

## Reinventing the ILO

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Francis Maupain has put to work his decades of ILO experience in authoring the valuable book we celebrate in this symposium. Maupain's timing is propitious when he calls for "reinventing the ILO" (2013, p. 243), given the enhanced attention the Organization has received in recent years, together with the opportunities inuring from the ILO's approaching centenary in 2019. In this essay, I summarize and comment on Maupain's key findings.

Maupain understands the ILO to be the "social regulator of the global economy" (p. 243) and, in light of that objective, he shows how the Organization is underperforming. To improve its performance, Maupain offers several ideas for how the ILO can "make a more imaginative deployment of its persuasion capacities" (p. 245). One idea is to provide member States with better policy guidance, through the use of a new "Social Policy" instrument (p. 247). Another idea is for the ILO to promote coherence among intergovernmental agencies through "inter-organisational dialogue" (p. 111). A third is for the ILO to improve the "market for social justice" (p. 212) by working with allied organizations to create a "decent work" or "social" label for goods in world trade.

Maupain's book provides a thorough examination of some weaknesses in the ILO system. For example, he argues that the ILO's "normative tool" – i.e. standard-setting Conventions and Recommendations – suffers from a "genetic defect" in that it "operates solely on traditional state actors" (p. 38) and "is not operative in respect of non-state actors" (p. 47). Maupain also takes note of two ways in which the international labour landscape is evolving in a manner that may weaken the ILO. One is that changing industrial organization "threatens to explode the tripartite categories" of governments, workers,

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and employers (p. 10); the other is that ILO norms have been borrowed by regional and bilateral trade arrangements.

Technical cooperation programmes have a distinguished history at the ILO; for Maupain, the Organization should improve on that experience through a better institutional framework to help governments and social partners take advantage of the opportunities presented by globalization. Such assistance would include, for example, education and training, social protection systems, and labour market regulation. Based on the precedent of the ILO Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117) (p. 50), Maupain calls for the ILO to establish a “voluntary peer review system for interested states to draw the lessons of each other’s experiences” (p. 247). From my perspective, that is an excellent idea, and those tasked to design such a best-practices mechanism would benefit from systematically evaluating the peer review schemes already in place in the World Trade Organization (WTO) and in some multilateral environmental agreements. Because none of those schemes provide a systematic role for business and civil society, a new ILO review mechanism has a stronger potential for effectiveness, either in traditional tripartite or broader multipartite form.

To address the problem of misalignment among international organizations, Maupain proposes that the ILO invite representatives of other organizations to participate in dialogues and fora as a way to “directly influence the representatives of the organisations involved” (p. 115). Although I do not see any harm in such a project, in my view, Maupain gives up too easily on reviving the ILO’s constitutional mandate, enshrined in the Declaration of Philadelphia, to “examine and consider all international economic and financial policies and measures” in the light of fundamental ILO objectives.<sup>1</sup> To be sure, Maupain refers to this mandate throughout his book, yet notes only the “futility of pretending that the ILO can dictate coherence of its own accord” (p. 114) with a “hierarchy of objectives imposed from above” (p. 65).

Maupain’s apprehension is unwarranted. The ILO cannot dictate from above; rather, the ILO can and should compete with brethren institutions of the world economy to influence parliamentarians, national regulators, markets, other international agencies, and social actors. Aided by its unique brand of constitutional tripartism, the ILO is well positioned to compete.<sup>2</sup>

Certainly, Albert Thomas, the ILO’s legendary first Director, understood the imperative of organizational competition and acknowledged his own role of critiquing international economic policies. For example, in 1920, Thomas wrote to the Secretary-General of the League of Nations to criticize a resolution adopted by the Brussels Financial Conference of 1920 recommending to Governments the abolition of unemployment subsidies that “tend to [lead to] the demoralisation of the worker instead of encouraging readiness to work”

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<sup>1</sup> ILO Constitution, Declaration of Philadelphia, Para. 2(d).

