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# The Lost History of the ILO's Trade Sanctions

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## I. Introduction

In 1994, the Report of the ILO Director-General declared that one of the 'premises' on which the ILO is based is that it 'should rely on cooperation rather than coercion in its efforts to promote social progress'.<sup>1</sup> In line with that premise, the Report observed that

the framers of the Constitution deliberately discarded all forms of coercion. Showing a great sense of realism, they concluded that recourse to constraints or sanctions would only discourage States from ratifying Conventions, or worse yet, from joining the Organization.<sup>2</sup>

When I read this statement in 1994 that the ILO's framers had discarded coercion and sanctions, I knew it to be untrue because, several years earlier, I had written about how the framers, in 1919, had placed trade sanctions into the ILO's Constitution.<sup>3</sup>

Over the years, my writings have occasionally discussed the ILO's original enforcement system. In 2001, I suggested that there are lessons to be

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\* This essay is dedicated to four individuals in the ILO community who, over the decades, sought to enhance my understanding of the ILO's past, present, and future – especially Francis Maupain, and also to Abraham Katz, Virginia Leary, and Nicolas Valticos. My thanks to José Alvarez for his thoughtful comments and to the participants at the seminar at the University of Vienna Faculty of Law where a draft of this essay was presented.

<sup>1</sup> International Labour Conference, 81st Session (1994), Report of the Director General, *Defending values, promoting change – Social justice in a global economy: An ILO agenda*, 58.

<sup>2</sup> *ibid* 55.

<sup>3</sup> Steve Charnovitz, 'The Influence of international labour standards on the world trading regime. A historical overview' (1987) 126 *International Labour Review* 565, 576.

learned from the lack of use of the ILO's sanctions.<sup>4</sup> A few years ago, I showed how the ILO's original dispute procedures had important impact outside the ILO in serving as a model for dispute resolution in the world trading system.<sup>5</sup> But until recently, I had not looked closely at why the endowed sanctions were not used.

The ILO's experiment with trade sanctions receives little attention in literature about the ILO. How did the trade sanctions for the ILO get erased from its institutional memory? For many ILO scholars, the original availability of trade sanctions was a bygone factoid to be overlooked in simplifying the portrayal of the ILO as an organization relying on voluntarism and persuasion rather than coercion or teeth. Even as advocacy for using trade sanctions to promote worker rights intensified in the late 20th and early 21st centuries, those advocates were incurious as to what happened with the ILO's own trade sanctions.

Yet there has to be a good reason why an international organization would leave unused in its toolbox the sanctioning mechanism specifically designed to enforce its ratified standards. Reflecting on this puzzle last year in the run-up to the ILO's centenary, I looked again at the 1994 Report which states that 'sanctions' have 'been repeatedly discarded since the ILO's earliest days for pragmatic reasons'.<sup>6</sup> I wondered what those episodes of discarding were. So, I decided to search for and write up that lost history.

Given the space constraints of this volume, my essay will focus on the early years of the ILO through 1934.<sup>7</sup> Using two chronological narratives, this essay will examine the rise and fall of ILO sanctions. The final section discusses the continuing relevance of the ILO's adventure with its trade sanctions.

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<sup>4</sup> Steve Charnovitz, 'Rethinking WTO Sanctions' (2001) 95 *American Journal of International Law* 792, 831.

<sup>5</sup> Steve Charnovitz, 'What the World Trade Organization learned from the International Labour Organization' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook of Transnational Labour Law* (Edward Elgar 2015) 411.

<sup>6</sup> Report of the Director-General (n 1) 52.

<sup>7</sup> For future scholars, let me note that I was not able to delve into the archives of the ILO or the League and not able to access most non-English-language sources.

## II. The rise of ILO sanctions

Looking back from 1934, ILO founder Sir Malcolm Delevingne observes that one of the ‘leading ideas embodied’ in the ILO Constitution of 1919 is ‘supervision over, and enforcement of, the observance’ of ILO conventions.<sup>8</sup> Delevingne explains that the idea of enforcement by the ILO can be traced back to earlier intergovernmental labour negotiations including the British government’s unsuccessful proposals for enforcement through arbitration offered at the Berne diplomatic conference of 1906.<sup>9</sup>

In 1918, as the Great War draws to a close, both the French and British governments seek to create an international organization focusing on labour.<sup>10</sup> Unlike the institutional caution in 1906, this time there is agreement on the need for an international arrangement with enforceability. The French government’s proposal is that the Conference of the new organization ‘will supervise the enforcement of Conventions which have been accepted’ and will settle disputes either itself or through a Court of Arbitration.<sup>11</sup> The British government’s proposal is an intricate framework of what becomes the ILO. Known as the ‘Early British Draft’, this framework provides a ‘complaint’ process against ‘inadequate enforcement’ of ILO conventions because ‘otherwise countries might obtain unfair advantage in industrial competition through lax administration of the international standards’.<sup>12</sup> Penalties are to be available against ‘non-observance’, but the British Draft maintains that it is ‘undesirable to provide an excessive penalty’ for a ‘comparatively trifling offence’.<sup>13</sup> On the other hand, for a failure to carry out ‘a convention designed to prevent oppressive conditions’, the

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<sup>8</sup> Sir Malcolm Delevingne, ‘The Pre-War History of International Labor Legislation’ in James T. Shotwell (ed), *The Origins of the International Labor Organization* (Columbia UP 1934) vol I, 19, 41-52. In 1919, Sir Malcolm was an Assistant Under Secretary in the British Home Office with extensive experience in improving British workplace regulation.

<sup>9</sup> The Berne conference adopted the first two multilateral labour conventions – on phosphorus matches and night work for women in industry.

<sup>10</sup> By 1918, the concept of the functional international organization had deep roots in international law going back to the scholarship of University of Vienna Professor Georg Jellinek in 1889.

<sup>11</sup> Letter from the French Minister of Labour (December 1918) Document 21 in Shotwell (n 8) vol II, 97, 105.

<sup>12</sup> Early British Draft, Document 25 in Shotwell (n 8) vol II, 124.

<sup>13</sup> *ibid* 125.

British Draft suggests that the appropriate penalty would be for signatory States 'to discriminate against the articles produced under the conditions of unfair competition proved to exist unless those conditions are remedied'.<sup>14</sup>

At the end of January 1919, the Preliminary Peace Conference appoints a Commission on International Labour Legislation (the Labour Commission) to prepare detailed recommendations on labour. Nine countries are represented on the Commission whose delegates are drawn mainly from governments. But for some of the countries, delegates (or substitutes) are also drawn from industry, labour and academia.<sup>15</sup> In an early decision, the Labour Commission agrees to use the 'Draft Convention' formulated by the British government as a vehicle for discussion.<sup>16</sup>

The Draft Convention provides that when a 'complaint' arises from a contracting party that another party is not 'securing the effective observance' of an ILO Convention, 'the Governing Body shall apply for the appointment of a Commission of Enquiry' to consider the complaint and report thereon on 'steps which should be taken to meet the complaint and the time within which they should be taken'.<sup>17</sup> In addition, the Commission of Enquiry<sup>18</sup> is directed to indicate in its report the measures, if any, 'against the commerce' of a defaulting State which it considers to be appropriate, and which other States would be justified in adopting.<sup>19</sup> Should the defaulting State not accept the recommendations of the Commission, the defaulting State would have a right to refer the matter to the Permanent Court of International Justice (PCIJ). The role of the Court is to 'affirm, vary or reverse any of the findings or recommendations of the Commission of

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<sup>14</sup> *ibid.*

<sup>15</sup> Several of the Commission's main players had collaborated with each other for years in international labour circles; see Jasmien Van Daele, 'Engineering Social Peace: Networks, Ideas, and the Founding of the International Labour Organization' (2005) 50 *International Review of Social History* 435, 451–52.

<sup>16</sup> Minutes of Proceeding No. 2, Second meeting of the Commission on International Labour Legislation, Official Bulletin (OB) (1919-20) I 8.

<sup>17</sup> Draft Convention, *ibid* 13-14, articles 24 and 27.

<sup>18</sup> By 1919, the Commission of Enquiry is already part of international law machinery. Yet the ILO Commission is assigned broader duties than earlier commissions had. Cesare P.R. Romano, 'The ILO system of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements' (1996) *Vienna International Institute for Applied System*, 11, 14.

<sup>19</sup> Draft Convention (n 17) article 27.

Enquiry', and the Court may indicate the 'measures, if any, against the commerce' of the defaulting State which the Court considers to be appropriate, and which other States would be justified in adopting.<sup>20</sup> Should the defaulting State fail to comply, any other State would be authorized to take 'against the commerce' of the defaulting State the 'measures indicated' by the Commission or the Court.<sup>21</sup>

In the ensuing debate within the Labour Commission, the most active delegates make several important observations. Ernest Mahaim, a law professor at the University of Liège (Belgium) and the principal organizer nearly 20 years earlier of the International Association of Labour Legislation, warns that the 'economic sanctions' in the British Draft have a 'danger of encouraging protectionist measures' (17).<sup>22</sup> Léon Jouhaux, the Secretary-General of the French General Confederation of Labour, praises the sanctions as being 'of supreme importance' (66). Emile Vandervelde, the Belgian Minister of Justice and former President of the Second International, emphasizes that it 'was not a question of measures to compel a State to accept international labour legislation, but only of sanctions against Governments which, having ratified a Convention, failed to honour their word' (66). Vandervelde also points out that Belgian employers are 'somewhat alarmed by the fact that no scales of penalties had been provided' (66). George Barnes, a Scottish parliamentarian and member of the British War Cabinet, notes the procedural value of providing a 'Court of Appeal open to defaulting States [...] before the economic sanctions [...] could become operative' (66).

Several delegates advance amendments. Vandervelde proposes that in addition to complaints from contracting parties, complaints should also be allowed from delegates to the ILO Conference (62, 64). Another Vandervelde amendment recognizes the need for 'sanctions'<sup>23</sup> and 'penalties', but proposes a wording change from 'measures against the commerce'

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<sup>20</sup> *ibid* article 31. The Court's decision is to be 'final' meaning no further judicial review; *ibid* article 30.

<sup>21</sup> *ibid* article 32.

<sup>22</sup> I will include the page references in parentheses to the Commission's Minutes republished in OB (n 16).

<sup>23</sup> The term 'sanctions' does not appear in the English version of Part XIII of the Treaty of Versailles, but the French version uses the term 'les sanctions'; Treaty of Versailles, 28 June 1919, 112 British and Foreign State Papers 1, articles 414, 418-419.

to 'measures of an economic character' (66, 68). Both amendments succeed. In a subsequent session, a British amendment is accepted to grant the Governing Body discretion as to whether to utilize a Commission of Enquiry (109, 124).

