations. External codes of conduct may contain much more detailed provisions. For example, the overview of the code of conduct of the Fair Labor Association (FLA, a non-profit organization founded in the USA) merely mentions freedom of association and collective bargaining.<sup>59</sup> However, the complete version of this code incorporates a much more detailed set of standards called Compliance Benchmarks.<sup>60</sup> Among these are 24 specific demands related to freedom of association and collective bargaining that are clearly based on the corresponding principles developed by the ILO.

Verification of compliance with codes presents a larger problem than their content. Many internal codes at this time include reservations about external verification of compliance. Although most of the major MNC subscribe to some external codes, they nevertheless retain their own internal ones. This equivocation on the part of corporations bears a striking resemblance to the way governments with their own labour legislation have at the same time ratified international agreements related to labour without much regard for consistency between the various standards adopted.

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<sup>57</sup> The OECD examined the content of 148 codes adopted by MNC. On the norms most frequently encountered see: J. Rhys, *Corporate Codes of Conduct: Self-Regulation in a Global Economy*, a Technology, Business and Society Programme Paper published by the United Nations Research Institute for Social Development, 2001, at 22. See also: P. Macklem, M. Trebilcock, *New Labour Standards Compliance Strategies: Corporate Codes of Conduct and Social Labeling Programs*, a Research Report prepared for the Federal Labour Standards Review, Faculty of Law, University of Toronto, 2006, at 50.

<sup>58</sup> For a representative example see the standards published by Adidas available at: [http://www.adidas-group.com/media/filer\\_public/11/c7/11c72b1b-b6b2-4fe7-b0b9-59c7242143e9/adidas\\_group\\_workplace\\_standards\\_january\\_2016\\_en.pdf](http://www.adidas-group.com/media/filer_public/11/c7/11c72b1b-b6b2-4fe7-b0b9-59c7242143e9/adidas_group_workplace_standards_january_2016_en.pdf).

<sup>59</sup> See the Fair Labor Association's Workplace Code of Conduct available at: <http://www.fairlabor.org/our-work/labor-standards>.

<sup>60</sup> See the Fair Labor Association's Compliance benchmarks available at: [http://www.fairlabor.org/sites/default/files/fla\\_complete\\_code\\_and\\_benchmarks.pdf](http://www.fairlabor.org/sites/default/files/fla_complete_code_and_benchmarks.pdf).

Even external codes that mostly avoid the fox-in-the-henhouse problem have nevertheless raised particular concerns among specialists. The first concern is about the profusion of international trade union associations, human rights organizations, commercial campaigns, and social campaigns that compete with each other to claim a niche for themselves in the establishment and application of international labour standards. Some of the better-known ones are the Business Social Compliance Initiative (BSCI), the Fair Labor Association, the Worker Rights Consortium (WRC), the Ethical Trading Initiative (ETI), the Fair Trade Foundation, Social Accountability International (SAI), and Worldwide Responsible Accredited Production (WRAP). There are many other organizations active in this field.<sup>61</sup> International non-governmental organizations, governmental institutions, and several companies promulgate their own codes, and that serves only to complicate the already chaotic mass of material on these topics even more. Several of these institutions operate commercially and receive payment in return for applying social labelling and in so doing undermine faith in the very idea of social labelling. All these varied institutions conflict so much as they compete with each other that they fail to combine forces even to advance their authority in general. Although the texts of all these codes broadly resemble each other, it is very difficult for consumers to be sure that a particular social labelling organization is operating ethically and really maintains control over international employers. To address this problem the International Standards Association (ISO) in 2010 adopted a new international standard for social responsibility (ISO 26000) with the purpose of bringing some consistency to the disorderly process of generating “private ILS”.<sup>62</sup> However, that ISO standard is not a legally binding instrument.<sup>63</sup>

The second concern even for external codes is the very serious misgiving that the much less stringent regulations on MNC may drive out or water down national labour legislation and ILS. Even without the disruption of the social

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<sup>61</sup> For additional detail see: ISO, *Guidance on Social Responsibility. Draft International Standard ISO/DIS 26000*, published in ISO Doc. No.: ISO/TMB/WG SR N 172 (30-39), Geneva: ISO, 2009. Available at: [http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/ISO\\_DIS\\_26000\\_Guidance\\_on\\_Social\\_Responsibility.pdf?nodeid=8385026&vernum=-2](http://isotc.iso.org/livelink/livelink/fetch/-8929321/8929339/8929348/3935837/ISO_DIS_26000_Guidance_on_Social_Responsibility.pdf?nodeid=8385026&vernum=-2).

