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The ILO and International Judicial Mechanisms: A Story of Control and Trust

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I. Introduction

The notion of control is linked to the respect for and the implementation of international law. It includes a broad array of mechanisms and tools, which include, inter alia, reporting and alert mechanisms, complaints mechanisms, fact-finding, peer-pressure as well as ad hoc and permanent judicial mechanisms.¹ Various terms are used to express the idea of control – such as supervision, compliance, implementation or enforcement – but they all aim at the same objective: ensuring effective respect of the law by member States. It is quite remarkable that the ILO Constitution placed a special focus on effectiveness since its establishment.² In this sense, the ILO is unique in many respects. Since the very inception of the Organization, one of its key features has been the emphasis placed on normative activities as well as on ensuring respect for the rules adopted as a result of such activities.

The control mechanisms foreseen and used in the context of the ILO, although diverse in their characteristics, are envisaged in a comprehensive framework. The Organization has been and continues to be very innovative in this area. One particular issue I would like to focus on relates to the international judicial mechanisms and their possible contribution to the respect

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¹ Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'Suivi et Contrôle' in Evelyne Lagrange and Jean-Marc Sorel (eds), *Traité de droit des organisations internationales* (LGDJ 2013) 800.

² See article 19, paragraph 5d), requiring that a State ratifying a convention undertakes to 'take such action as may be necessary to make effective the provisions of such Convention' and article 24 of the ILO Constitution which speaks of 'effective observance'.

for the law of the ILO. To this end, the array of ILO control mechanisms will first be presented (II). I will then give special attention to how judicial mechanisms can also have a role to play. I will focus on how the judicial mechanisms have been incorporated into the ILO mechanisms of control (III) and show that they are subject to increasing resistance within the ILO (IV). Finally, it is important to have a look at judicial and quasi-judicial procedures for the application and interpretation of international labour standards being set up outside the ILO, and discuss the role the ILO can play (V).

II. The diverse characteristics of ILO control mechanisms

The ILO control mechanisms are many and diverse. They were innovative at the time of their establishment. They are still ‘advanced’³ in comparison to the control mechanisms of other international organizations. An additional feature is that they exist in a unitary framework, that is to say that they are linked to one another.⁴ In this context, tripartism is of central importance. It plays a role in the choice of topics of standards (which is decided by the tripartite Governing Body of the ILO), their elaboration and their adoption (by the annual tripartite International Labour Conference), but also with regard to the control mechanisms. Indeed, many aspects of the ILO’s control mechanisms are tripartite in nature, and involve tripartite decision-making. The current difficulty in the operationalization of tripartism is having an impact on the ILO in general, but more specifically on the ILO’s control system.⁵

1. *The reporting procedure*

The ILO control mechanisms include, first and foremost, a reporting procedure as reflected in article 22 of the ILO Constitution. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) – created in 1926 and currently composed of 20 experts – and

³ Francis Maupain, ‘A Second Century for What? The ILO at a Regulatory Crossroad’ (2019) *International Organizations Law Review* 1, 14.

⁴ Anne Trebilcock, ‘The International Labour Organization’ in Michael J. Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge UP 2018) 848, 864.

⁵ Claire La Hovary, ‘The ILO, its standards and their supervision: difficult times?’ (Völkerrechtsblog 2015).

the Conference Committee on the Application of Standards (CAS) – created in 1927 with a tripartite composition – are tasked with making observations on specific reports. The CEACR can also make general observations in relation to the application of a convention. State parties to an ILO convention have an obligation to report on a regular basis on the measures they have taken towards its implementation. They have to do so every three years for the ‘priority’ conventions⁶ and every six years for the others. They may also be obliged to send reports at shorter intervals. The social partners may send comments as provided for in article 23 of the ILO Constitution. After an exchange with the concerned States, the CAS draws up conclusions which may recommend States to take specific measures or to ask for technical assistance.

The reporting procedure plays a crucial role in monitoring and alerting. That said, it is in a way a victim of its own success. It has been overwhelmed by the increasing number of conventions which have been adopted. It thus faces challenges in terms of deadlines which need to be extended. More importantly, there is also an issue of relevance caused by the decreasing appetite of States for ratifying conventions.⁷ This situation should be seen as one of shared responsibility between the member States and the Organization, raising the issue of the proper role to be played by the reporting procedure and addressing the challenges it faces.

2. *Representations by social partners*

Social partners, be they employers’ or workers’ organizations, have the right to make a representation to the Governing Body under article 24 of the ILO Constitution against any State which has allegedly failed to abide by a convention to which it is party.⁸ In making a representation, it is necessary to identify the relevant convention(s) and specific provisions at stake.

⁶ This denomination was adopted by the Governing Body in 1999 to designate four conventions, which were to be ratified quickly by the States Parties: the Employment Policy Convention, 1964 (No. 122), the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129) and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144); see GB.276/LILS/WP/PRS/1.

⁷ Maupain (n 3).

⁸ To date, about 168 article 24 representations have been received <https://www.ilo.org/dyn/normlex/en/f?p=1000:50010:::NO:50010:P50010_ARTICLE_NO:24>.

Tripartite committees may be established by the Governing Body to examine the merits of such representations. Due process needs to be respected, in particular the adversarial process (*principe du contradictoire*). The tripartite committees send their reports to the Governing Body. Various follow-up activities may be considered, such as referral to the aforementioned CEACR. Representations may also be pursued as complaints under article 26 of the ILO Constitution.

3. *Complaints procedure*

Under article 26 of the ILO Constitution, complaints⁹ may be filed against a State not complying with a ratified convention by another member State to the same convention, a delegate to the ILO Conference or the Governing Body in its own capacity.¹⁰ The Governing Body may set up a Commission of Inquiry composed of three independent persons.

Thirteen Commissions of Inquiry have been established so far. Practice reveals that there is a certain threshold to be met for a commission to be established: there must be persistent and serious violations. There is a possibility for on-site fact-finding, but there is no obligation on a targeted country to accept an on-site fact-finding commission.¹¹

A question arises as to when it should be decided to send a fact-finding commission. The case of Venezuela reveals the difficulties linked to the establishment of a Commission of Inquiry. Thirty-three employer delegates at the International Labour Conference presented in June 2015 a complaint, but it was only in March 2018 that the Governing Body decided that a Commission of Inquiry should be established with respect to the Minimum

⁹ To date, 30 article 26 complaints have been made <<http://www.ilo.int/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm>>.