As the debate proceeds, Arthur Fontaine, the Director of the French Ministry of Labour, offers slightly broader language for the potential penalties. Mahaim responds that the Belgian delegation opposes 'protectionism of a penal character' and therefore urges that 'recourse should be had to penalties of an economic character (financial tariffs, transit facilities, etc.), but barring any penalty of a military character' (125). Delevingne explains that the term 'penalties of an economic character' has a 'very wide application, and included all measures affecting the economic life of a country' (125). After hearing those points, Fontaine drops his amendment, but avows that the agreed-upon text 'would of course not exclude the possibility of inserting in a Convention clauses establishing a system of fines in the case of violation' (125).

Henry Robinson, a lawyer-banker and United States delegate to the Allied Supreme Economic Council, proposes several amendments affecting obligations and sanctions. One amendment seeks to devolve the United States treaty obligation internally to the individual state governments (73-74). Against that amendment, Fontaine objects that 'it was difficult to see what form of economic sanction could be applied against any of them which failed to carry out a Convention' (74). Another Robinson amendment seeks to water down the United States commitment to merely a 'best endeavour' to obtain compliance at the subnational level (88). Delevingne objects that this could free a federal State 'from all liability, while the other States remained subject to the application of the clauses concerning enquiry and penalties' (91).

As part of the United States 'counter-draft', Robinson then proposes 'to delete the whole system of penalties' as being 'superfluous' and 'dangerous', and instead leave the 'application of penalties to the League of Nations' (150). Speaking in favor of this amendment, James Shotwell, a history professor at Columbia University, warns that with the availability of 'penalties', there is 'a risk of going too far and creating too many organizations, for what was done for labour might equally be done as regards other questions' (153). Speaking against the United States amendment, Fontaine

declares that ‘he was convinced that as regards international legislation it would rarely be necessary to have recourse to penalties; all the same it was necessary that they should be provided as the very basis of international legislation’ (154). The American Federation of Labor President Samuel Gompers, who is the president of the Labour Commission, intervenes to suggest that several clauses, including ‘the clauses dealing with penalties’ are ‘imprudent’ given the ‘heated discussion’ in the United States about the League of Nations (154). Fontaine’s position ultimately prevails after the United States delegation drops its proposal to transfer out the enforcement as one part of the crucial compromise reached to reduce certain obligations of governments with federalism (179).

Years later, two negotiators memorialized their recollections regarding the decision against eliminating the ILO’s enforcement machinery. In 1934, Edward Phelan explained that ‘it had been thought desirable to have the machinery in the hands of experts in labor matters’.<sup>24</sup> In 1937, Shotwell observed that ‘it was quite impossible’ to secure the United States amendment from a Commission ‘the leading members of which had had years of experience in dealing with evasions of the law’.<sup>25</sup>

Returning to 1919, the Labour Commission then takes up an amendment from the French delegation to remove the ‘discretion’ of States in applying ‘penalties’ in order to give the tribunal’s application of economic measures ‘a more obligatory character’ (125, 184). This amendment draws some support, but tougher opposition. For example, Robinson argues that the existing text already provides ‘sufficient sanction’ (184). The French amendment is withdrawn.

At the conclusion of the debate, the Labour Commission prepares its Report presenting the agreed-upon treaty language and a commentary on that text.<sup>26</sup> In editing their report, the Commission agrees to change

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<sup>24</sup> Edward J. Phelan, ‘The Commission on International Labor Legislation’ in Shotwell (n 8) vol I, 127, 165. Phelan had been a key author of the Early British Draft and was secretary of the labour section of the British delegation to the 1919 Peace negotiations. Phelan became the first civil servant in the ILO and by 1934 had risen to be the Assistant-Director.

<sup>25</sup> James T. Shotwell, *At the Paris Peace Conference* (Macmillan 1937) 218.

<sup>26</sup> The Commission’s report gets rapidly published in 1919; Report of the Commission on International Labour Legislation of the Peace Conference, American Association of International Legislation 6 International Conciliation 851-78; see also OB (n 16) 260.



the title of the descriptive section called 'Penalties (articles 22 to 34)' to 'Enforcement (articles 22 to 34)' because the word 'penalties' is viewed as 'too strong' (223, 265). With reference to the 'economic measures' in article 33, the Report states:

It will be seen that the above procedure has been carefully devised in order to avoid the imposition of penalties, except in the last resort, when a State has flagrantly and persistently refused to carry out its obligations under a convention. It can hardly be doubted that it will seldom, if ever, be necessary to bring these powers into operation, but the Commission consider that the fact of their existence is nevertheless a matter of almost vital importance to the success of the scheme. The representatives of the working classes in some countries have pressed their delegates to urge more drastic provisions in regard to penalties. The Commission, while taking the view that it will in the long run be preferable as well as more effective to rely on the pressure of international public opinion rather than on economic measures, nevertheless considers it necessary to retain the possibility of the latter in the background. If all forms of sanction were removed, the effectiveness of the scheme, and, what is almost equally important, the belief in its effectiveness, would be in great measure destroyed (266).

In April 1919, Minister Barnes presents the Labour Commission's Report to the Preliminary Peace Conference. He explains that because there were 'limitations imposed on States against accepting the decrees of any super-authority', the Commission 'had perforce to give up ideas of uniformity or coercion, and to rely mainly upon the goodwill of States to accept advice and guidance which might be given to them' (288). Barnes then introduces the ILO as having the role 'to diffuse light in dark places' with the 'effective idea' of the ILO being 'creation and mobilisation of healthy public opinion' (288-89).<sup>27</sup> He goes over the ILO's main features, including its 'enforcement clauses', and remarks that 'although the machinery of organisation is brought into play, reliance is based on inquiry and publicity'

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<sup>27</sup> Barnes also enigmatically states: 'I freely admit that at one time I had a good deal more faith in penalties but, Sir, closer inspection led me to the conclusion that penalties must be kept well in the background and can be applied only through the League of Nations and under the authority of the League of Nations' (288).

(291). Barnes closes by noting the expectation that the ‘Peace-makers’ are going ‘to make industrial as well as military peace’ (292). After some discussion and minor wording changes, the Preliminary Peace Conference adopts the Commission’s recommendations for the labour clauses to be inserted into two Peace treaties as ‘Part XIII Labour’.

At least two of the national parliamentary debates on the Peace Treaty discuss ILO enforcement and sanctions. When the United States Senate debates the ratification of the Peace Treaty in fall 1919, several senators express dismay about the dangers of potential economic sanctions and boycotts against the United States economy arising from ILO membership.<sup>28</sup> By contrast in France, the ILO’s enforcement procedures get criticized for being too weak. In reporting the Treaty to the French Parliament, Louis Barthou, a former Prime Minister of France, bemoans that ‘labour had hoped for and had deserved something more’.<sup>29</sup> Barthou goes on to predict that ‘sooner or later it will be necessary to establish an international code of labour with executive machinery, compulsory powers and sanctions’.<sup>30</sup>

The ILO’s enforcement provisions quickly garner the attention of the legal community. In 1919, former United States Attorney General George Wickersham explains that ‘machinery is provided whereby a state which fails to carry out its obligations, or to enforce a convention which has been ratified, may be subjected to economic measures to compel it to do so’.<sup>31</sup> In her lecture to the Grotius Society, Sophy Sanger discusses the authority of the ILO’s Commission of Enquiry to suggest ‘what economic penalties might properly be imposed upon the defaulting government’.<sup>32</sup>

In 1920, an excellent and swiftly-prepared collection of essays about the ILO is published under the title *Labour as an International Problem*.

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<sup>28</sup> Daniel Patrick Moynihan, ‘The United States and the International Labor Organization (1889-1934)’ (unpublished thesis Fletcher School of Law and Diplomacy 1960) 267–76.

<sup>29</sup> Remarks of Justin Godart, a French parliamentarian and government delegate, upon his election as President of the ILO Conference: International Labour Conference, 18<sup>th</sup> Session (1934) 11–12.

<sup>30</sup> *ibid* 12.

<sup>31</sup> George W. Wickersham, ‘Labor’ No. 25, (1919) 2(3) World Peace Foundation Pamphlets 161–162.

<sup>32</sup> Sophy Sanger, ‘The International Labour Organisation of the League of Nations’ (1919) 5 Transactions of the Grotius Society 145, 151. Sanger was a British advocate for labour law reform and the longtime editor of the quarterly journal *World’s Labour Laws*.

Several of the essays discuss the ILO's enforcement system. The editor of the volume, John Solano, describes the ILO as 'a wonderful development for democracy' and notes how the worker and employer would be enabled to 'charge the government of another nation with breach of faith toward its workers, and if necessary to cause it to be arraigned before the Tribunal of the League of Nations for judgment which may involve corrective measures of an economic nature taken against it conjointly by all the member states of the League'.<sup>33</sup> In his essay, Professor Shotwell optimistically observes that the 'provision for overseeing the enforcement of labour legislation was of fundamental importance' and that this 'interference in the home life of the participants in case they do not behave' is 'going a long way towards the breakdown of that conception of sovereignty as absolute which was the ruinous doctrine upon which the old régime, before the war, was based'.<sup>34</sup> Arthur Fontaine writes that while the rules of the ILO 'make due provision for economic measures, moral considerations have been given full weight, and those responsible for drafting the rules when discussing them, attached as much importance to moral factors as to definite measures of enforcement'.<sup>35</sup> George Barnes details the treaty procedures wherein the 'defaulting State' is given an opportunity of 'remedying voluntarily any grievance alleged' before the 'punitive economic measures' and 'penalties for default' may be taken.<sup>36</sup>

Albert Thomas, a French parliamentarian and Minister of Armament during the War, is elected to be the Director of the ILO. In his first report of the Director, Thomas details how the International Labour Office (hereinafter 'Office') had begun to ready two components of the enforcement process for ILO conventions: first, the establishment of the panel of persons of industrial experience who could be appointed to a Commission of Enquiry; and second, the PCIJ's rules for its labour jurisdiction. Although article 14 of the Covenant of the League of Nations provides

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<sup>33</sup> E. John Solano, 'Introduction' in E. John Solano (ed), *Labour as an International Problem* (MacMillan, 1920) xiii, li. Solano had served in the British Ministry of Labour.

<sup>34</sup> James T. Shotwell, 'Historical Significance of the International Labour Conference' in Solano (n 33) 41, 55-56.

<sup>35</sup> Arthur Fontaine, 'A Review of International Labour Legislation' in Solano (n 33) 161, 185.