<sup>62</sup> ISO, *Guidance on Social Responsibility – ISO 26000:2010(E)*, Geneva: ISO, 2010.

<sup>63</sup> On this topic see: R. Hahn, *Standardizing Social Responsibility? New Perspectives on Guidance Documents and Management System Standards for Sustainable Development*, IEEE Transactions on Engineering Management, Vol. 59, No. 4, 2012, at 717 – 727.

partnership system that is now occurring, the risk would still remain that social partnership might be superseded by the "voluntary" actions of corporations that would create the illusion that workers no longer need classical collective bargaining and collective agreements. Otto Kahn-Freund has stated that workers' rights that are won through involved collective negotiations are more important and valuable than those handed to workers as "gifts from on high".<sup>64</sup> Because of this risk of devaluation of ILS Wolfgang Däubler has mounted a sharp criticism of the concept of corporate social responsibility as a whole.<sup>65</sup>

## 2. International framework agreements and social dialogue at the international level

The most natural response to the negative consequences of globalization would be internationalization of the trade union movement.<sup>66</sup> International trade unions as such have been in existence for a long time, having started in the 19th century.<sup>67</sup> However, uniting workers at an international level so that they are on a more equal footing with MNC encounters many more difficulties than uniting them within a single country.<sup>68</sup> This is the case because of radically different systems and traditions in the realms of labour law and social partnership in different nations and also because of the "national egoism" of workers who regard their foreign colleagues mostly as competitors rather than allies in negotiating with an extensive – global – employer, and even because of the usual mundane obstacles that stand in the way of communicating internationally.

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<sup>64</sup> P. Davies, M. Freedland, *Kahn-Freund's Labour and the Law*, London: Stevens, 1983, at 14.

<sup>65</sup> W. Däubler, *Corporate Social Responsibility: A Way to Make Deregulation More Acceptable?*, in R. Blanpain, F. Hendricx (eds.), *Labour Law between Change and Tradition: Liber Amicorum Antoine Jacobs*, Austin et al.: Wolters Kluwer, 2011, at 49 – 58.

<sup>66</sup> P. Sheldon, B. Gan, G. J. Bamber, *Collective Bargaining: An International Developments and Challenges*, in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 10th ed., The Hague et al.: Wolters Kluwer, 2010, at 609 – 658.

<sup>67</sup> J. P. Windmuller, S. K. Pursey, J. Baker, *The International Trade Union Movement*, in *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 10th ed., The Hague et al.: Wolters Kluwer, 2010, at 71 – 96.

<sup>68</sup> On this topic see: J. Rojot, *The Right to Bargain Collectively: An International Perspective on its Extent and Relevance*, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 20, No. 4, 2004, at 513 – 532; J. Rojot, *International Collective Bargaining Relations*, in M. J. Morley, P. Gunning, D. G. Collings (eds.), *Global Industrial Relations*, London and New York: Routledge, 2006, at 254 – 255.

Even so, global trade union federations, that is, international trade unions uniting workers in specific sectors or professions, have been able to conclude scores of global or international framework agreements (hereinafter both will be referred to as IFA) with several major MNC.<sup>69</sup> According to sociological studies, the main motivation that induced a series of companies to sign IFAs was to maintain a favourable image in the eyes of foreign consumers, investors, tender committees, etc. rather than to respond to pressure from trade unions.<sup>70</sup>

At present the reach of IFAs is rather small: specialists estimate that as of 2010 IFAs covered in the neighbourhood of 6 million workers out of 77 million workers employed by MNC.<sup>71</sup> Furthermore, in contrast with traditional agreements entered into by social partners or collective bargaining at various levels within states<sup>72</sup>, IFAs are not formally binding in law, and MNC may not be held *legally* responsible for any breaches of them.<sup>73</sup> Nevertheless to regard IFAs exclusively as “soft law” would not be correct: global associations of trade unions may conduct campaigns across national borders aimed at compelling MNC to observe the IFAs that they have signed or to compel MNC to enter into IFAs if they have previously refused to do so. Such campaigns are sporadic in nature, but they do take place and sometimes end in success. The best re-

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<sup>69</sup> See Framework Agreements published on the Global Unions website: <http://www.global-unions.org/framework-agreements.html?lang=en>; Global Framework Agreements published on the United Nations Global Compact website: [http://www.unglobalcompact.org/Issues/Labour/Global\\_Framework\\_Agreements.html](http://www.unglobalcompact.org/Issues/Labour/Global_Framework_Agreements.html). For an evaluation of the content of the agreements see: D. Stevis, *International Framework Agreements and Global Social Dialogue: Parameters and Prospects*, ILO Employment Sector, Employment Working Paper No. 47, Geneva: ILO, 2010. Available at: [http://www.ilo.org/wcmsp5/groups/public/-ed\\_emp/documents/publication/wcms\\_122176.pdf](http://www.ilo.org/wcmsp5/groups/public/-ed_emp/documents/publication/wcms_122176.pdf).