<sup>2</sup> At one point, Maupain wisely calls for a “countervailing logic” in having the ILO establish a “symmetrical mechanism” to substitute for an analytical function that could be carried out by the WTO, if that organization were not giving a “flat refusal” (p. 107).

(ILO, 1920, p. 14). In 1930, Thomas highlighted ILO initiatives to “promote energetic and sustained action in the economic sphere, and to lay down general guiding lines valid for ourselves and perhaps for the League of Nations too” (Thomas, 1948, p. 113).

Another problem with Maupain’s analysis of the Declaration of Philadelphia is that he seems to uncritically accept Professor Ernst Haas’s unperceptive interpretation of the Declaration.<sup>3</sup> In Haas’s telling, the Declaration evidences the ILO’s efforts to become the “master agency” (Haas, 1964, p. 156) “supreme in its own rather sweeping field” (p. 157) with “jurisdiction over all economics” (p. 159) premised on the “need for international economic planning” (p. 155). Yet a close examination of the text of the Declaration and its negotiating history show that the role of the ILO was intended to be “advisory and not administrative” (Goodrich and Gambs, 1944, p. 3), and hence not a master agency.

While I support Maupain’s suggestion for a periodic dialogue between the ILO Governing Body and “chief executives” of other international agencies (p. 117), such a networking event is hardly a substitute for regular comprehensive ILO review of international economic policies that would seek to inform and influence government policy-makers, not just international civil servants. Should the ILO go forward by reviewing the policies of the WTO, the World Bank, and other organizations, such review could focus on both “employment” and “social justice” towards that end.

Besides being a unifying theme of both trade and sustainable development objectives, employment policy – as Maupain notes – offers “an unparalleled common ground between workers’ and employers’ interests” (p. 87). Maupain’s book provides a good discussion of past ILO work on employment, including the often overlooked Employment Policy Convention, 1964 (No. 122) (pp. 47–49). My own research on international employment policy had called for a central role for the ILO (Charnovitz, 1995), but in the last two decades, the ILO has made only limited progress in that regard.

A view of the ILO as “the International Organization for Social Justice” can be traced back to ILO co-founder James Shotwell (Langille, 2009, p. 75). Today, concerns about social justice, poverty alleviation, and income distribution are as salient as ever. In my view, the ILO should be preparing an annual “social justice impact statement” for key international programmes. For example, an ILO study of the social repercussions of the failure by the WTO to consummate the Doha Trade Round would find an eager readership.

Maupain’s idea for using social labels to leverage the market recognizes accurately how consumer decisions can influence both producers and regulators. While Maupain notes a recent papal encyclical highlighting consumers’ social responsibility (p. 216), consumer organizations have of course promoted

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<sup>3</sup> Indeed, Maupain refers to the Declaration of Philadelphia as the ILO’s attempt at an “audacious take-over bid” with regard to the emerging post-war economic and financial system (Maupain, p. 69).

ethical labelling as far back as the early nineteenth century. Recently, world trade jurisprudence has validated the use of labels to provide information about the environmental provenance of a product in international trade (specifically “dolphin-safe” labels for tuna).

Maupain’s specific proposal in his book is for a new multilateral agreement to establish a “decent work” label (p. 236) affixed by the “country of origin” (p. 233) that would indicate whether the good or service was produced in accordance with applicable legislation in the country of origin (p. 229). The agreement would provide for the “mutual recognition” among destination country governments of such a label subject to a “mandatory and universal verification system” (p. 232). Maupain suggests that such an agreement could be negotiated within the ILO or alongside it.

While I concede that the proposed labelling system could add value to the global economy, there are three problems with the proposal that would diminish its effectiveness. First, the benchmark of national legislation is problematic when national legislation is inadequate. Indeed, Maupain recognizes that flaw, in providing for an alternative level of protection, requiring the application of national legislation that is “substantially equivalent” to the protections specified in ILO instruments (p. 237). Second, the proposed role of governments as affixers of labels is troubling, given their vulnerability to corruption and rent-seeking interests. Third, the focus on information about working conditions in the country of origin fails to appreciate that goods in global value chains often have multiple countries of production. A successful social labelling programme would therefore need more sophisticated terms of reference.