<sup>36</sup> George N. Barnes, 'The Scope and Purpose of International Labour Legislation' in Solano (n 33) 3, 19-20.

for the establishment of the PCIJ, the only part of the Treaty of Versailles that assigns specific duties to the Court are the provisions in Part XIII. In December 1920, the Council of the League of Nations finalizes the Statute for the PCIJ which provides several innovative mechanisms to address the anticipated labour cases. These mechanisms include: a 'special chamber' for labour matters, assistance to the judges by four 'technical assessors' chosen 'with a view to insuring a just representation of the competing interests', and the 'liberty' of the Office to furnish the Court with all relevant information.<sup>37</sup>

While the drafters of the Statute realized that some of the labour cases 'may present features which are not of an exclusively legal character',<sup>38</sup> the Statute evinces no hesitation in the directive that labour cases 'shall be heard and determined by the Court'.<sup>39</sup> Because only States could be parties before the PCIJ (see Statute article 34), there was a possibility that an appeal to the Court by a defendant government (see Treaty article 415) would entail a proceeding in which there was only one party before the Court, especially if the complaint came from the ILO Governing Body (see Treaty article 411). In the absence of any contentious labour case given appellate review, the Court was never called upon to formulate a standard of review for that awkward scenario.

In addition to the attention he devotes to the mechanics of the ILO's enforcement machinery, Thomas affirms the sanctions in several other ways. Writing in the first issue of the *International Labour Review* in January 1921, the Director states that the ILO 'may organise inquiries and undertake inspection and, where necessary, may have recourse to its sanctions'.<sup>40</sup> That month, at the Governing Body, Thomas clarifies that 'economic action could only be taken with regard to a State which failed to apply the Convention which it had ratified and not to a State which

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<sup>37</sup> Statute of the Permanent Court of International Justice, 16 December 1920, 6 League of Nations Treaty Series 390, article 26. Note the interlinking treaty features whereby Part XIII assigns duties to the PCIJ and the PCIJ Statute assigns duties to the ILO Governing Body to nominate assessors.

<sup>38</sup> League of Nations, Report Submitted to the Third Committee, reprinted in Alexander P. Fachiri, *The Permanent Court of International Justice* (Oxford 1925) 312, 316.

<sup>39</sup> Statute (n 37) article 26.

<sup>40</sup> Albert Thomas, 'The International Labour Organization. Its Origins, Development and Future' (1921) 1 *International Labour Review* 5.

had refused to ratify a Convention'.<sup>41</sup> He further explains that 'as regards the application of general principles [article 427], unless States voluntarily agreed to apply them, the International Labour Organisation could not, at present, have recourse to coercive measures'.<sup>42</sup> In response to concerns as to the scope of the competence of the Governing Body, Thomas sagaciously urges the Governing Body 'not to bind itself by the adoption of a definite principle, since it would often be called upon to take decisions which would involve the making trial of fresh measures without disregard of the text of the Treaty'.<sup>43</sup>

In the 1921 report of the Director to the International Labour Conference, Thomas alludes to potential conflicts between 'the sanctions at the disposal of the International Labour Organisation for enforcing agreements' and the potential sanctions at the disposal of the League's International Blockade Commission.<sup>44</sup> Thomas had already communicated with the Blockade Commission about a potential overlap with the ILO's 'economic sanctions'.<sup>45</sup> The Commission had responded that its terms of reference do not include 'questions concerning the workers'.<sup>46</sup> Thomas also points out in his Report that the 'organisation of sanctions [...] comprises all the mechanism of a legislative or juridical nature placed at the disposal of the International Labor Organisation'.<sup>47</sup> He states that this 'machinery is already in being and that it merely remains for the individual States to set it in motion'.<sup>48</sup>

No motion ensues. In his 1922 report, Thomas writes: 'there is no doubt that we are still far from the complete scheme anticipated in the Treaty of Peace, wherein the system of Conventions which have come into force is completed by a series of measures of supervision, accompanied if necessary by sanctions'.<sup>49</sup> Even though still far from use, the sanctions seem

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<sup>41</sup> Governing Body, sixth session (1921), minutes 25.

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.* 18.

<sup>44</sup> International Labour Conference, third session (1921), Report of the Director, para 115.

<sup>45</sup> *ibid.* para 118.

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.* para 120.

<sup>48</sup> *ibid.*

<sup>49</sup> International Labour Conference, fourth session (1922), Report of the Director, para 89.

real enough to trigger concerns. For example, the 1922 ILO Special Report on the situation regarding the ratification of the hours Convention looks at the ratification debate in the Netherlands. During that parliamentary discussion, the Dutch government expresses worries that ratification ‘affords no guarantee that other countries will take the same measures’ and yet if the Netherlands ratifies and then fails to observe its obligations, then the Dutch economy ‘would become subject to severe sanctions.’<sup>50</sup>

The novelty of ILO enforcement elicits new scholarship by ILO insiders. For example, in 1921, Ernest Mahaim, now Belgian Minister of Industry, Labour and Food and a member of the Governing Body, writes an article stating after ILO conventions are ratified by legislatures, ‘a system of penalties guarantees their observation.’<sup>51</sup> In 1922, Sophy Sanger, by then the first chief of the ILO’s Legislative Section, presents a detailed study to the International Law Association on the topic of the PCIJ and labour cases.<sup>52</sup> Sanger anticipates that workers or employers who have ‘become fully alive to the economic advantages of an international standard of regulation’ will ‘take the initiative in urging their Government to start proceedings before the Court to induce a competing country faithfully to impose the same standard.’<sup>53</sup>

In 1924, the Office prepares a report on several procedural matters in which ‘sanctions’ are discussed in two contexts.<sup>54</sup> First, in explaining why the Governing Body should not seek to interpret ILO conventions, the Office warns that if a State has in ‘good faith conformed’ with the Governing Body’s opinion, the State might nevertheless ‘find itself liable to sanctions’ if the PCIJ renders a contrary decision, and then the ‘authority of the Governing Body would be compromised.’<sup>55</sup> Second, in considering the implications of allowing reservations to conventions, the Office points out how important it is to know when ratifications ‘take full effect’ because at

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<sup>50</sup> *ibid.*, Appendix XIV 945, 1009, para 59.

<sup>51</sup> Ernest Mahaim, ‘International Labour Law’ (1921) 1 *International Labour Review* 283, 285.

<sup>52</sup> Sophy Sanger, ‘The Permanent Court of International Justice and Labour Cases’ (1922), *International Law Association, Report of the 13th conference*, vol 1 46-72.

<sup>53</sup> *ibid.* 49.

<sup>54</sup> *International Labour Conference, sixth Session (1924), Report on the institution of a procedure for amendment of conventions.*

<sup>55</sup> *ibid.* 44-45.

that point, ratifying countries are subject to prescribed supervision in the case of non-observance and 'would be liable to the sanctions prescribed'.<sup>56</sup>

By the mid-1920s, the ILO's progressive features generate a new wave of scholarship. In 1924, George Alexander Johnston comprehensively examines the ILO in its social and economic context. Johnston explains that a State ratifying an ILO convention takes on an obligation of 'effective observance' and that the 'due fulfilment by each Government of this responsibility is intended to be secured by a system of sanctions'.<sup>57</sup>

Also in 1924, José de Vilallonga, the ILO's first Legal Adviser, expounds the law of the ILO in relation to international law.<sup>58</sup> While noting that Part XIII 'provides for the adoption of measures of an economic character against a Member failing to fulfill its obligations', he explains that the Organization itself lacks 'means of international compulsion' to impose those economic measures.<sup>59</sup> Moreover, neither the Commission of Enquiry nor the PCIJ have 'the power to order the adoption of the economic measures indicated'.<sup>60</sup> Instead, 'each Member is entirely free to decide' whether it will undertake the indicated 'economic reprisals'.<sup>61</sup> The value added is that Part XIII 'has certainly modified the common law of reprisal, but only to the advantage of the Members' by recognizing that each ILO Member 'has the right to take economic reprisals'.<sup>62</sup> In addition, Vilallonga postulates that the ILO's 'attributes' bring it 'under what has been called administrative international law' which he praises as 'the most modern part' of 'the law of nations' because it 'aims at organising the international community'.<sup>63</sup>

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<sup>56</sup> *ibid* 76.

<sup>57</sup> George A. Johnston, *International Social Progress. The Work of the International Labour Organisation of the League of Nations* (George Allen & Unwin Ltd. 1924) 42. In 1924, Johnston is a lecturer at the Universities of Glasgow and St. Andrews. Earlier, he embarks upon long service as an ILO official. Johnston writes two important books about the ILO as bookends on his career. His second book George A. Johnston, *The International Labour Organisation. Its Work for Social and Economic Progress* (Europa 1970) is quoted below (n 178).

<sup>58</sup> José de Vilallonga, 'The Legal Character of the International Labour Organisation' (1924) 9 *International Labour Review* 196-207.

<sup>59</sup> *ibid* 202-03.

<sup>60</sup> *ibid*.

<sup>61</sup> *ibid* 203.

<sup>62</sup> *ibid*.

<sup>63</sup> *ibid*.

In that same year, the ILO's procedure for representations (article 409) gets its first use. A Japanese seamen's union lodges a representation that the Japanese government is not adhering to the Placing of Seamen Convention, 1920 (No. 9). When it considers this representation, the Governing Body decides not to advance this case to 'the first stage in the procedure for enquiry laid down in the Treaty'.<sup>64</sup> Decades later, Ernst Haas analyzes this and other representations in the ILO's first two decades and concludes that the Governing Body's committees were 'quite ready to accept all sorts of excuses which, on a rigorous reading of ILO obligations, might not have been considered germane'.<sup>65</sup>

In 1925, Edward Harriman undertakes a detailed examination of the legal aspects of the League, the PCIJ and the ILO.<sup>66</sup> Harriman analogizes that a complaint in the ILO 'is in the nature of a criminal as distinguished from a civil action'.<sup>67</sup> He explains that after a 'judgment rendered against the defaulting Member [...] the Court has the power and the duty to fix the sanction for its own decree'.<sup>68</sup>

The report of the Director for 1925 hints some impatience at the slowness in 'putting into operation the system of mutual supervision'.<sup>69</sup> While 'the machine had been assembled', writes Thomas, 'there was no guarantee that the required current would be forthcoming and that the machine would be set in motion'.<sup>70</sup> The only upside to this lack of motion is that it gives Thomas a ready answer to criticism that the ILO is not doing enough on implementation. Thomas asks why, if countries ratifying conventions are alarmed about 'competition of neighboring States which have ratified

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<sup>64</sup> ILO, *The International Labour Organisation: The First Decade* (George Allen & Unwin 1931) 71.

<sup>65</sup> Ernst B. Haas, *Beyond the Nation-State: Functionalism and International Organization* (Stanford UP 1964) 359. Haas was a political scientist and international relations scholar.

<sup>66</sup> Edward A. Harriman, *The Constitution at the Cross Roads: A Study of the Legal Aspects of the League of Nations, the Permanent Court of International Justice, and the Permanent Organization of Labor* (George H. Doran 1925). When he wrote this book, Harriman was a lecturer at the George Washington University Law School.