<sup>70</sup> K. Papadakis, *Adopting International Framework Agreements in the Russian Federation, South Africa and Japan: Management Motivations*, in K. Papadakis (ed.), *Shaping Global Industrial Relations: The Impact of International Framework Agreements*, Basingstoke, New York: ILO, Palgrave MacMillan, 2011, at 69.

<sup>71</sup> K. Papadakis, *Globalizing Industrial Relations: What Role for International Framework Agreements?*, in S. Hayter (ed.), *The Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice*, Geneva: ILO with Edward Elgar, 2011, at 280 – 281.

<sup>72</sup> Except for agreements concluded within the UK, which are by tradition regarded as ‘gentlemen’s agreements’ if their texts do not state otherwise.

<sup>73</sup> For more detail on the legal status of IFAs see: A. Sobczak, *Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility*, in K. Papadakis (ed.), *Cross-Border Social Dialogue and Agreements: An Emerging Global Industrial Relations Framework?*, Geneva: ILO, 2007, at 115 – 130.

sults obtained by workers' representatives at the international level have been accomplished within the EU.<sup>74</sup> This was borne out by the drastic political and social reaction to the steamship company Viking Line when it attempted to change the flag flown by one of its ships from Finland to Estonia.<sup>75</sup>

The overwhelming majority of IFAs are concluded by international trade union federations with MNC that have their headquarters in the EU. Apart from the EU, some IFAs have been signed with MNC that are based in Australia, Indonesia, Canada, Malaysia, New Zealand, Russia, South Africa, and Japan.

Sometimes workers' interests gain representation in international collective bargaining via global works councils that operate in ways analogous to the European Works Councils (EWC) established in the EU.<sup>76</sup> That kind of global works council managed to block DaimlerChrysler's attempt to transfer its production from South Africa, where workers had mounted a strike, to its facilities in Brazil and Germany.<sup>77</sup> It is worth mentioning that this MNC had its origins in the EU. The DaimlerChrysler dispute is of interest also because its IFA, as well as its corporate code of conduct (see above), had allowed for termination of its contracts with its subcontractors that infringe ILS. As a result of pressure from trade unions, DaimlerChrysler rejected services from eight of its suppliers in Brazil.<sup>78</sup>

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<sup>74</sup> See, for example: F. Dorsemont, T. Jaspers, A. A. H. van Hoek (eds.), *Cross-Border Collective Actions in Europe: A Legal Challenge*, Antwerpen-Oxford: Intersentia, 2007.

<sup>75</sup> *International Transport Workers Federation v Viking Line ABP*, ECJ Case No. C-438/05 of December 11, 2007. See also: R. Blanpain (ed.) with A. M. Świątkowski (guest editor), *The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflicts in the European Union and Russia*, Alphen aan den Rijn: Kluwer Law International, 2009; N. Lyutov, *Konflikt mezhdu fundamental'nymi pravami rabotnikov i predprinimatelei v praktika Evropeiskogo suda spravedlivosti* [*The Conflict between the Fundamental Rights of Workers and Entrepreneurs in the Jurisprudence of the European Court of Justice*], *Trudovoe pravo* [Labour Law], No. 12, 2008, at 70 – 79.

<sup>76</sup> According to *Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast)*, Official Journal of the European Communities, 16 May 2009, L 122/28.

<sup>77</sup> I. Wick, *Workers' tool or PR ploy? A guide to codes of international labour practice*, 4th edition, Bonn: Friedrich-Ebert-Stiftung, 2005, at 24.

<sup>78</sup> J. Holdcroft, *International Framework Agreements: A Progress Report*, *Metal World*, No. 3, 2007, at 21.