¹⁰ Before the 1946 amendments to the procedure, only a member State could make a complaint.

¹¹ Some countries have refused to cooperate. As a reminder, article 27 of the ILO Constitution sets out a broad cooperation obligation for all Member States: 'The Members agree that, in the event of the reference of a complaint to a Commission of Inquiry under article 26, they will each, whether directly concerned in the complaint or not, place at the disposal of the Commission all the information in their possession which bears upon the subject-matter of the complaint'.

Wage-Fixing Machinery Convention, 1928 (No. 26), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). This decision was finally made on the recommendation of the Officers of the Governing Body. They were deeply concerned with the lack of any progress with respect to the previous decisions of the Governing Body, in particular as to the establishment of a social dialogue table and action plan, which it had urged the Government to institutionalize before the end of 2017.¹² It was also not possible to carry out the high-level mission recommended at the preceding session,¹³ due to the objections raised by the Government to the mission's agenda.¹⁴ The abovementioned commission was established in March 2018 and made a visit to the country in July 2019.¹⁵

When a State does not abide by the recommendations of the Commission, the Governing Body can take action under article 33 of the Constitution. It may 'recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith'. It did so once in 2000 against Myanmar because of its forced labour practice as described and qualified by a Commission of Inquiry. The possibility to resort to the International Court of Justice was envisaged. However, another course of action was decided upon. A resolution of the International Labour Conference, adopted on 15 June 2000,

¹² Complaint concerning non-observance by the Bolivarian Republic of Venezuela of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), made under article 26 of the ILO Constitution by several delegates to the 104th Session (2015) of the International Labour Conference, GB.329/INS/15.

¹³ *ibid.*

¹⁴ Decision on the complaint concerning non-observance by the Bolivarian Republic of Venezuela of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), GB.332/INS/10(Rev.) para 13.

¹⁵ 'ILO Commission of Inquiry will visit the Bolivarian Republic of Venezuela from 8 to 12 July, 2019' (ILO Press Release 8 July 2019) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_712318/lang-en/index.htm>.

recommend[ed] to the Organization's constituents as a whole – governments, employers and workers – that they: (i) review, in the light of the conclusions of the Commission of Inquiry the relations that they may have with the member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations; and (ii) report back in due course and at appropriate intervals to the Governing Body.¹⁶

4. *Complaints before the Committee on Freedom of Association*

The Committee on Freedom of Association was created in 1951 for the purpose of examining complaints about violations of freedom of association in application of Convention No. 87 and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).¹⁷ The complaints may be lodged by employers' and workers' organizations against an ILO member State, whether or not it has ratified the two conventions.¹⁸ The Committee is composed of an independent chairperson and eighteen members representing the three constituencies. All members act in their personal capacity. The Committee evaluates specific allegations regarding freedom of association principles. After receiving a response from the State concerned, the Committee formulates recommendations on how the situation could be remedied. The Governing Body adopts the report and a State must report on how it has taken into account the Committee's recommendation. All recommendations have so far been adopted by the Committee by consensus.

The ILO and the United Nations have created a supplementary mechanism that can receive complaints. The Fact-finding and Conciliation Commission on Freedom of Association was established in 1950 under an agreement between the two organizations. Its mandate was initially to

¹⁶ ILC 88th Session (2000), Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar, point 1(b).

¹⁷ To date, approximately 3,100 complaints have been filed <<http://www.ilo.int/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang-en/index.htm>>.

¹⁸ Freedom of association is mentioned in the ILO Constitution.

consider whether a complaint merited asking the member State to accept a fact-finding commission. It is a part of the special procedures at the ILO for the examination of complaints alleging violations of the freedom of association. The Economic and Social Council can receive complaints, which it may forward to this body.¹⁹

5. *Judicial mechanisms*

Since the time of the adoption of the ILO Constitution in 1919, resort to international judicial mechanisms has figured among the means the ILO has for ensuring respect for the rule of law. The contribution of international judicial mechanisms is plainly part of the ILO control framework. It is one element of this comprehensive framework. Noteworthy is the fact that even before the creation of the Permanent Court of International Justice (PCIJ) in 1920, ILO member States had considered that the World Court should play a key role in ensuring respect for the normative instruments adopted by the ILO as well as for interpreting its Constitution.

In 1946, a proposal to establish a tribunal was included in article 37 of the ILO Constitution, in addition to a possible resort to the International Court of Justice (ICJ). Its role and contribution as well as that of the other judicial mechanisms will be examined in detail in the light of the objective of ensuring effective compliance with the law by member States.

¹⁹ To date, it has received six complaints; see *Prelude to change: Industrial relations reform in South Africa* (1992); *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the United States/Puerto Rico* (1981); *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Lesotho* (1975); *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Case of Chile* (1975); *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Trade Union Situation in Greece* (1966); *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Persons Employed in the Public Sector in Japan* (1966) <https://www.ilo.org/global/standards/information-resources-and-publications/WCMS_160778/lang-en/index.htm>.

III. Judicial mechanisms as core components of the ILO control framework

The role of judicial mechanisms deserves further scrutiny in order to stress their unique role within the ILO in comparison to other international organizations. Their intervention was conceived in the context of the other control mechanisms of the ILO. An assessment will thereafter be made of their use.

1. *The various paths to the International Court of Justice*

Having recourse to the PCIJ, and later to the ICJ, was envisioned in various ways. The ILO Constitution foresees referral to the ICJ following an examination of a complaint by an ILO Commission of Inquiry. It also refers to the intervention of the ICJ with respect to the interpretation of ILO conventions and of the Constitution itself. In practice, resort to the Court has also been foreseen in the context of article 33 of the ILO Constitution.

1.1 The ICJ and the complaints procedure

It is recalled that, pursuant to article 26 of the ILO Constitution, a member State may be the object of a complaint which alleges non-observance of a convention it has ratified. Under article 29, paragraph 2, of the ILO Constitution, the State concerned by the complaint can inform the ILO Director-General, within three months of the rendering of the report of an ILO Commission of Inquiry, as to whether it accepts the recommendations of the Commission, and, if not, whether it proposes to refer the complaint to the World Court. Articles 31 and 32 of the Constitution provide that the ICJ may affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry and that its decision will be final.²⁰

The insertion of this provision in 1919 was forward-looking. The resort to the Court was considered as offering an additional due process layer. The aim was to introduce some kind of appeal procedure open to a defaulting State, that is to say, 'one more intervening stage before the economic sanctions could become operative'.²¹

²⁰ ILO Constitution, article 31.