<sup>67</sup> *ibid.* 71.

<sup>68</sup> *ibid.* 71, 185.

<sup>69</sup> International Labour Conference, sixth session (1925), Report of the Director, para 74.

<sup>70</sup> *ibid.*



Conventions but do not apply them, why do not the former set in motion the procedure for filing complaints'.<sup>71</sup> Calling for 'a bold and persistent application of the whole of the machinery created by the Treaty', Thomas urges that 'each Member must exercise its recognized rights, and thus promote the common interest of all'.<sup>72</sup>

In 1926, the Director reiterates the value of the ILO's complaint system. Thomas reports that 'no actions have been taken under articles 411 and following which govern the procedure for dealing with complaints'; then he reminds everyone that 'the machinery is there' should a Commission of Enquiry 'have to be appointed'.<sup>73</sup> Thomas avers that a government ratifying an ILO convention acquires 'moral pressure' to insist on 'ratifications elsewhere'.<sup>74</sup> Showing his sophisticated understanding of the interplay between social and economic factors, Thomas contrasts the 'efficacy of a simultaneous raising of labour standards' with the 'ineffectiveness of protection by means of tariffs'.<sup>75</sup> Thomas also documents the recent labour Ministerial Conference held in London among five European countries to come to a common agreement on the interpretation of the Washington Hours of Work (Industry) Convention, 1919 (No. 1) in order to promote its ratification. The 'London Agreement' of March 1926 provides that the five governments 'will not lodge complaints against each other for wrongful or incomplete application of the Convention'.<sup>76</sup>

In June 1926, the PCIJ holds a public sitting in an important matter for the ILO, the advisory opinion on the *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer*. In a proceeding that is impossible to imagine in today's State-centric International Court of Justice, the PCIJ allows three international non-governmental organizations to make oral statements to the Court. Although the ILO's system of enforcement is not itself at issue in the proceeding, two of those organizations discuss enforcement as context for interpreting the ILO's competence.

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<sup>71</sup> *ibid* para 199.

<sup>72</sup> *ibid*.

<sup>73</sup> International Labour Conference, seventh session (1926), Report of the Director, para 60.

<sup>74</sup> *ibid* para 218.

<sup>75</sup> *ibid*.

<sup>76</sup> *ibid* para 117.

Seeking to delineate a narrower role of the ILO, the representative of the International Organization of Industrial Employers explains that 'if at any time a Government fails to carry out its duties', the actions to be taken following a Commission of Enquiry 'lie with the Governments', and the Treaty 'has carefully excluded intervention by the International Labour Organisation as such'.<sup>77</sup> Seeking to demonstrate expanded competence, the representative of the International Confederation of Christian Trade Unions points out that the ILO's authors 'have not confined themselves to giving the International Labour Organization strong and effective rules, they have also provided a procedure including economic sanctions'.<sup>78</sup> Commenting a few years later on the role 'played by private organisations in international life' in the PCIJ's advisory proceedings on labour, Thomas discerns on the legal horizon 'the sign of a possible evolution of international law in a more realistic direction'.<sup>79</sup>

In his 1927 Report, the Director devotes attention to evolving processes for supervision of ratified ILO conventions. Referring to the newly-established Committee of Experts, Thomas insists that its work 'is still only the beginning of real supervision' with 'no immediate sanction behind them'.<sup>80</sup> He asserts that 'the only methods which can be effective are the procedures of representation and complaint'.<sup>81</sup> Yet he also understands that 'there are various difficulties which may prevent industrial organisations from setting in motion the procedure of representation'.<sup>82</sup> As for the prospect of complaints, Thomas laments that 'the time has perhaps not yet come when the different States will have brought home to them afresh the importance of working conditions in international competition'.<sup>83</sup> Thomas submits that 'the Office has never had the ingenuous idea that by the magic of the written word, the whole machinery provided for in the Treaty of Peace can

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<sup>77</sup> Speeches delivered and documents read in Court (1926) 11 OB 238, 244, 253-54.

<sup>78</sup> *ibid.* 268, 275. For the official version, see *Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer*, PCIJ Series C, Acts and documents relating to judgments and advisory opinions given by the Court, No. 12, documents relating to advisory opinion No. 13.

<sup>79</sup> International Labour Conference, 14<sup>th</sup> Session (1930) Report of the Director para 45.

<sup>80</sup> International Labour Conference, 10<sup>th</sup> Session (1927) Report of the Director para 114.

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

be set going at one stroke' so that 'the States which are mutually bound by Conventions will severely supervise one another and set to work the different procedures provided for, including even decisions of the Court of Justice and economic sanctions'.<sup>84</sup> Looking ahead, Thomas envisions that complaints and representations 'will only be set going, when the time comes for their use, by the development of international life'.<sup>85</sup>

Thomas continues to champion the complaint process during his remaining years as Director, but he increasingly warms up to the improved article 408 process as an alternative to complaints. In 1927, he calls the new process 'a kind of first warning publicly given to the States' which are not strictly applying a ratified convention.<sup>86</sup> In his report of 1928, Thomas questions the claims that ratifying governments take 'liberties' with conventions in practice, and asks why the authors of such claims have 'not set in motion the procedure of complaint'.<sup>87</sup> In 1929, Thomas lauds the 'considerable progress' in utilizing article 408 reports, and suggests that 'it is perhaps for this very reason' that there are not any 'cases of the opening of the procedure of representation or complaint'.<sup>88</sup> In 1931, Thomas accords more credit to the new process. While admitting that 'it is true that the machinery of supervision and sanctions has as yet scarcely been utilised', Thomas points out that 'it is misleading to keep alleging that ratified Conventions are not being enforced' because 'exceptions' to enforcement 'are being dealt with and are disappearing' through the article 408 processes.<sup>89</sup>

In 1929, as part of the ongoing discussion of the revision of ILO conventions, H.C. Ørsted, a Danish employer delegate and director of the Nordic employers federation, writes a memo to the ILO's Standing Orders Committee analyzing the legal character of the ratification of an ILO convention. According to Ørsted, this legal character is an obligation 'with respect to the Organisation', not the 'legal character of reciprocity'.<sup>90</sup>

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<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid* para 118. Article 408 requires every ILO member to make an annual report on the measures it has taken to give effect to the provisions of conventions to which it is a party.

<sup>87</sup> International Labour Conference, 11<sup>th</sup> Session (1928) Report of the Director para 104.

<sup>88</sup> International Labour Conference, 12<sup>th</sup> Session (1929) Report of the Director para 101.

<sup>89</sup> International Labour Conference, 15<sup>th</sup> Session (1931) Report of the Director 6.

<sup>90</sup> International Labour Conference, 12<sup>th</sup> Session (1929) appendix III, 762, 764–65.

Ørsted reaches this conclusion, in part, because of the exclusive power of the Governing Body 'to adopt the procedure of enquiry which may lead to the adoption of economic sanctions against a State Member which fails to fulfil the obligations resulting from the ratification of a Convention'.<sup>91</sup>

Later that year, Mahaim authors an article for the *Revue de Droit International et de Législation Comparée* in which he responds to Ørsted's thesis.<sup>92</sup> In Mahaim's view, that the obligations of ILO conventions are towards the Organization does not preclude that such obligations can simultaneously be towards other States parties. Mahaim reasons that the Berne labour conventions of 1906 were mutual obligations 'although without sanctions'.<sup>93</sup> The Peace Treaty, says Mahaim, is intended 'to improve on the methods inaugurated at Berne' through the creation of the Permanent Organization with its new processes 'and, finally, the sanctions'.<sup>94</sup> But these improvements are supplemental to the underlying mutual obligations, not a replacement for them. Mahaim sees the sanctions as an important part of the improvements achieved in 1919 with the Organization having 'the whole system of sanctions placed in its hands'.<sup>95</sup> Indeed, the 'procedure of sanctions' appears to be so central to Mahaim's ontology that he views the sanctions as evidencing an 'abdication of sovereignty on the part of the Members'.<sup>96</sup>

In 1929, a book by Charles Howard-Ellis details the ILO's complaint procedure and explains that it is 'very carefully devised in a series of graduated steps' starting with the Governing Body and ending with 'the actual operation of economic coercion to secure compliance'.<sup>97</sup> Ellis, a sometime British intelligence officer, observes that 'public opinion has proved exceedingly efficient in inducing governments to live up to conventions once ratified, and no suggestion has been made of resorting to more stringent

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<sup>91</sup> *ibid.*

<sup>92</sup> I have relied on the English translation of the shortened version of Mahaim's article as edited for publication by the ILO.

<sup>93</sup> Ernest Mahaim, 'Some Legal Questions relating to International Labour Conventions' (1929) 6 *International Labour Review* 765.

<sup>94</sup> *ibid.* 779.

<sup>95</sup> *ibid.* 779, 783.

<sup>96</sup> *ibid.* 783.

<sup>97</sup> Charles Howard-Ellis, *The Origin Structure & Working of the League of Nations* (Houghton Mifflin 1929) 229–30.

measures'.<sup>98</sup> In his view, 'it is doubtful whether a case will ever occur of this procedure being applied to the end'.<sup>99</sup>

In 1929-30, P.P. Pillai, the first and longtime director of the ILO's branch office in New Delhi, delivers a series of lectures about the ILO.<sup>100</sup> One lecture discusses the ILO's enforcement process and notes that any ILO member 'can enforce against the recalcitrant state the punitive economic measures set out either in the report of the Commission of Enquiry or in the Court's final order'.<sup>101</sup> Pillai observes that 'it has sometimes been argued that international supervision over ratified Conventions cannot but be perfunctory and that the economic sanctions referred to would hardly, if ever, be resorted to'.<sup>102</sup> Pillai disagrees, suggesting instead that the sanctions would be resorted to.

In a 1931 monograph chronicling the ILO's first decade, the Office points out that the ILO has 'a complete system of procedure for complaints, enquiries and sanctions which occupies no fewer than ten Articles of Part XIII'.<sup>103</sup> The monograph goes on to explain that:

the system is clearly inspired by a desire to delay the application of sanctions as long as possible, so as to allow the State implicated to justify itself at every stage of the procedure or to fulfil its obligations under the Convention. The sanctions provided, moreover, are of a purely economic nature, and the power of imposing them rests with the Permanent Court of International Justice.<sup>104</sup>

In addition, the Office points out that if the Governing Body were to publish a representation, 'all the States Members would be given the opportunity, if they thought fit, to make a formal complaint, and so to open the procedure for enquiry and sanctions'.<sup>105</sup>

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<sup>98</sup> *ibid* 230.

<sup>99</sup> *ibid* 229.

<sup>100</sup> P.P. Pillai, *India and the International Labour Organisation* (Patna University 1931). Pillai was an Indian economist.