Turning to the discussion of the ILO’s operations, I disagree with Maupain’s argument that the ILO operates solely on traditional state actors. While it is true that the ILO Constitution (art. 19) conveys obligations to Members regarding Conventions and Recommendations, nothing in the Constitution restricts the ILO’s normative focus solely to States.<sup>4</sup> Indeed, many provisions in ILO Conventions refer to the rights and obligations of workers and employers, and in some instances national courts have given such provisions direct effect.<sup>5</sup> Furthermore, given the tripartism that lies at the heart of the ILO, it would be ironic if the ILO’s normative capacity were narrower than the uni-partism in other international organizations, such as the United Nations Security Council, which routinely enacts resolutions urging action by not only States but also other entities.<sup>6</sup> The WTO provides another example of norma-

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<sup>4</sup> From the start, the ILO Constitution, in art. 19, para. 5(b), recognized the possibility of more than a single authority having competence to enact legislation or take “other action” to implement an ILO Convention.

<sup>5</sup> For example, in 1951, the US Supreme Court held that seamen had rights under the ILO Shipowners’ Liability (Sick and Injured Seamen) Convention, 1936 (No. 55), in a case where the shipowner was the US Government. See *Warren v. United States*, 340 U.S. 523 (1951).

<sup>6</sup> For example, the Security Council resolution on the protection of civilians in armed conflict, No. 2175 (2014) urges action by States, parties involved in an armed conflict, and humanitarian personnel.

tive ecumenicalism in its Code of Good Practice for the Preparation, Adoption and Application of Standards. This WTO Code is open to acceptance by governmental and non-governmental bodies alike.

In reality, the ILO's subjects of law are hardly limited to States or, for that matter, to a State's elected officials, regulators, and judges. As C. Wilfred Jenks visualized over 40 years ago, ILO Conventions could perhaps be applied by "collective agreements" as well as by "voluntary bodies" (Jenks, 1970, p. 31). Looking ahead, the ILO could become more prescriptive for international organizations, the private sector, and voluntary bodies. For example, a recent study suggested that the ILO should assign legal responsibility not only to States in whose territory the labour rights violations occurred, but also to additional actors, including transnational corporations and their home Governments (Dahan, Lerner and Milman-Sivan, 2013, p. 740).

Along with discussing the virtues of tripartism, Maupain also airs its pathologies. For example, he notes the blurring boundary between employers and workers and the dearth of multinational enterprises represented in the Employers' group (p. 129). While the ILO's founders were quite forward-looking in 1919, in fashioning a constitutional role for "non-Government" delegates,<sup>7</sup> the privileged role for organized employer and worker organizations makes it harder to open the ILO to significant participation by relevant stakeholders reflecting consumer, human rights, and other social interests (Alston, 1994, p. 102; Charnovitz, 2000, p. 177; Helfer, 2006, p. 718; Standing, 2008, p. 373).<sup>8</sup>

Maupain's chapter on the "decentralized linkages" of social clauses in free trade agreements (FTAs) and trade preferences provides a useful survey of recent developments. He sagely observes that it would be "self-defeating" to "play down" these provisions "just because they have been won outside of ILO standards and procedures" (p. 180). As the World Bank has noted, trade agreements "can incorporate incentives for attention to [employee] voice and working conditions by linking trade access to the adoption and enforcement of labour laws and standards" (World Bank, 2012, p. 32). In my view, the incorporation of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up into recent US trade agreements has been a positive development for both the United States and the ILO (Charnovitz, 2011).

In summary, Maupain contributes a number of valuable strategies for revitalizing the ILO. As a longtime supporter of ILO reform (e.g. Charnovitz, 2000), I look forward to watching how Maupain's proposed innovations will better equip the ILO for promoting social justice and human dignity.

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<sup>7</sup> ILO Constitution, art. 3, para. 5.

<sup>8</sup> See also Mundlak (2011, pp. 325–328) (critiquing the myth of the "unitary labor voice", and calling for a more complex system for the representation of interests).

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