²¹ Anne-Marie La Rosa, 'Links between ILO and the ICJ: A less than Perfect Match', in Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers 2002) 119, 126.

The procedure foreseen in article 29 was envisaged as a contentious one. The Organization went to great lengths to ensure a corresponding place for itself in the PCIJ Statute. However, the Statute of the PCIJ did not include any provision allowing the ILO to have access to the Court when it exercises its contentious function. It has been said that: 'even if recourse to the Court was provided in the ILO Constitution, cases where a State would not accept the recommendations of a Commission of Inquiry [...] were just not appealable because, in both cases, it could not be considered as an interstate dispute'.²²

1.2 The ICJ and interpretation issues

Another resort to the Court is foreseen in article 37, paragraph 1, of the ILO Constitution, which reads as follows:

Any question or dispute relating to the interpretation of this Constitution or any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

This provision acknowledges a preeminent role to the World Court in terms of interpretation of the ILO Constitution and international labour conventions, highlighting its privileged, although not exclusive, position in this endeavor. Due to the tripartite nature of the Organization, it was considered that the interpretation of ILO conventions could not be left to the member States. Because of this institutional specificity, it was considered that the power of interpreting the ILO's instruments, including its Constitution, should be entrusted to a third party such as the PCIJ. The World Court 'was believed independent enough to credibly carry out this custodian role and render decisions which would be binding on all (constituencies)'.²³

Article 37, paragraph 1, provides for the referral of 'any question or dispute' (*questions ou difficultés* in French) relating to the interpretation of the Constitution or of any international labour convention adopted by member States pursuant to the provisions of the Constitution to the International

²² *ibid.*

²³ *ibid* 122.

Court of Justice ‘for decision’ (*appréciation* in French). The wording of this provision calls for some explanation as it deviates from the established principles and rules governing the advisory function of the International Court of Justice and of its predecessor. In other words, should it be considered that article 37, paragraph 1, refers to the contentious function of the ICJ (as with article 29) or does this provision refer to the advisory function of the Court?

There are historical reasons that may explain, at least in part, the language used in article 37, paragraph 1. Article 14 of the Covenant of the League of Nations, which called for the establishment of the PCIJ, also provided that the Court ‘may give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly’. As interpreted in practice, and eventually also reflected in article 82 of the Rules of the Court of 1936,²⁴ two types of advisory opinions were considered: one was an opinion related to a ‘dispute’ (*différend* in French) which should be largely assimilated to a contentious case while the other was an opinion related to a non-contentious ‘question’ (*point* in French).²⁵ It has thus been suggested that the drafters of article 37 intended, while borrowing language from article 14 of the Covenant, to recognize the compulsory jurisdiction of the Court for contentious cases between ILO member States as well as to allow for requests for advisory opinions to be brought directly before the Court without the prior approval for the League’s Council.²⁶ According to the ILO, article 37, paragraph 1, has always been understood as conferring a binding and decisive effect to advisory opinions obtained on that basis.²⁷

²⁴ Article 82 of the Rules of the Court of 1936 reads as follows: ‘In proceedings in regard to advisory opinions, the Court shall, in addition to the provisions of Chapter IV of the Statute of the Court, apply the provisions of the articles hereinafter set out. It shall also be guided by the provisions of the present Rules which apply in contentious cases to the extent to which it recognises them to be applicable, according as the advisory opinion for which the Court is asked relates, in the terms of article 14 of the Covenant of the League of Nations, to a “dispute” or to a “question”’.

²⁵ ILO, The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, GB.322/INS/5 para 9. On this issue, Démètre Négulesco, ‘L’évolution de la procédure des avis consultatifs de la Cour permanente de Justice internationale’ (1936) 57 *Recueil des cours* 5. See also Manley Hudson, ‘Les avis consultatifs de la Cour permanente de Justice internationale’ (1925) 10 *Recueil des cours* 345.

²⁶ Georges Fischer, *Les rapports entre l’Organisation internationale du Travail et la Cour permanente de Justice internationale* (Pedone 1947) 30-46.

²⁷ ILO (n 25) para 7.

A similar and rather enigmatic provision to article 37, paragraph 1, was introduced in constitutive agreements of other international organizations. One can refer to article XIV of the UNESCO constitutive act or to article 75 of the WHO constitution. Notwithstanding the similarity with other international organizations' constitutive agreements, a peculiarity is that the ILO constitutive agreement is pioneering insofar as the provision was included in 1919. Tripartism surely played a role and resort to the World Court was perceived as a guarantor of the constitutional order of the Organization.

In practice, six requests for an advisory opinion were made at the time of the PCIJ.²⁸ Four of them were initiated following a request made by the ILO Governing Body,²⁹ and two of them following a State's initiative.³⁰ Even though article 37, paragraph 1, which corresponds to article 423 of the Versailles Treaty, had entered into force at that time, it is interesting to note that no request was ever submitted directly to the PCIJ on this ground. All six requests were submitted to the Court through the League Council pursuant to article 14 of the Covenant.³¹ The Council of the League of Nations merely served as a conduit as the questions put by the Council to the Court were those posed by the ILO and the State who asked for the advisory opinion.

²⁸ *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, PCIJ, Series B, No. 1 (1922); *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, PCIJ, Series B, No. 2 (1922); *Competence of the International Labour Organization to examine proposals for the Organization and Development of Methods of Agricultural Production*, PCIJ, Series B, No. 3 (1922); *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer*, PCIJ, Series B, No. 13 (1926); *Free City of Danzig and the International Labour Organization*, PCIJ, Series B, No. 18 (1930); *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, PCIJ, Series A/B, No. 50 (1932).

²⁹ In the case of the first advisory opinion, the International Labour Conference called upon the Governing Body to request the Council of the League of Nations to request an advisory opinion to the Court.

³⁰ France was at the origin of the two advisory opinions on the *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* and on the *Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production*.