<sup>101</sup> *ibid* 98.

<sup>102</sup> *ibid*.

<sup>103</sup> ILO (n 64) 71.

<sup>104</sup> *ibid*.

<sup>105</sup> *ibid* 72.

In 1931, the Governing Body takes up several interconnected issues involving the supervisory process. To better inform these discussions, the Governing Body had requested a study of the status of article 411 complaints. The ensuing legal study by the Office restates the authority of Conference delegates to lodge a complaint, and clarifies that the Governing Body enjoys 'wide' freedom and 'discretion' in addressing complaints and in deciding whether to authorize a Commission of Enquiry.<sup>106</sup> With regard to the rules for representations in the Standing Orders, the Governing Body had tasked a Committee to consider needed revisions. During debate within that Committee on a draft prepared by the Office, a participant had remarked that since the 'term sanction was not specifically referred to in the Treaty, it was not desirable to make use of it in the Standings Orders'.<sup>107</sup> In late 1931, the Governing Body adopts new Standing Orders for handling representations that provide for a confidential consideration within the Governing Body until there is a decision as to what to do about the representation, including the possibility of proceeding to a complaint.<sup>108</sup> The term 'sanction' is omitted.

In 1932, a question arises as to whether the ratification of an ILO convention by a non-Member of the ILO would make that country 'liable to the sanctions laid down in the Treaty of Peace'.<sup>109</sup> At the time, the United States is still a non-member. A legal analysis by the Office concludes that a non-member State ratifying an ILO convention 'would in effect involve acceptance *ad hoc* of certain of the provisions of Part XIII concerning supervision and sanctions with respect to the application of Conventions'.<sup>110</sup>

Albert Thomas dies suddenly in May 1932 and is succeeded by Deputy Director Harold Butler. Butler had begun his service to the ILO on the Labour Commission drafting Part XIII. Thomas himself was not a drafter, and that status may have better enabled him to transform the nascent ILO into a 'living'<sup>111</sup> institution energetic and adept enough to earn its way through the tumultuous decades ahead.

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<sup>106</sup> Governing Body, 56th session (1932), minutes, appendix XIII, 155, 156.

<sup>107</sup> *ibid* 85, 94-95.

<sup>108</sup> *ibid* 164-66. The Legal Study notes the 'serious nature of the possible consequence of the procedure of complaint' *ibid* 156.

<sup>109</sup> Governing Body, 57th Session (1932), minutes, 229-30.

<sup>110</sup> Governing Body, 60th Session (1932), minutes, appendix XIV, 668.

<sup>111</sup> 'Albert Thomas' (1932) XVII (3) OB 95-96.

All of the documentation I have been able to collect suggests that Thomas believes in the importance of the complaint process and does all he can to put that system into operation. Although Thomas is surely aware of the critical views (discussed below) about the ILO's machinery for sanctions, nothing in any of his writings or actions suggests that he objects to the possibility of sanctions if a complaint is verified and proves unsuccessful in remedying the treaty default. On the contrary, for Thomas, the sanctions 'placed at the disposal of the International Labour Organisation' are an integral part of his vision for a successful ILO. As he explained in 1922 (quoted above), the system of conventions is 'completed' by supervision and 'if necessary by sanctions'.<sup>112</sup>

In October 1932, the Governing Body considers the question of what should be done about situations where article 408 reports fail to produce adequate results. Tom Moore, the Canadian worker delegate, proposes that 'there should be some intermediate step' between observations 'and the application of sanctions under the Treaty'.<sup>113</sup> Léon Jouhaux interjects that 'it was certain that the Office would soon reach the stage at which it would have to take certain responsibilities regarding the application of the sanctions provided by the Treaty'.<sup>114</sup> This discussion of sanctions is brought to a close by Butler, the new Director, who declares that 'if it were found that, in spite of all the observations made, certain States persisted in not applying the Conventions they had ratified, it would be necessary to contemplate the application of sanctions'.<sup>115</sup> So, as Butler begins his six years of service as Director, he does not initially express any differences in his views on sanctions from the long-time support for the possibility of sanctions expressed by Thomas from 1920 through 1931.

The March 1933 issue of the *Annals of the American Academy of Political and Social Science* is devoted to the ILO whose cutting-edge enforcement system is discussed and praised in several of the 24 essays. Jean Morellet, the ILO's second legal adviser, points out 'the important distinction in methods of application between International Labor conventions and ordinary

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<sup>112</sup> International Labour Conference (n 49).

<sup>113</sup> Governing Body (n 110) 583.

<sup>114</sup> *ibid* 584.

<sup>115</sup> *ibid.* Butler goes on to say that he believes that 'the number of such cases would be very small'.

international Conventions, for the application of the former is subject to a procedure of supervision and sanctions which is regulated in great detail by the [Peace] Treaties'.<sup>116</sup> Joseph Chamberlain, a law professor at Columbia University, calls attention to the ILO's 'provision for economic sanctions against a recalcitrant state'.<sup>117</sup> Charles Pipkin, a professor of political science at Louisiana State University, takes note of the provisions 'providing sanctions for the observation of labor treaties'.<sup>118</sup> Shotwell describes Part XIII as 'having a long series of provisions for the international punishment of any state not living up to its agreement under the treaty'.<sup>119</sup>

One of the essayists, Francis Graham Wilson, writes specifically on the topic of enforcement of international labour standards.<sup>120</sup> At that time, Wilson is a 32-year old professor of political science at the University of Washington who had received a fellowship to spend a year in Geneva (1931-32) to write a book about the ILO. Over a lengthy academic career, Wilson becomes an eminent political scientist known for his writings on conservatism and public opinion. I will discuss Wilson's thesis on ILO enforcement in the context of his 'controversial' book about the ILO published in late 1934.<sup>121</sup>

### III. The fall of ILO sanctions

The rejection of the ILO's sanctions commences as the ink dries on the Peace Treaties. In July 1919, after noting the availability of 'measures of an economic character prepared to compel compliance', George Wickersham

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<sup>116</sup> Jean Morellet, 'Legal Competence of the International Labor Organization' (1933) 166 *Annals of the American Academy of Political and Social Science* 46, 51.

<sup>117</sup> Joseph P. Chamberlain, 'Legislation in a Changing Economic World' (1933) 166 *Annals of the American Academy of Political and Social Science* 30, 44.

<sup>118</sup> Charles W. Pipkin, 'Relations with the League of Nations' (1933) 166 *Annals of the American Academy of Political and Social Science* 124.

<sup>119</sup> James T. Shotwell, 'The International Labor Organization as an Alternative to Violent Revolution' (1933) 166 *Annals of the American Academy of Political and Social Science* 18, 22.

<sup>120</sup> Francis G. Wilson, 'The Enforcement of International Labor Standards' (1933) 166 *Annals of the American Academy of Political and Social Science* 95-101. Wilson had written on international labour regulation as early as 1929.

<sup>121</sup> See 'Book Notes' (1935) 31 *International Labour Review* 907, 921 (reviewing Wilson's book and calling it 'one of the most controversial accounts' of the ILO 'that have appeared for some years', yet praising Wilson's 'standard of accuracy').



suggests that the ILO should act more like the League of Nations in placing reliance 'upon the effect of discussion, interchange of opinion and suggestion, than upon coercion, to accomplish the beneficent ends in view'.<sup>122</sup> George Barnes, in his 1920 essay quoted above, proclaims that 'it is important to eliminate from the scheme, as far as possible, coercive measures to enforce the observance of the conventions'.<sup>123</sup> Instead, Barnes suggests that 'national honour, public opinion, [and] the moral obligations of good faith and diplomacy should be relied upon, and should almost invariably suffice to secure the observance of conventions, provided that they are practicable and based upon justice and good reason'.<sup>124</sup>

In 1924, Beddington Behrens points out that while the Treaty of Versailles 'lays down various forms of coercion' should the terms of an ILO convention not be applied, those provisions are 'of no present practical importance'.<sup>125</sup> He goes on to explain: 'one can hardly conceive, in the present state of the world, of a general economic boycott of a country, especially if it was one of the large Powers, for failure to observe some clause in a labour convention it had ratified'.<sup>126</sup> Instead, Behrens postulates that the ILO's 'strength must reside in its power to appeal to international public opinion' rather than in 'the threat of armies or of economic boycott'.<sup>127</sup>

By 1926, there is growing discomfort with the sanctions in the ILO Constitution. In his address upon being elected President of the ILO's 1926 Conference, Monseigneur Nolens points to the ILO's 'system of international supervision and sanctions' and calls attention to how 'the enforcement of Conventions' applies only to ratifying countries.<sup>128</sup> Nolens voices

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<sup>122</sup> George W. Wickersham, 'International Labor Standards and their Possible Enforcement in the United States' (July 1919) 8 Proceedings of the Academy of Political Science in the City of New York 50, 65-66.

<sup>123</sup> Barnes (n 36) 6.

<sup>124</sup> *ibid.*

<sup>125</sup> E. Beddington Behrens, *The International Labour Office* (Leonard Parsons 1924) 36. At the time, Beddington-Behrens was an international civil servant at the League and the ILO.

<sup>126</sup> *ibid.* 37.

<sup>127</sup> *ibid.* 37-38.

<sup>128</sup> International Labour Conference, 8<sup>th</sup> Session (1926) 9. In addition to his religious roles, Nolens is a longtime government delegate of The Netherlands who had founded the Netherlands Association for Labour Legislation.

concern that this potential enforcement ‘may in itself be to Members who have not ratified a further ground for not ratifying in a hurry’.<sup>129</sup> In his treatise on the ILO, Paul Périgord observes that in complaints being considered by a Commission of Enquiry or the PCIJ, ‘abundant provision is made for the defaulting state to remedy any grievance alleged against it before any question of penalty can arise’.<sup>130</sup> Périgord adds that the drafters of the ILO procedures ‘did not believe in coercive measures’ to ‘secure the observance of the conventions’, but instead relied upon ‘national honor, public sentiment, international moral sense, and friendly representations’ which ‘should prove sufficient’.<sup>131</sup> Périgord may be the originator of the myth that the ILO’s founders did not believe in coercive measures.<sup>132</sup>

The ILO Conference of June 1926 features a spirited discussion of the sanctions in the ILO system. The context is the decision to establish what is now called the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The Office had prepared a note explaining that the ‘functions of the Committee of Experts would be entirely technical and in no sense judicial’.<sup>133</sup> The note clarifies that the proposed system of examination ‘is not in any way concerned with the machinery of enquiry and of sanctions’ and its operation ‘is not based upon complaints’.<sup>134</sup> During the debate on setting up the Committee of Experts, Mahaim (now a longtime Belgian government delegate) points out that ‘formal complaints’ are a ‘serious step’ that can lead to an ‘official inquiry’ which can make possible the ‘system of sanctions’ including ‘a financial and economic blockade of a defaulting State’.<sup>135</sup> Mahaim suggests that such sanctions should be reserved only for cases that are ‘scandalous’.<sup>136</sup> For the rest of the cases, Mahaim explains that the Peace Treaty provides an ‘intermediate

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<sup>129</sup> *ibid* 10.