Another notable success for international coordination between representatives of workers came during the merger of ABB with Alstom from 1993 to 2003 when trade unions and the EWC for Alstom played a fundamental role both in shaping the programme for consolidating management of the company during restructuring, which entailed severe personnel cuts, and also in averting Alstom's bankruptcy.<sup>79</sup> However, the integration of the EU governments (especially of the "old EU" meaning the Western European countries) has proceeded so far that, in the first place, it is quite a stretch to speak of *international* solidarity of workers there; and, second, even within this regional union it would not be justified to speak of a properly functioning social dialogue throughout the entire EU. The "old" and "new" EU members are engaged in a major conflict over the level of income for their workers.<sup>80</sup>

A very significant example of the effectiveness of social dialogue at an international level is provided by Costa Rica, where the social partnership system has been infiltrated by what are referred to as "yellow" trade unions that are in fact controlled by employers. Because the Chiquita Banana Company had an IFA, dialogue was opened between the employer and trade unions representing a minority of workers.<sup>81</sup> A thoroughgoing comparative analysis of corporate codes of conduct with IFAs has indicated that, even though both declarations are nominally "soft law", IFAs contain far more specific obligations for the

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<sup>79</sup> R. Erne, *European Unions: Labor's Quest for a Transnational Democracy*, Ithaca and London: Cornell University Press, 2008, at 128 – 156.

<sup>80</sup> The gap in incomes between the 'old' and 'new' EU countries led to a serious crisis as workers from the 'new' countries were free to relocate to the 'old' ones. The most indicative illustration of this crisis was in the Viking Line (see above) and Laval cases that were brought before the European Court of Justice. See *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECJ Judgment (18 December 2007) Case No.C-341/05. For more details see M. Rönmar (ed.), *EU Industrial Relations v. National Industrial Relations: Comparative and Interdisciplinary Perspectives*, Aspen: Wolters Kluwer, 2008; R. Eklund, *A Swedish Perspective on Laval*, *Comparative Labor Law & Policy Journal*, Vol. 29, No. 4, 2008, at 551 – 571; G. Orlandini, *Trade Union Rights and Market Freedoms: The European Court of Justice Sets out the Rules*, *Comparative Labor Law & Policy Journal*, Vol. 29, No. 4, 2008, at 571 – 603.

<sup>81</sup> I. Schömann, A. Sobczak, P. Wilke, E. Voss, *Codes of Conduct and International Framework Agreements: New Forms of Governance at Company Level. Case study: Chiquita*, European Foundation for the Improvement of Living and Working Conditions, Luxembourg: Office for Official Publications of the European Communities, 2008, at 12. Available at: <http://www.eurofound.europa.eu/pubdocs/2007/92/en/1/ef0792en.pdf>.

employer and also mechanisms to ensure that those obligations are fulfilled.<sup>82</sup> This is the case because IFAs are usually drawn up through negotiations between social partners. They are not arrived at unilaterally by an MNC to include mostly vague and abstract formulas designed above all to advertise the company’s virtues rather than protect the labour rights of its workers and those working for its suppliers and subcontractors.

On the other hand, IFAs, in contrast with collective contracts and agreements concluded at a national level, do not generally contain specific provisions for the amount of wages or other crucial labour conditions; they merely establish a general framework for relations between the social partners. At this time the solitary exception to this rule is the IFA based on the ILO Maritime Labour Convention of 2006 (ILO) concluded between the International Transport Workers’ Federation (ITF) and employers of the International Maritime Employers’ Council.<sup>83</sup>

## V. CONCLUSION

It would appear then that the “new” ILL provided by privately owned companies and non-governmental organizations cannot be effective or would not even exist without the involvement of the traditional key players in “classical” ILL – governments and international organizations.

The authoritative British specialist on labour law Bob Hepple maintained that the role of the ILO in applying both corporate codes of conduct and ILS may lie in its function as an independent mediator for resolving disputes between MNC and global trade union federations, and ultimately in the establishment of the ILO as an international labour tribunal for resolving transnational labour conflicts.<sup>84</sup> This proposal is worth supporting even though there

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<sup>82</sup> A. García-Muñoz Alhambra, B. ter Haar, A. Kun, *Soft on the inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law*, International Journal of Comparative Labour Law and Industrial Relations, Vol. 27, No. 4, 2011, at 362; Schömann *et al.*, *op. cit.* (fn. 81), at 94.

<sup>83</sup> See 2015 – 2017 IBF Framework TCC Agreement available at: <http://www.itfseafarers.org/files/seealsodocs/33555/20122014ibfframeworktccagreement.pdf>.