³¹ In the case of the *Free City of Danzig and the International Labour Organization*, although reference was made to article 423 of the Treaty of Versailles (now article 37 of the ILO Constitution), it was on the basis of article 14 of the Covenant that the request for an advisory opinion was made; see *Danzig* (n 28) 4, 8–9.

With the creation of the United Nations, request for advisory opinion was envisaged in new terms. In 1946, the conclusion of the UN-ILO Agreement offered another path for requesting advisory opinions. Given the fact that, in accordance with article 96 (2) of the UN Charter, the General Assembly had duly authorized the ILO to request advisory opinions, the ICJ would base its jurisdiction primarily on article IX (2) of the 1946 UN-ILO Agreement between the UN and the ILO, which explicitly authorizes the ILO to request an advisory opinion.³² According to article IX, paragraph 2, of the said Agreement,

the General Assembly authorizes the International Labour Organisation to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationship of the Organisation and the United Nations or other specialized agencies.

Article IX, paragraph 3, of the Agreement provides that a request may be addressed to the Court by the Conference or by the Governing Body acting in pursuance of an authorization by the Conference. The ILO has so far not sought any advisory opinion from the International Court of Justice.

1.3 The ICJ advisory function and the participation of non-State actors

The tripartism feature of the ILO was taken into account through article 73 of the (Revised) Rules of the Permanent Court of International Justice pursuant to which employers' and workers' organizations were allowed to participate in advisory proceedings initiated by the ILO.³³ As noted by the Court's President in 1926, practice had created a precedent

³² See also the Resolution 50 (I) (1946) by which the General Assembly approved the UN-ILO Agreement.

³³ As an example, in the advisory opinion concerning the *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, the Court invited the International Association for the Legal Protection of Workers, the International Federation of Christian Trade Unions, and the International Federation of Trade Unions. The third annual report of the PCIJ, published in 1927, contains a list of the international organizations permitted to submit information to the Court under article 73 which consists almost entirely of international trade unions, as noted by Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *American Journal of International Law* 623.

of admitting 'great industrial organizations, whether of workers or of employers', which would be difficult to exclude 'owing to their very great importance', although admittedly these great organizations were 'at any rate indirectly recognized as constituting elements' of the ILO.³⁴

The question whether the social partners can be accorded some place in the advisory proceedings that would correspond to their role in the adoption process has always been central to the debate about the possible referral of a dispute regarding the interpretation of a convention to the ICJ. In 1993, an Office paper on this matter noted that

there is probably good reason to consider that it is even more important, in order to ensure that the specificity of the Organisation and of international labour conventions is taken adequately into account at the Court, to ensure appropriate access for the social partners to enable them to assert their interests and intentions, than to be concerned with the methods and principles of interpretations that may be applied at the Court.³⁵

Although no advisory opinion has been requested by the ILO to the ICJ on whatever basis, the participation of non-State actors should not be a concern. As a matter of fact, this form of participation has become a feature in ICJ advisory proceedings.³⁶ Recent advisory proceedings support the view that the ICJ is 'prepared to open up its advisory proceedings to actors, other than States and international intergovernmental organizations, every time the participation of such actors is substantively and procedurally essential

³⁴ PCIJ, Acts and documents concerning the organization of the Court, Series D, Addendum to No. 2, 1926, 224-225, cited by Yaël Ronen, 'Participation of non-State actors in the ICJ proceedings' (2012) 11 *Law and Practice of International Courts and Tribunals* 77, 88.

³⁵ ILO, Article 37, paragraph 2, of the Constitution and the interpretation of international labour conventions, GB.256/SC/2/2 para 48. The paper indicated, however, that 'it is unclear whether, in the current context of the Statute of the International Court of Justice the term "international organization" could continue to be given such a wide interpretation as to enable international employers' and workers' organizations to be consulted and heard directly' (para 42).

³⁶ Laurence Boisson de Chazournes, 'La procédure consultative de la Cour internationale de Justice et la promotion de la règle de droit: remarques sur les conditions d'accès et de participation', in Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw and Karl Sommerman (eds), *Common values in international law: Essays in honour of Christian Tomuschat*, (N.P. Engel 2006) 479.

considering the concrete context of the case, in light of considerations of fairness and justice, but also bearing in mind the need to obtain the fullest information possible'.³⁷ The *Wall* and *Kosovo* cases appear to confirm that the Court is open to the participation of entities that are directly interested in a dispute and likely to be affected by the outcome of the proceedings; they are also likely to provide information that may not be available to the Court otherwise.³⁸ As an Office paper has underlined

irrespective of whether the Court would grant permission to any international employers' and workers' organizations to participate autonomously in the proceedings, the Office could include in the dossier to be submitted together with the request any briefs, position papers or other documents that the Employers' and Workers' groups might wish to bring to the knowledge of the Court. In any event, failing direct invitation by the Court, nothing prevents employers' and workers' organizations from submitting their views as uninvited briefs. Moreover, it cannot be excluded that, in preparing their written statements, some member States may consult national employers' and workers' organizations and properly reflect their views as part of the information communicated to the Court.³⁹

2. *The establishment of a tribunal*

In 1946, a second paragraph was added in article 37 of the ILO Constitution. It states that the ILO can establish a tribunal 'for the expeditious determination of any dispute or question relating to the interpretation of a convention'.⁴⁰ This was introduced into the Constitution in 1946 on the proposal by the Committee on Constitutional Questions set up by the Governing Body on 13 May 1944. The Committee considered that it would in any case be desirable to grant to the Governing Body the discretionary power to institute a tribunal for the rapid settlement of all questions

³⁷ ILO (n 25) para 43.

³⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 141-142, paras 4-5; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 407, para 3.*

³⁹ ILO (n 25) para 47.