<sup>130</sup> Paul Périgord, *The International Labor Organization: A Study of Labor and Capital in Cooperation* (D. Appleton 1926) 131. Périgord was a French-American professor at the University of California at Los Angeles.

<sup>131</sup> *ibid* 132.

<sup>132</sup> I characterize this claim as a myth because the Commission’s minutes show only a modicum of opposition to the coercive measures actually approved.

<sup>133</sup> International Labour Conference, 8<sup>th</sup> Session (1926) 399-400.

<sup>134</sup> *ibid* 400.

<sup>135</sup> *ibid* 250.

<sup>136</sup> *ibid*. I read Mahaim as making a distinction between scandalous noncompliance and technical noncompliance.

system' based on the annual reports of governments.<sup>137</sup> Both the Office and Mahaim are conceptualizing a distinction between two alternative methods of managing treaty implementation. As Mahaim sees it, the Peace Treaty 'organises a system of control separate from the system of sanctions'.<sup>138</sup>

Right after Mahaim's reference to a 'blockade', Belgium's worker delegate Corneille Mertens jumps in. Noting 'the possible result of an economic blockade' on the ILO-defaulting country, Mertens protests: 'I do not like such measures, and I hope they will not be taken, but that any defect with respect to application will be met by other means'.<sup>139</sup> Still, Mertens is dubious of 'the argument that any such system [of sanctions] will lead to difficulties in ratification' because 'for the most part this argument is brought forward by countries which do not wish to ratify'.<sup>140</sup>

This discussion of sanctions provokes an intervention from Sir Joseph Cook. Cook is an Australian government delegate who had once been Prime Minister and was one of the plenipotentiaries in Paris who received the report of the Labour Commission. Cook retorts that the ILO was never intended to

be a court to wield a big stick and go about with a blackthorn to flagellate nations which were recalcitrant. It was intended to be an Organisation where reason and persuasion and public opinion should be enthroned. It was proposed to gather the facts and let in the light of public opinion upon them. That, I venture to say, will in the long run, perhaps prove the best sanction of all – the most effective and the most likely to give the best results.<sup>141</sup>

In June 1934, the ILO is given its first opportunity to 'open the procedure' for a Commission of Enquiry. This opportunity arises during the ILO's 1934 Conference when the Indian worker delegate, Jamnadas M. Mehta, the President of the National Trades Union Federation and the All-India Railwaymen's Federation, decries India's failure to apply the Hours

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<sup>137</sup> *ibid.*

<sup>138</sup> *ibid.*

<sup>139</sup> *ibid.* 251.

<sup>140</sup> *ibid.*

<sup>141</sup> *ibid.* 252.

of Work (Industry) Convention to half of the railway workers.<sup>142</sup> Even as a first-time delegate, Mehta (who is a barrister) understands his rights and invokes his complaint ‘as a Delegate from India’.<sup>143</sup> He asks ‘the Governing Body to have a Commission of Enquiry appointed’.<sup>144</sup>

To his disadvantage, Mehta neglects to line up some allies for his initiative. And his timing is poor. Mehta lodges his complaint at the end of the discussion of article 408 reports, and just before the eagerly awaited announcement that the United States Government is now ready to be invited to join the ILO.

Notwithstanding the bad timing, Mehta’s initiative should have been celebrated by the Conference as a long-awaited institutional achievement for the ILO. Yet no celebration occurs. Mehta’s announcement draws a quick rejection from A.G. Clow, an Indian government delegate. Clow rebukes Mehta for bringing up a ‘domestic dispute’ and showing ‘ignorance’ because, as Clow puts it, ‘those of you who are familiar with the Treaty, will of course, know that it is only [...] Member States, and not “members” of the Conference who “have the right” to make effective applications under’ article 411.<sup>145</sup> On the substance, Clow points out that the Committee of Experts ‘has never expressed the view’ put forward by Mehta regarding defects in India’s implementation of the Convention.<sup>146</sup>

As soon as he can get recognized, P.J.S. Serrarens, the worker delegate from The Netherlands and longtime Secretary-General of the International Federation of Christian Trade Unions, stands up to Clow. Serrarens appreciates the historical significance of Mehta’s bold move. Serrarens states that he is ‘glad that the Indian Workers’ delegate has invoked the procedure laid down in article 411 *et seq.* of the Treaty of Peace’.<sup>147</sup> In riposte, Serrarens points out that Clow ‘himself was in error’ regarding Mehta’s rights.<sup>148</sup> Soon afterward, a British government delegate seeks to end the discussion

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<sup>142</sup> International Labour Conference, 18<sup>th</sup> Session (1934) 451–52.

<sup>143</sup> *ibid.* 452.

<sup>144</sup> *ibid.*

<sup>145</sup> *ibid.* 453.

<sup>146</sup> *ibid.*

<sup>147</sup> *ibid.* 456.

<sup>148</sup> *ibid.*

and notes that the Governing Body will consider Mehta's complaint 'in due course'.<sup>149</sup>

Due course occurs behind closed doors. In September 1934, the Governing Body takes up Mehta's complaint in a private sitting.<sup>150</sup> Then in early 1935, in another private sitting, the Governing Body adopts a resolution expressing 'hopes' that the 'benefits of the Convention will be extended at an early date to such workers on Indian railways as do not yet enjoy them'.<sup>151</sup> Because the Governing Body debates Mehta's public complaint in a private sitting, there is no transparency as to what considerations led to the negative determination. Although article 411 gives the Governing Body the discretion to decide whether a Commission of Enquiry is needed, the circumstances of this complaint warrant an affirmative decision of the Governing Body made in a public session.<sup>152</sup> The criticism that I express here parallels that of Professor Haas who pungently states that 'instead of appointing the Commission of Inquiry foreseen in the Constitution, the Governing Body in effect used the representation procedure in order to exonerate the British authorities'.<sup>153</sup>

Wilson's 1934 treatise presents a detailed description of the ILO's enforcement mechanism and offers numerous valuable insights.<sup>154</sup> Wilson coins a great name, the 'Commission of Verification', for the inventive and precedential article 420 procedures to lift sanctions (223).<sup>155</sup> He appreciates

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<sup>149</sup> *ibid.*

<sup>150</sup> Governing Body, 68th session (1934) 19 OB. 101, 112.

<sup>151</sup> Governing Body, 69th session (1935) 20 OB 15; Governing Body, 69th Session (1935), Minutes, 30, 62, 127.

<sup>152</sup> To be sure, the allegation Mehta presents fell far short of scandalous non-compliance (non-coverage of certain Indian railway workers would seem to be permitted by article 10 of the Washington Hours Convention). Recalling the discussion in the Early British Draft, the right first case for a Commission of Inquiry would have been against non-compliance that leaves in place 'oppressive conditions' for workers. On the other hand, an easy case like India's railway workers might have provided a good test drive. And it was important for the Governing Body to demonstrate that the accused Government cannot veto an inquiry. Certainly, there was no justification for the Governing Body to rule against Mehta without giving reasons.

<sup>153</sup> Haas (n 65) 358.

<sup>154</sup> Francis Graham Wilson, *Labor in the League System: A Study of the International Labor Organization in Relation to International Administration* (Stanford UP 1934).

<sup>155</sup> For ease of reference, my essay includes page references to Wilson's book.

the significance of the ILO's alternative to unilateral reprisal by placing 'in the hands of an international body the supervision and evaluation of enforcement' (231). He grasps how 'unique' ILO enforcement is and shows that the League of Nations has no parallel means of enforcement of its conventions because sanctions in the League apply only to 'political issues' rather than to 'questions of social co-operation' (221, 230-231).

Yet despite all of the legal progress in the ILO's enforcement system, Wilson denounces the sanctions:

If one consults the minutes of the Peace Conference Commission which drafted Part XIII, one will find there a high regard for 'sanctions'. It seems utterly absurd now that sensible members of that Commission could have believed that an economic blockade might be instituted by the Powers simply because, let us say, one country allowed more hours of work than are permitted by the Washington hours convention (217). The plain fact is that the Labor Organization is functioning in a world of nationalistic realism which admits of no teeth to Part XIII. States have more sanctions against the Labor Organization than the Labor Organization has against the states (218). Although the Peace Conference made heroic attempts to provide sanctions for international labor law, none in fact was assured. Sanctions machinery is to be found in Part XIII, but the international situation does not permit it to be endowed with life (241).

After several pages of like criticism, Wilson announces the burial of the ILO's sanctions. He writes that beyond articles 408 and 409, the rest of the 'measures of control' are 'likely to become a dead letter, while remaining a testimonial to the mentality of the Peace Conference' (221). Wilson explains that up 'to 1932 at least', the position of the Office has been 'that there are genuine sanctions for the enforcement of the international law of labor' (220). Yet, as he completes his book in October 1934, Wilson predicts: 'the chances are now that there will be no further references to sanctions in the documents of the Organization' (219). In addition, he observes that 'the Office seems to recognize that if the Governing Body should proceed beyond the mere consideration of a complaint, it would be faced with the future abstention of a member from its work, and perhaps the denunciation of a Convention or perhaps all of the conventions which the particular state in question has ratified' (220).

In summary, Wilson declares that ‘the governments are unwilling to register complaints; the Governing Body is unwilling to set the machinery of enforcement in motion on its own initiative; and trade unions, it seems, have not been interested in filing representations against their governments’ (230).<sup>156</sup> Why are governments not filing complaints? To Wilson, ‘the obvious reluctance of the governments to resort to [the] enforcement procedure is understandable’ (230) because ‘it is not likely that such steps would result in the better enforcement of the convention and it would likely provide grounds for future retaliation by the same means’ (230).

Wilson’s prediction proves correct as to the cessation of the ILO’s references to ‘sanctions’. Once Albert Thomas is gone, no ILO Director-General mentions sanctions or even the complaint process in his annual report until 1950. After 1932, sanctions are only rarely mentioned in ILO bodies until a new debate commences around 1945 on the ILO’s constitutional reforms. One such mention occurs in 1936 when Léon Jouhaux, the French workers representative, advises the Governing Body that ‘sanctions’ have never been applied because ‘it was felt that to apply them would have the effect of preventing Governments from ratifying Conventions’.<sup>157</sup>

Scholarly references to sanctions likewise diminish. In 1937, Jean Zarras authors a comprehensive juridical study of the machinery for supervising the application of ILO conventions. Zarras explains how mutual supervision through annual reports has supplanted the formal procedures of representation and complaints. He engages in an extensive analysis of complaints and sanctions and points out numerous problems in applying sanctions, such as the absence of certainty that all States will apply the sanctions. Furthermore, Zarras suggests that rigorously applying the sanction procedure would weaken the ‘moral force’ of the ILO.<sup>158</sup> In 1938 when Serrarens explains that the ILO Constitution provides for commissions of inquiry and ‘the possibility of economic sanctions’; then, in understatement,

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<sup>156</sup> In a late-added footnote to his book before it goes to press in October 1934, Wilson reports that India’s worker delegate has invoked the complaint procedure ‘for the first time’. Wilson (n 154) 30.