<sup>84</sup> B. Hepple, *Does Law Matter? The Future of Binding Norms*, in G. P. Politakis (ed.), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision. Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations held in Geneva, 24-25 November 2006*, Geneva: ILO, 2007, at 230 – 231. Available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@normes/documents/publication/wcms\\_087817.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087817.pdf).

has been no sign that the ILO is moving in that direction since the suggestion was made quite a while ago at one of the ILO's own round tables.

Another way to modernize the effect of the ILO and other international organizations on labour would be to design coordinated actions for transnational labour inspections, which may exert significantly tighter controls over compliance with ILS "in the field" when coordinating with traditional international and non-governmental organizations.<sup>85</sup>

Interaction between traditional and non-governmental entities with sources for ILL might go a long way toward solving one of the most important problems in current labour law. There is discussion of the quite significant share of the labour market that is now informal. Quite often in developing countries the informal portion of the labour market is larger than the portion with officially constituted labour relations, and the share of the informal market is trending still higher.<sup>86</sup> Traditional forms of law are useless when applied to the informal sector. Mechanisms that allow for interaction between social partners may possibly ameliorate the situation to a certain extent.

However, the more fundamental problem in the current status of ILL, regardless of any consideration of traditional institutions or new ones, non-governmental initiatives, or frameworks is the drastically increased mobility of capital coupled with the much more restricted ability of workers to choose where they work. In order to bring about significantly more effective application of ILS, the forces of international trade unions, other non-governmental organizations, and the ILO must be combined and directed not only at the integration of ILS into international trade, but also at limiting the unimpeded flow of capital that leads to the "race to the bottom". There is not much sign so far that this is the way things are heading. Instead, any socially oriented entities are coming under still more pressure from free trade agreements proposed by the USA and MNC.<sup>87</sup>

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<sup>85</sup> For more on this topic see: M. A. García-Muñoz Alhambra, B. ter Haar, A. Kun, *Independent Monitoring of Private Transnational Regulation of Labour Standards: A Proposal for a "Transnational Labour Inspectorate" System*, in E. Ales, I. Senatori (eds.), *The Transnational Dimension of Labour Relations: A New Order in the Making? Atti del XI Convegno internazionale in ricordo di Marco Biagi*, Torino: G. Giappichelli Editore, 2013, at 254 – 291. Available at: <http://www.labourlawresearch.net/sites/default/files/papers/TLI-final.pdf>.

<sup>86</sup> On this topic see, for example: Olivier, *op. cit.* (fn. 49), at 21 – 38; Sengenberger, *op. cit.* (fn. 49), at 341.

<sup>87</sup> Specifically, the already adopted Trans-Pacific Partnership (TPP) [trade] agreement and the Transatlantic Trade and Investment Partnership (TTIP) that is now under discussion.

Sažetak

Prof. dr. sc. Nikita Lyutov\*

**TRADICIONALNO I NOVO "GLOBALNO" MEĐUNARODNO  
RADNO PRAVO – MOŽE LI SE USKLADITI NJIHOVO  
DJELOVANJE?**

*U radu se razmatra problem kako je međunarodno radno pravo, do sada uglavnom razvijano odlukama Međunarodne organizacije rada (MOR), suočeno s novim oblikom "globalnog" radnog prava nastalog uslijed promjena u oblicima zapošljavanja zbog globalizacije i rasta uloge međunarodnih korporacija. Konkurentni utjecaji u području uređenja radnih prava još nisu postigli stabilan i produktivan odnos te autor u radu identificira nekoliko dodirnih točaka u kojima se oni sukobljavaju, kao i pozadinske silnice koje utječu na navedeni odnos. U članku se također analizira nekoliko prijedloga kako bi trebalo urediti odnos međunarodnog i "globalnog" radnog prava. Posebna pozornost posvećena je mogućnosti povezivanja standarda međunarodnog radnog prava i međunarodne trgovine. Naime, dosadašnji naponi na uključenju "društvene klauzule" u međunarodne trgovinske ugovore u okviru WTO-a bili su neuspješni. Autor smatra da je trenutačno stanje rijetkog i slabog povezivanja međunarodnih trgovinskih ugovora s radnopravnim pitanjima problematično te zaključuje da je potrebno znatnije ograničenje u slobodnom protoku kapitala iz jedne u drugu zemlju kako bi se izbjegla "utrka do dna" među zemljama u razvoju te da bi se izbjeglo općenito smanjenje prava radnika u cijelom svijetu.*

*Ključne riječi: međunarodni radni standardi, Međunarodna organizacija rada, međunarodno radno pravo, međunarodna trgovina, soft law*

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