⁴⁰ ILC 27th Session (1945) Report IV(1) 107-108, 158; ILC 29th Session (1946) Report II(1) 60-61.

or disputes concerning the interpretation of a convention. It was stressed that, whereas the interpretation of the Constitution was solely a matter for the ICJ, this was not the case regarding questions of the interpretation of conventions. The points to be settled were 'often so detailed that it was not worthwhile placing them before the principal judicial authority'. Other considerations of a practical nature were also made.⁴¹ In the words of a representative of the French Government on the subject,

as it would be impractical to refer every question or dispute concerning the interpretation of a Convention to the Court, his Government had long been in favour of establishing an in-house interpretative body under article 37(2) of the Constitution. It should be a flexible, low-cost mechanism that would convene at the express request of the Governing Body.⁴²

At the time of the amendment to article 37, the idea of a hierarchy between international judicial mechanisms was present, giving the last word to the ICJ when seized. Article 37, paragraph 1, which refers to the advisory function of the International Court of Justice, is part of the Constitution as originally drafted in 1919, whereas article 37, paragraph 2, which provides for the establishment of an internal judicial body, was introduced at the time of the constitutional amendment of 1946. It was considered that article 37 is based on the postulate that the most critical questions relating to the interpretation of ILO conventions and any question relating to the interpretation of the Constitution itself should be brought before the International Court of Justice, while requests for the interpretation of ILO conventions that might be less complex or more amenable to expeditious determination could be submitted to an internal tribunal.⁴³ In this respect, it is noteworthy that according to article 37, paragraph 2, 'any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph'.

The setting up of a tribunal as foreseen in article 37, paragraph 2, constitutes additional evidence of the importance attached to the role played by judicial mechanisms. The objective was to create a judicial mechanism, which

⁴¹ ILO (n 35) para 5.

⁴² GB.322/PV, para 90.

⁴³ ILO (n 25) para 5.

would be 'closer' to the ILO than the World Court. The interpretation function of the tribunal was at stake, with it being binding on all member States. Article 37, paragraph 2, even stresses that 'any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference'.

An element of trust is evident in the proposal for the establishment of a tribunal. This mechanism is often referred to in ILO reports and documents as an 'in house' mechanism.⁴⁴

It was felt that the tribunal would be better able than the ICJ to gain the confidence of the various ILO constituencies. Indeed, the flexible nature of arbitration offers some leeway in this respect. The selection of the arbitrators, the choice of the applicable law and of the rules of procedure could meet the requests of the three ILO constituencies and make room for their interventions. Notably, the rules of procedure could foresee the access of the social partners to the tribunal. On this subject, the tribunal provided for in article 37, paragraph 2, could offer a clear advantage in that the Governing Body would be entirely free to decide on the conditions of its functioning. To this effect, the Office drew upon earlier discussions and consultations on the subject and undertook a comprehensive review of the structure of major international courts and tribunals in operation.⁴⁵ A draft Statute of the tribunal was prepared and submitted to the Governing Body.⁴⁶ However, many States and stakeholders remain opposed to the establishment of such

⁴⁴ ILO, *The Standards Initiative: Joint report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association*, GB.326/LILS/3/1 para 44.

⁴⁵ See, in particular, ILO (n 35); GB.256/PV(Rev.); ILO, *Non-paper on interpretation of international labour Conventions* (February 2010); ILO, *Informal exploratory paper on interpretation of international labour Conventions* (October 2010). The statutes and rules of procedure of the following courts and tribunals were consulted: International Court of Justice; International Tribunal for the Law of the Sea; International Criminal Court; International Criminal Tribunal for Rwanda; International Criminal Tribunal for the former Yugoslavia; Inter-American Court of Human Rights; European Court of Human Rights; African Court on Human and People's Rights; ILO Administrative Tribunal. Other relevant documents included the World Intellectual Property Organization Arbitration and Expedited Arbitration Rules, the Agreement establishing the World Trade Organization (WTO), the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, and the UNCITRAL Arbitration Rules.

⁴⁶ ILO (n 25) Appendix II.

a tribunal, the immediate need for which they do not yet see and they point to additional sources of expenditure for the Organization.⁴⁷ On this latter point, one can note that the ILO is already hosting the ILO Administrative Tribunal, and the registry of this tribunal could be used for the tribunal to be established under article 37, paragraph 2.

The Governing Body is responsible for the referral of any dispute or question related to the interpretation of a convention.⁴⁸ One question that must be asked is how and by whom the matter may be placed on the Governing Body's agenda. Article 37, paragraph 2, presupposes that there is a contestation, or at least a serious question, that has arisen concerning the interpretation to be given to a convention and the required intervention of the Governing Body guarantees that this will in fact be the case.

The above-mentioned draft Statute prepared by the Office does not indicate how the Governing Body might assess the appropriateness of referring a particular matter to the tribunal. In assessing whether to make an interpretation request, the Governing Body may consider all practical, legal and political circumstances it deems pertinent, such as whether the matter has already been the subject of comments by an ILO organ or by another body; the nature of the interpretative question or dispute and its implications, including in relation to the ILO supervisory system; whether any requests for clarification have been made and by whom; and the usefulness of obtaining an authoritative interpretation. The proposed Statute does not regulate either how the consideration of a question or dispute could be brought before the Governing Body. As an Office paper pointed out, several courses of action can, nevertheless, be envisaged as to how a question or a dispute might be brought before the Governing Body for possible submission to the tribunal. For example, the ILO control mechanisms, in particular the CEACR or the CAS, may in their respective reports express the view that the Governing Body should refer a specific matter to the tribunal. Consideration of an interpretation issue could also be included in a session of the Governing Body by the screening group, whose mandate to draw up the agenda of the Governing Body would allow the matter to be introduced whenever it is deemed suitable.⁴⁹

⁴⁷ ILO (n 42) paras 47-210.

⁴⁸ *ibid* para 136.

⁴⁹ ILO (n 25) paras 81-82. See also ILO (n 35) paras 59-60.

IV. A growing resistance to international judicial mechanisms

Since 1946, the ILO has neither requested an advisory opinion, whatever the legal basis, nor established an ad hoc tribunal. Although the ILO is rather unique in its professed faith in the role that international judicial mechanisms can play, it has so far resisted in engaging itself on this path. This is probably due to the control framework that has developed in parallel to fill the gaps and which to a certain extent makes it possible to settle day-to-day difficulties without having to go through the complex procedure of requesting an advisory opinion to the ICJ. This framework brings into play three complementary bodies: the Office, the Committee of Experts, and the Conference itself, mainly through the CAS.