<sup>157</sup> Governing Body, 75th Session (1936), minutes 55. Jouhaux suggests that the sanction procedure could be modified ‘to provide a more elastic procedure’; *ibid.*

<sup>158</sup> See Jean Zarras, *Le contrôle de l’application des conventions internationales du travail* (Sirey 1937) 331. Zarras is a labor ministry official in Greece.

Serrarnes observes that this ‘severe machinery of supervision did not become the usual method of international administration’ in the ILO.<sup>159</sup> What happens instead, in my own view, was that the decentralized complaint process, which was originally intended to be a regular method of administration, got left behind in favor of a more centralized and upgraded review process. At some point in time, the new process gets renamed the ‘regular’ supervisory system, while the complaint process is recharacterized as one of the ‘special procedures’.<sup>160</sup>

Looking now at Wilson’s trenchant analysis, one can see that he presciently announces the moment in which the ILO discards its trade sanctions. Wilson is right in detecting the sharp mood swing against sanctions. Wilson is right in forecasting that when the Governing Body receives its first complaint (the India railway case that concludes in February 1935), its response will be capped at ‘mere consideration’. How does Wilson so shrewdly anticipate the ILO’s philosophical rejection of its own trade sanctions? My hunch is that Wilson applies his skills as a political theorist to the insights he gains mingling with ILO insiders.<sup>161</sup> There may also be a Wilson Effect.

#### IV. The contemporary significance of the demise of ILO sanctions

Why are the trade sanctions not deployed between 1919 and 1934? The simplest answer is that no complaints are lodged until Mehta’s failed move. Without complaints, there cannot be any sanctions. As Albert Thomas signals in 1927, complaints would get going only at the right time in the ‘development of international life’. As it turns out, international life does not welcome an ILO complaint for decades to come.

While the absence of complaints explains why there are no sanctions, could it also be that the availability of ILO sanctions explains why there are no complaints? Perhaps. Yet even Wilson does not blame the sanctions. Instead, Wilson suggests that governments are unwilling to register complaints because of the ‘international situation’ and worries about

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<sup>159</sup> P.J.S. Serrarnes, ‘International Good Will and I.L.O. Treaties’ (1938) 28 American Labor Legislative Review 119, 120.

<sup>160</sup> <<https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang-en/index.htm>>.

<sup>161</sup> Wilson (n 154) viii-ix (noting his unattributed conversations with ILO staff).



counter-complaints. Moreover, if the availability of sanctions is the key factor blocking complaints, then the so-called elimination of sanctions in 1946 should have opened the floodgates to complaints. Although the details of the ILO's 1946 constitutional amendment are outside the temporal scope of my essay, Haas in 1964 expresses the conventional wisdom that because of the amendment, 'the possibility of sanctions no longer exists'.<sup>162</sup> Yet in the long period between 1946 and 1960, the ILO's now sanction-free complaint process remains inactive.

The workers might have been less worried about counter-complaints than governments and yet workers, too, withhold complaints. Recalling the concerns of worker delegate Mertens in 1926 about an ILO-related 'economic blockade', one can speculate that workers were not attracted to a process that could lead to trade sanctions on the fruits of their labour. Consistent with my speculation, a longtime ILO official has observed that workers have traditionally 'taken the view that the application of sanctions to countries which violated standards was not part of ILO culture'.<sup>163</sup>

My own guess is that workers did not file complaints because they doubted that a complaint could succeed. In the ILO's first two decades, the process for worker representations looks futile.<sup>164</sup> Moreover, the disappointing treatment given by the Governing Body to Mehta's complaint probably reinforces doubts as to the ILO's commitment to its complaint process. Indeed, when Wilson reports that Mehta has filed the first complaint in the ILO, Wilson discerns that the 'handling of this problem will be of great interest to observers of the enforcement machinery'.<sup>165</sup>

As noted above, the ILO's sanctions are given only superficial attention in literature about the ILO. This pattern of omission does not apply to Professor Haas who is among the leading scholars of the ILO during the 1960s. But although Haas takes account of the ILO's sanctions, some of his conclusions are questionable. Insofar as studies of the ILO offer an

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<sup>162</sup> Haas (n 65) 356.

<sup>163</sup> William R. Simpson, 'Standard-setting and supervision: A system in difficulty' in Jean-Claude Javillier and Bernard Gernigon (eds), *Les normes internationales du travail: un patrimoine pour l'avenir. Melanges en l'honneur de Nicolas Valticos* (ILO 2004) 47, 61.

<sup>164</sup> See Haas (n 65) 357 (analyzing the disposition of 12 worker representations between 1920 and 1938).

<sup>165</sup> Wilson (n 154) 30.

explanation as to why the sanctions go unused, one explanation we see is that the ILO's enforcement process lacked its own volition and was being controlled by the League.<sup>166</sup> This explanation is sometimes footnoted to Haas who argued that 'the consent of the Council of the League of Nations was required to initiate serious sanctions; the League controlled the ILO pursestrings'.<sup>167</sup>

In my view, the argument that the League prevented the ILO from using its sanctions is erroneous. Writing during the era of the League, Wilson debunks what he calls the 'conservative view' that sanctions 'are measures which are to be taken by the League of Nations through the Secretary-General and not by the Organization at all'.<sup>168</sup> Instead, Wilson insists, correctly, that if the Governing Body applies for a Commission of Enquiry, 'there is no discretion left the Secretary General as to whether or not this commission shall be established'.<sup>169</sup> Furthermore, any suggestion that the political capacity of the League set a ceiling for the political capacity of the ILO overlooks the fundamental point that, unlike the League, the ILO enjoys the benefits of tripartism. From his vantage point in studying both the League and the ILO, Smith Simpson, in 1941, observes that tripartism gives the ILO 'an element of strength, of vigor, of independent criticism which the League never had'.<sup>170</sup>

Some of the sources quoted in my essay (e.g., Solano 1920 and ILO 1931) can be read to suggest that the role of the Court as the final

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<sup>166</sup> Some confusion that arises in comparing the League to the ILO is that the ILO was an affiliated agency of the League.

<sup>167</sup> Haas (n 65) 143. See also Laurence R. Helfer, 'Understanding Change in International Organizations: Globalization and Innovation in the ILO' (2006) 59 *Vanderbilt Law Review* 649, 680 (explaining that 'the power of the purse and the authority to impose economic sanctions remained with the ILO's parent organization, the League of Nations').

<sup>168</sup> Wilson (n 154) 219. Furthermore, Wilson's analysis refutes the idea that the trade sanctions are part of the machinery of the League, rather than the ILO, because, as he explains, the League did not have any judicialized compliance sanctions. In addition, as noted above, the 1919 Labour Commission had decided against an amendment to outsource enforcement to the League.

<sup>169</sup> Wilson (n 154) 68.

<sup>170</sup> Smith Simpson 'The International Labour Organisation: Retrospect and Forecast' (1941) 20 *International Conciliation* 317, 326. In 1941, Simpson was teaching at the Wharton School. He later became a career U.S. Foreign Service officer known for his observant and candid reporting.

adjudicator of trade sanctions meant that the sanctions belonged to the Court, rather than to the ILO. And if so, then the ILO never possessed any sanctions to use or not to use. The problem with this assertion is that the Court had the same independence from the League as it did from the ILO. Alternatively, as Professor Harriman explains, one should view the Court as being a part of both the ILO and the League.<sup>171</sup> Either way, the existence of independent judicial review does not transfer agency regulatory authority to the courts.

Another explanation Haas gives for the non-use of sanctions is that 'neither the Office nor the Governing Body ever took the enforcement procedure very seriously'.<sup>172</sup> Haas cites no evidence backing up his claim. By contrast, my essay stacks up considerable evidence that refutes his claim. My essay reports numerous statements about sanctions made within the ILO and in the writings by ILO officials.<sup>173</sup> Besides, if no one took sanctions very seriously, why was so much intellectual energy devoted to pushing back against sanctions beginning in 1919 and culminating in the sharp critique Wilson paints in 1934? And why the London Agreement of 1926 to forego government-sponsored complaints?

The history presented here shows that it would not be accurate to suggest that neither the framers of the ILO nor the ILO's early leadership ever seriously contemplated that the sanctions would be used. On the other hand, the history shows a conviction of many of the ILO's framers and early leaders that sanctions would be reserved and should be reserved only for a severe breakdown in compliance. Recall statements to that effect by Fontaine (1919), the Labour Commission (1919), Barnes (1919), Mahaim (1926), Ellis (1929), and Butler (1932).<sup>174</sup>

Based on experience with the use of sanctions in the World Trade Organization (WTO) over the past 25 years, let me offer a new hypothesis

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<sup>171</sup> Edward A. Harriman, 'The United States and the World Court' (1926) 13 *Virginia Law Review* 1, 2 (stating that 'the Permanent Court of International Justice was to be the Supreme Court of the Permanent Organization of Labor as well as of the League of Nations').

<sup>172</sup> Haas (n 65) 350.

<sup>173</sup> Many of these statements are made in a clearly positive context including, for example, the statements by Ernest Mahaim who serves continuously on the Governing Body from 1919 to 1938.

<sup>174</sup> See OB (n 16); International Labour Conference (n 133); Ellis (n 97); Butler (n 115).

as to why the ILO community was so reluctant to open the door to complaints and sanctions. The problem is that the original ILO Constitution did not provide 'scales of penalties' (Vandervelde) to be applied in order to avoid 'excessive penalty' (Early British Draft). The existence of this unguided missile of ILO penalties explains why participants were expressing worries about 'severe sanctions' (Dutch Government), 'a general economic boycott' (Behrens), a 'financial and economic blockade' (Mahaim), and an 'economic blockade' (Mertens and Wilson). Such aggressive remedies seem out of the question today, but that is only because we have become conditioned to deploying sanctions only against threats to peace. Back in 1919 apparently, the use of an economic blockade to uphold worker rights was not so obviously a nonstarter.

In my view, had the sanctions process advanced to the point where a Commission of Enquiry or the PCIJ needed to indicate 'appropriate' economic measures (articles 414 and 418), then legal standards for appropriateness would have developed through caselaw. The PCIJ would have had before it any recommendations on economic measures by the Commission of Enquiry and could have sought views of the parties and the assessors as to the level and type of sanction to 'indicate'. Then some proportionality principle could have been applied to quantify the sanctions indicated.

Nevertheless, reasonable observers in the 1920s were justified in worrying about the unpredictability of the ILO's economic measures. In the absence of any prescribed limitation on sanctions, the ILO's complaint machinery was Pandora's box. What would be the point of rolling the dice with ILO sanctions if Wilson were right that 'States have more sanctions against the Labor Organization than the Labor Organization has against the states'?

As the sanctions for labour convention enforcement atrophy from disuse, the ILO recovers by growing new supervisory tissue. Wilson may be the first commentator to describe the ILO as an Organization with 'no teeth'. Yet, when Wilson pens those words, the ILO still has teeth. Wilson's key intellectual contribution is that the ILO's teeth can be pulled because

persuasion is a much more powerful instrument of the Organization than force, as is exemplified in the possible sanctions provided in the Treaty of Peace. Thus, the Organization becomes an agent for the formation of public opinion, for the cultivation of the international sense

of right, and an instrumentality for the shaping of those attitudes in the various states which make possible the passage of social legislation.<sup>175</sup>

It is Wilson who ushers in the ILO's first constitutional moment in which the law of control is transformed from hard to soft measures without formal constitutional revision. A capacity for such institutional change is a hallmark of the ILO. Looking back at the first half-century of ILO practice, C. Wilfred Jenks observes in 1969 that 'the spirit of the system' is that 'constitutional arrangements' are 'treated as the starting point of a process of continuing growth'.<sup>176</sup> As instituted by the framers in 1919, the ILO's sanctions exist side-by-side with the 'pressure of international public opinion' (Labour Commission) and the 'moral factors' (Fontaine). Then, in the reconceptualization of ILO supervision, as initiated by Barnes in 1920, the coercive measures are fingered for elimination.

Wiping out the trade sanctions is accomplished through a new philosophy of implementation. This informal constitutional amendment reflects a belief that compliance with ILO conventions is more fruitfully promoted without sanctions through the power of 'suggestion' (Wickersham) and 'friendly representations' (Périgord). In 1926, Sir Joseph Cook formulates what becomes the modern theory of ILO implementation by rejecting the ILO's 'big stick' in favour of 'reason and persuasion' that would be 'more likely to give the best results' than sanctions.

Several years afterward, Wilson sharpens ILO theory by recognizing how various mechanisms enable the ILO to be 'an agent' and 'an instrumentality for the shaping' of attitudes in the various States and enable the ILO 'to lead and not merely to follow opinion'.<sup>177</sup> Comparing the two options, Wilson pronounces that 'persuasion is a much more powerful instrument of the Organization than force'. In other words, the ILO could now disavow its sanctions because the ILO believed it had paved a better path.

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<sup>175</sup> Wilson (n 154) 295.

<sup>176</sup> C. Wilfred Jenks, *Social Justice in the Law of Nations* (Oxford UP 1970) 67-68.

<sup>177</sup> Wilson (n 154) 295, 296. Wilson references Lowe's 1921 book about international labour and was probably influenced by it. Lowe had written that 'public opinion is the fundamental sanction of international agreements' and 'that sanction can be made effective only by an efficient organization through which the public will can express itself; Boutelle Ellsworth Lowe, *The International Protection of Labor* (MacMillan 1921) 103.

The original ILO Constitution featured a two-prong implementation system: to secure State consent to an ILO convention, the Constitution relied only upon persuasion. But to combat non-compliance with a ratified ILO convention, the Constitution provided sanctions. Those are the sanctions discontinued in the ILO's constitutional moment with a recalibration of means to ends.

In the ILO's normative revamp, compliance with ratified conventions is to be promoted only with persuasion mediated through supervisory processes. The ILO disengages its sanctions because the sanctions are thought to militate against the goal of national implementation due to the contradiction of seeking to compel a country to do what is putatively in its self-interest. Even the term 'pressure' becomes too harsh for the ILO's ears. In 1970, the staff veteran George Johnston confides that the 'word pressure is never used in the ILO. Nevertheless, influence can be, and is, exercised'.<sup>178</sup> Utilizing influence without pressure constitutes a coherent approach.

The excision of the sanctions from the ILO's implementation system does not render the remaining managerial system the best of all possible worlds. The ILO gave up a technique that was unique and then placed too much confidence in 'moral factors' (Fontaine), 'moral obligations of good faith' (Barnes), 'international public opinion' (Behrens), 'national honor' (Périgord), 'the light of public opinion' (Cook), 'public opinion' (Ellis), and 'persuasion' (Wilson) as a sufficient means to achieve compliance. Had the first ILO complaints launched much earlier in international life, the tale of the ILO's sanctions might have been different.

A successful scenario is imaginable for how ILO sanctions might have been used to confront scandalous non-compliance in a democratic country. As David Hunter Miller hypothesized in 1921 in a discussion of the 'sanctions' in the 'Labor Clauses of the Treaty of Versailles', 'no State could afford to reject a public decision of the International Court that it was not fulfilling an agreement made for the benefit primarily of its own people'.<sup>179</sup> To my knowledge, no one has ever conducted interactive simulation games of the

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<sup>178</sup> Johnston (n 57) 101.

<sup>179</sup> David Hunter Miller, *International Relations of Labor* (Alfred A. Knopf 1921) 48, 50-51. Miller was the legal adviser to the U.S. peace negotiators and later became a senior legal officer in the United States Department of State.

ILO's trade sanctions to test the prospect of successful sanction scenarios against scofflaw countries. Looking back from today, I believe that Wilson underestimates the power of international law processes to remedy government misbehaviour, especially with the filip of trade measures 'against the articles produced under the conditions of unfair competition proved to exist' (British Draft).

Nevertheless, in the big picture, Wilson got it right: the sanctions were too heavy-handed for the ILO. One can easily imagine the frustration of an ILO official trying to explain to developing countries why signing on to a convention is voluntary, yet improperly administering the convention is sanctionable. The ILO needed a softer touch. By dismantling the sanctions, the ILO's two-engine system could be remodeled into a simpler design relying only on the engine of persuasion and tripartism.

When sanctions have worked in international organizations as catalysts for treaty compliance – most notably in the trading system – the context is an organization where one set of rules applies to all member governments. The key structural difference between ILO law and WTO law is not that the topic of the ILO is labour while the topic of the WTO is trade. Rather, the key structural difference between WTO rules and ILO conventions is that (most of) the WTO's substantive rules are membership obligations, while the ILO's substantive rules are *à la carte* options.

In 1995, Abram and Antonia Handler Chayes co-authored an influential book titled *The New Sovereignty* about compliance with international regulatory agreements. The book contends that 'sanctioning authority by treaty' is 'rarely used when granted, and likely to be ineffective when used'.<sup>180</sup> Instead, in the 'theory of compliance' they put forward, compliance is promoted by a process of 'persuasion' that is 'essentially managerial rather than enforcement'.<sup>181</sup> The book's analysis distinguishes an enforcement model from a managerial model, and then documents the adoption and use of

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<sup>180</sup> Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Harvard 1995) 33.

<sup>181</sup> *ibid* 1, 230. See Harold Hongju Koh, 'Why Do Nations Obey International Law' (book review) (1997) 106 *Yale Law Journal* 2599, 2601 (in the 'Chayeses' view, nations obey international rules not because they are threatened with sanctions, but because they are persuaded to comply by the dynamic created by the treaty regimes to which they belong').

intergovernmental managerial processes to promote compliance without formal enforcement.<sup>182</sup>

Chayes and Chayes report that the ‘roots of this development can be traced at least as far back as the early days of the International Labor Organization’.<sup>183</sup> Yet the headwaters of the rejection of hard enforcement – the sidelining of ILO sanctions in the early 1930s – is completely absent from the Chayes and Chayes book even though that episode would have provided strong evidence for their thesis. When the ‘Chayeses’ trace the root to the ILO, the ILO practice they dig back to is the limited use of the ILO’s machinery for complaints and the establishment of the CEACR.<sup>184</sup> *The New Sovereignty* does not mention the ILO’s sanctions.

The Chayeses miss the big story about how the ILO pushes back against its trade sanctions because that neglected history does not appear in the international law and international relations literature they draw upon. Because the two story lines presented in my essay are so little known, the ILO has not received any credit for its volitional move to disconnect its trade sanctions. The mangled account given in the Director-General’s 1994 report quoted above<sup>185</sup> leaves the false impression that no change occurs because the ILO has always lacked sanctions.

Let me draw it all together by quoting the most famous sentence in 19th century legal scholarship. In 1881, Oliver Wendell Holmes Jr. wrote that ‘the life of the law has not been logic: it has been experience’.<sup>186</sup> The story of the ILO’s sanctions provides a good illustration of this maxim. The original ILO Constitution’s provision on sanctions is based on the straightforward logic that ILO conventions need enforcement to prevent self-interested defection.<sup>187</sup> Although an aversion to the ILO’s trade sanctions materializes by 1920, the expendability of sanctions becomes apparent only after the ILO

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<sup>182</sup> Chayes and Chayes (n 180) 230.

<sup>183</sup> *ibid.*

<sup>184</sup> *ibid* 203, 231, 375 n. 27.

<sup>185</sup> International Labour Conference (n 1).

<sup>186</sup> Oliver Wendell Holmes, Jr, *The Common Law* (Little Brown 1881) 1.

<sup>187</sup> See Arthur Fontaine’s statement to the 1919 Labour Commission that penalties ‘should be provided as the very basis of international legislation’ and the Labor Commission’s Report declaring the penalties to be ‘a matter of almost vital importance in the success of the scheme’; OB (n 16) 125, 266. See also Francis Maupain, ‘Is the ILO Effective in Upholding



gains experience year after year without a need for the sanctions originally thought to be logically necessary. By 1934, ILO's trade sanctions could be ejected from the life of the law because the ILO was moving forward with a less confrontational strategy for implementation.

I would like to believe that the reformation of ILO practice to abandon the trade sanctions would have gained the approval of Albert Thomas who was never fearful to make 'trial of fresh measures'. Ever the apostle of internationalism, Thomas is eager to teach the lesson that 'international life, after all, is something new and still in an embryonic stage; it can only really be created and developed by practice'.<sup>188</sup>

As it embarks upon its second century, the ILO should reunite with its lost history.

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Workers' Rights?: Reflections on the Myanmar Experience' in Philip Alston (ed), *Labor Rights as Human Rights* (Oxford 2005) 85, 118 (noting how the ILO's 'sanctions' fit the 'logic of reciprocity' in the 'original vision of the founders').

<sup>188</sup> International Labour Conference, 10<sup>th</sup> Session (1927), Report of the Director, First part, 113.

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