That said, at least on two occasions, discussions and consultations took place on having resort to international judicial mechanisms but no decision was taken. First, the non-cooperation of Myanmar after the Commission of Inquiry had submitted its report in 2000 (which dealt with forced labour) brought some to consider the possibility of a request to the ICJ for an advisory opinion. As previously stated, this was considered and discussed in the context of article 33 of the ILO Constitution. As an action to secure compliance, a question could have been asked to the ICJ. To this end, discussions were held in the Governing Body on the need for such a request for an advisory opinion and the formulation of questions, if any, to be addressed to the ICJ.⁵⁰ However, another course of action was retained with the adoption of a resolution requiring States and international organizations, to take a series of measures against Myanmar.

⁵⁰ The following questions were proposed: '(1) Do the requirements of the Forced Labour Convention, 1930 (No. 29), imply that complaints of forced or compulsory labour can be made: (i) without any sort of intimidation of persons who complain or seek to make such complaints, and (ii) in conditions such that complainants may have sufficient confidence that their complaints will be objectively examined by the national authorities with a view to the prosecution of, and the imposition of adequate and strictly enforced penalties on, those who exact forced or compulsory labour? (2) If the answer to either part of the first question is in the affirmative, and taking into account the national legal regime governing the prosecutorial and judicial system for handling complaints of forced or compulsory labour, is the public assertion by the Government of a right to prosecute persons for making false allegations of forced or compulsory labour compatible with the requirements of the Forced Labour Convention, 1930 (No. 29)?' See ILO, *Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (no. 29)*, GB.298/5/2 Appendix. See also GB.298/PV para 141.

More recently, in 2012, the Employers delegates on the CAS which discusses the recommendations of the CEACR during the International Labour Conference, 'refused to include any comments involving the right to strike under Convention No. 87, since they objected to interpretations by the CEACR concerning freedom of association on this point'.⁵¹ This created an institutional crisis. Discussions were conducted on the possibility to ask the ICJ for an advisory opinion,⁵² or on the possibility to establish an ad hoc tribunal which would render a judgment on the issue. No decision was taken although the problem is not yet fully resolved. One of the points of deadlock is the meaning and scope of a request for an advisory opinion to the ICJ. Many participants fear the impact of such an approach on both the spirit of negotiation that must prevail within the ILO and the precedent that it could create.⁵³

The discussion which took place in the context of these two situations attests to a certain reluctance towards the World Court being involved in the work of the ILO. The Court has become more and more detached from the control framework of the ILO and there seems to be a similar reluctance towards an ad hoc tribunal as envisaged under article 37, paragraph 2.

Various questions arise in relation to the role of judicial mechanisms, especially the ICJ. They turn around the opposition between legal security and uncertainty. A judicial pronouncement presents the advantage of breaking the cycle of uncertainty but there is nonetheless the risk that it may not be accepted by the ILO tripartite constituents or that it may be accepted by one group but not by the others. One might wonder if it is better to find an 'internal' compromise at the price of uncertainty. Is constructive ambiguity better? Referring to the above-mentioned institutional issue in

⁵¹ Trebilcock (n 4) 875.

⁵² ILO (n 25) 14. The suggested questions were as follows: '(1) Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)? (2) Was the Committee of Experts on the Application of Conventions and Recommendations of the ILO competent to: (a) determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); and (b) in examining the application of that Convention, specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?'

⁵³ (n 42) 2 paras 47-210.

relation to the right to strike, it appears difficult to argue that ambiguity over this issue is proving constructive in practice.

In other situations, one might argue that the advantage of an interpretation given by the Conference, through the CAS, provides for an open discussion, in which interested parties have an opportunity to present their case. 'The persons taking part are precisely those with whom the standards originated and thus in the best position to appreciate the implications of any change of context for their contents'.⁵⁴ One would have to make an assessment of the cases where such an approach might be favoured, at the difference of cases where constructive ambiguity does not help resolve a crisis and may indeed contribute to its worsening.

Uncertainty may also present advantages in terms of negotiation. Uncertainty might offer more flexibility and thus more value in finding a solution that satisfies the tripartite constituents. The choice of interpretation by the organs of the Organization, at the price of lengthy negotiation processes, may be explained by the fact that this system of interpretation meets the need for a certain margin of legal uncertainty as well as the desire to limit the discretion left to judges. A statement of the Employers' representative, expressed during the debates on the issue of the right to strike, illustrates this sentiment:

The ILO could organize a tripartite meeting of experts in January 2015, to identify the problems relating to the modalities of exercising the right to strike at the national level and evaluate possible areas of future ILO action on the issue, including standard setting [...] The scenario he was proposing was more efficient time-wise, and was also far cheaper, more inclusive and more flexible than a referral to the ICJ, which would be a clear acknowledgment not only that tripartism and social dialogue had failed but also that social dialogue had not even been given a chance to resolve the dispute [...] An ICJ opinion to the contrary would damage the credibility of the ILO's supervisory system, by calling into question the status of the Committee's observations and reports.⁵⁵

⁵⁴ ILO (n 35) para 22.

⁵⁵ (n 42) paras 58-59.

The issue of the binding character of an advisory opinion under article 37, paragraph 1, of the ILO Constitution might also have an influence on the attitude of ILO constituents and bodies vis-à-vis the Court. There might be the fear that the ILO would have its hands tied. However, whatever the meaning of the term 'decision' in article 37, another option is open to the ILO, namely that of the UN-ILO agreement which clarifies the non-binding nature of advisory opinions.

Another question is concerned with the judicial authority of the ICJ. The World Court enjoys an authority *per se*. That said, one may wonder if the judicial organ enjoys too much authority or benefits from an authority that does not fit with today's international institutional world. The notion of 'authority' refers to a voluntary submission.⁵⁶ There is no hierarchical relationship between an authority holder and its subjects. As defined, the notion of 'authority' therefore excludes coercion and persuasion. In this context, the authority of the Court rests on multiple foundations. Its universal character, composition and working methods have played a major role in the establishment of this authority. Further, it is the only court with general jurisdiction. That said, from the outset, the latter feature has been identified as 'a matter of concern to the ILO, and in particular, when the Statute of the Permanent Court of International Justice was being prepared. The ILO approached the Committee of Jurists to whom this task was assigned in order to ensure that, in matters concerning labour, the Court would be composed in such a way as to offer not only guarantees of impartiality, but also of technical competence'.⁵⁷ The Office proposals were not followed with the exception of the reference to a chamber of the Court dedicated to issues of labour law.⁵⁸

When assessing the role of the World Court in the ILO control framework, one should recall the importance of the 1922 advisory opinion of the PCIJ concerning the nomination of the Dutch worker delegate at the third session of the International Labour Conference.⁵⁹ Still today, it remains the only authoritative guidance on matters relating to representativeness

⁵⁶ Max Weber, *The Theory of Social and Economic Organization* (The Free Press 1964) 324.

⁵⁷ ILO (n 35) para 39.

⁵⁸ Statute of the International Court of Justice, article 26, paragraph 1.

⁵⁹ *Designation of the Workers' Delegate* (n 28).

of workers' organizations and on which the Conference Credentials Committee systematically builds its case law.

It should also be noted that the rationale underlying article 37 of the ILO Constitution was to recognize the referral to the ICJ as the ultimate recourse in matters of interpretation disputes and to accept the Court's 'decision' as final settlement of any such dispute. It is clear that according to the letter and the spirit of the ILO Constitution, advisory opinions given by the International Court of Justice enjoy a special status and authority for all ILO Members. In the case of the six advisory opinions delivered at its request, all of them – even though not on the basis of article 37 – were published in the ILO Official Bulletin and referred to in the Director-General's Report to the Conference. They were also given effect in the subsequent practice of the Organization. For instance, following the Court's advisory opinion relating to the interpretation of the ILO's Night Work (Women) Convention, 1919 (No. 4), the Governing Body decided in 1933 to propose a revision to the convention that was eventually adopted by the Conference in 1934.⁶⁰

Lastly, it is also necessary to take into account the changing mandate of non-judicial mechanisms within the ILO. As regards the CEACR, for instance, according to the provisions adopted by the Governing Body and the Conference in 1926, its functions are technical and in no sense judicial. However, by comparison with this original mandate, the Committee has taken on a more independent role regarding interpretation, as it also has in other fields, without raising objections in principle. This enlarged role is in fact a response to the inherent needs of its work and to the conditions in which it is called upon to examine a constantly increasing number of reports concerning conventions that are also growing in number. That said, as the Committee itself stated in 1991, it is not a tribunal, and its views are not judgments.⁶¹ An implicit role therefore continues to be recognized for international judicial mechanisms, although this role may not be as significant as it was envisaged in 1919 and 1946.

⁶⁰ ILO (n 35) para 30.

⁶¹ Report of the CEACR (ILO 1990) para 11.

V. A new challenge for the ILO: The role of other judicial and quasi-judicial mechanisms

Interestingly, specialized international judicial and quasi-judicial mechanisms have been established since the late 1990s, being granted implicit jurisdiction to interpret and apply ILO instruments, directly or indirectly. The most significant are those contained in regional free trade agreements. These agreements include specific chapters devoted to labour legislation which refer in one manner or another to ILO norms and standards.⁶²

For example, Free Trade Agreements (FTAs) concluded by the EU contain 'Trade Sustainable Development (TSD) chapters' and 'labour standards'. They are considered as a key element of the EU's commitment to a 'value-based trade agenda'. They have been a standard component of the EU's Free Trade Agreements since the EU – South Korea FTA in 2009. There are variations between the provisions in these various agreements but the essential elements of TSD chapters are found in all recent FTAs.⁶³

The agreements require parties to make commitments in relation to the ILO Declaration on Fundamental Principles and Rights at Work 1998 which includes the principles concerning the fundamental rights which are the subject of the ILO's fundamental labour conventions.⁶⁴ These conventions deal with freedom of association and collective bargaining, forced and compulsory labour, child labour, and workplace-related discrimination. Substantial standards also refer to commitments expressed in political declarations such as the 2006 Ministerial Declaration on the UN Economic

⁶² Francis Maupain stresses the risk of selectiveness by these agreements in their understanding of labour laws. Maupain (n 3) 28.

⁶³ James Harrison, Mirela Barbu, Liam Campling and Franz Christian Ebert, 'Labour standards provisions in EU free trade agreements: Reflections on the European Commission's reform agenda' (2018) *World Trade Review* 4-8.

⁶⁴ In the Declaration, ILO member States agreed that they should all respect, promote, and realize the principles concerning the fundamental rights which are the subject of fundamental conventions (whether they have been ratified or not). The core labour standards consist of five standards, laid out in eight conventions: Freedom of association and the effective recognition of the right to collective bargaining (Conventions No. 87 and No. 98); the elimination of all forms of forced and compulsory labour (Conventions No. 29 (together with its Protocol of 2014) and No. 105); the effective abolition of child labour (Conventions No. 138 and No. 182); the elimination of discrimination in respect of employment and occupation (Conventions No. 100 and No. 111) <<https://www.ilo.org/declaration/lang-en/index.htm>>.

and Social Council Attainment of Full and Productive Employment and Decent Work for All. A set of procedural commitments accompanies the substantive standards. They include: commitments on dialogue and co-operation (via institutional structures), monitoring and review of the sustainability impacts of the agreement, a commitment to uphold levels of domestic protection in relation to labour standards, a commitment not to use standards for the purposes of disguised protectionism, and a commitment not to weaken or waive laws to encourage trade or investment. TSD chapters have their own dispute resolution mechanisms which are composed of a two-stage procedure: Government consultations and a Panel of experts that can be established if necessary.⁶⁵

Another illustrative example of this possible interpretation of ILO standards outside the ILO framework is the Dominican Republic – Central America Free Trade Agreement (CAFTA – DR)⁶⁶. Chapter 16 of the CAFTA – DR is dedicated to labour and, in particular, the enforcement by each State party of labour protections to which workers are entitled under national laws. The labour protections largely reflect those of the ILO Declaration on Fundamental Principles and Rights at Work 1998. According to article 16.8, they include the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labour; a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. The parties must, under article 16.1, strive to ensure that their laws provide for consistent labour standards and improve these standards where necessary.

Chapter 16 also includes a control mechanism, but with a rather narrow scope. According to article 16.7, it is limited to situations arising from article 16.2.1(a). Under the latter, ‘a Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement’. If there are questions as to whether a

⁶⁵ Harrison et al. (n 63) 6.

⁶⁶ First free-trade agreement between the United States and a group of smaller developing countries: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Dominican Republic.

Party is conforming to its obligations under article 16.2.1(a), another State party may request consultations pursuant to article 16.6.1. If the consulting Parties have failed to resolve the matter, the complaining Party may resort to the provisions of Chapter 20 on dispute settlement. This may lead to the establishment of an arbitral panel on the basis of a specific roster if further consultations or the Free Trade Commission are unable to resolve the issue.

It was on this basis that the very first labour dispute under a free trade agreement took place. Following unsuccessful consultations and a meeting of the Free Trade Commission, the United States requested in 2011 the establishment of an arbitral panel regarding Guatemala's alleged failure to effectively enforce its labour laws on the right of association, the right to organize and bargain collectively, and acceptable conditions of work. In 2017, the panel issued its report and rejected all US claims. It found the two elements of article 16.2.1(a), that is 'sustained or recurring course of action or inaction' and 'in a manner affecting trade between the parties', to be of a cumulative nature. On this basis, it rejected the US claims because of the absence of either element. Thus, although the United States had proved that Guatemala had failed to effectively enforce its labour laws in some situations, these instances did not constitute a course of inaction in a manner affecting trade. In other words, these proven breaches did not 'confer some competitive advantage on an employer or employers engaged in trade between the Parties'. The Panel also dismissed another claim on the ground that the law enforcement failure did not constitute a sustained or recurring course of action or inaction, although it had an impact on trade.⁶⁷

As was noted, some of the constituents of the ILO seem to have concerns about the Organization losing control over interpretation of international labour standards to the International Court of Justice. One might observe that, although more specialized in their prerogatives, free trade judicial and quasi-judicial mechanisms are already engaged in this endeavour. It would be important for the ILO to establish a relationship with these mechanisms. Many trade agreements, for example, make reference to the ILO Declaration of Fundamental Principles and Rights at Work 1998, but

⁶⁷ Panel Report, In the Matter of Guatemala – Issues relating to the obligations under article 16.2.1(a) of the CAFTA – DR, 14 June 2017; see also <<https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr>>.

the inconsistency in the wording of such references, and potential differences in interpretation and application, may lead to legal uncertainty and problems in practice.⁶⁸ The ILO could play a role in offering interpretative guidance on the application of labour instruments.⁶⁹

Another way would be for the ILO to participate in international dispute settlement proceedings, as the World Health Organization did in *Philip Morris Brand SARL (Switzerland) et al. v. Oriental Republic of Uruguay* by submitting a request for *amicus curiae*.⁷⁰ Article 20.10.1(d) of CAFTA – DR provides for the submission of *amicus curiae* by non-governmental entities. A flexible interpretation should allow for the participation of the Organization.

A similar concern arises in the context of criminal proceedings, as exemplified with decisions taken in relation to the Myanmar situation. In the conclusions adopted by the 95th International Labour Conference in 2006, it was suggested that the Office should provide information about criminal remedies that may exist under international law for action against perpetrators of forced labour in the context of the Myanmar case. Following an Office paper on the issue,⁷¹ a proposal was made to take the matter before the International Criminal Court (ICC), and that the Director-General should take steps to prepare this submission, in case no success would be achieved. The UN Security Council could subsequently be involved, as the following illustrates: ‘It should be made clear to the Government of Myanmar that the international community considered the situation in Myanmar to be extremely serious. The Governing Body should make the ILO’s detailed information on forced labour in Myanmar available to Security Council members through the UN Secretary-General, to allow

⁶⁸ Jordi Agustí-Panareda, Franz Christian Ebert and Desirée LeClercq, ‘ILO Labor Standards and Trade Agreements: A Case for Consistency’ (2015) 36 *Comparative Labour Law and Policy Journal* 347, 366.

⁶⁹ *ibid* 368.

⁷⁰ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, *Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*), Request to file a written submission (*Amicus Curiae Brief*) by the World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, 28 January 2015.

⁷¹ ILO, *Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)*, GB.297/8/2 paras 18-26.

the Council to examine and consider action to be taken to address the situation, with the possibility of referring the matter to the ICC Prosecutor. The ILO should already submit all information on the issue to the ICC, to allow the Prosecutor to begin work forthwith.⁷² Following that proposal, general conclusions were agreed to the effect that the Director-General could ensure that the developments concerning forced labour in Myanmar are appropriately brought to the attention of the UN Security Council and the Prosecutor of the ICC.⁷³ In this context, the ICC should monitor and interpret ILO rules on forced labour and their violation as a crime against humanity. As can be seen, had this route been followed, the number of judicial bodies capable of interpreting and monitoring the application of ILO rules and standards would have increased.

VI. Concluding remarks

As has been explored, the ILO's control mechanisms have diverse characteristics that include reporting procedures, the involvement of social partners, complaints procedures as well as interaction with judicial mechanisms. One of the dimensions of the latter was that there was originally a special relationship between the ILO and the World Court that had been developed by the founding fathers of the ILO Constitution. This interaction had been envisioned in a detailed way. The judicial organ was supposed to play a key role in ensuring respect for the ILO constitutional and normative order. The belief within the ILO that international judicial mechanisms could play an even more central role was strengthened with an amendment to the ILO Constitution providing for the establishment of an ad hoc or 'in house' tribunal. Over time the relationship has somewhat faded away and the appetite for interaction with judicial mechanisms appears currently to be lacking.

In this context, we must ask the question: would the setting up of a tribunal as foreseen in article 37, paragraph 2, of the ILO Constitution reinvigorate the relationship of the ILO with judicial institutions? As in all relationships, it is necessary for the actors concerned to know each other better before establishing firm trust. The setting up of an 'in house' tribunal

⁷² GB.297/PV para 122.

⁷³ *ibid* para 140.

would constitute a step in this direction, and could help dissipate resistance towards international judicial mechanisms. Other ILO control mechanisms may then refer to the tribunal when an interpretation dispute cannot be settled. Internalizing the judicial function in this way may allay fears of surrendering control to an external body.

That said, a diverse array of judicial and quasi-judicial mechanisms have been established in the context of bilateral and regional free-trade agreements and in other fora. In any event, the ILO should interact with these external bodies to ensure that ILO conventions and other standards are soundly interpreted, especially to avoid fragmentation and conflicting interpretations. This will require the ILO to intervene in new judicial mechanisms. As such, the ILO may need to develop internal judicial mechanisms as well as be proactive in its interaction with external judicial mechanisms, if it is to stay in control of the way in which labour law develops.