29. What the World Trade Organization learned from the International Labour Organization

*Steve Charnovitz**

1. INTRODUCTION

In 1987, I wrote an article for the *International Labour Review* titled, 'The Influence of International Labour Standards on the World Trading Regime.'[1] My article surveyed the attention to 'worker rights' in international trade policy beginning in the nineteenth century. Looking back at that history, I concluded that the 'influence' so far had been 'rather modest'; looking ahead, I suggested that the 'current resurgence of interest in worker rights may mark a watershed.'[2] A quarter-century later, that resurgence of interest has led to numerous achievements such as the institutionalization of a labour chapter in free trade agreements.[3]

In this chapter, I focus on a question that I could not have analysed in 1987 because at that time, the World Trade Organization (WTO) had not yet been established. For this project in 2014, I will examine how the creation of the International Labour Organization (ILO) laid down important precedents that were built upon in the General Agreement on Tariffs and Trade (GATT) in 1947 and in the WTO in 1994. My thesis is that international labour law served, in several important ways, as to inspiration to international trade law.

Labour law has been shaped by two revolutions: In the national labour law revolution of the early-nineteenth century, governments began to regulate labour conditions rather than to leave them to the vicissitudes of the market. In the international 'labour law revolution' of the early-twentieth century, governments began to coordinate their own regulation of the labour market as a strategy for responding to the pressures from international competition.

In 1919, the Treaty of Versailles set out the governmental interest in assuring adequate transnational labour regulation. As understood at that global constitutional moment, the improvement of working conditions was 'urgently required' because 'conditions of labour exist involving such injustice, hardship and privations to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled … .'[4] Regulatory coordination was needed because, as the Treaty

* This chapter is current as of November 2014.

[1] 126 INT'L LAB. REV. 565 (1987), reprinted with 1987 errata corrected in TRADE LAW AND GLOBAL GOVERNANCE 211–32 (Steve Charnovitz ed., 2002).

[2] 126 INT'L LAB. REV. at 580.

[3] See Jean-Marc Siroén, Labour provisions in preferential trade agreements: Current practice and outlook, 152 INTERNATIONAL LABOUR REVIEW 85 (2013).

[4] Treaty of Versailles, June 28, 1919, Part XIII, Section I, Preamble.

explains, the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.'[5] The emphasis on humane conditions (rather than merely efficient conditions) reflects the view of the ILO's founders that 'labour should not be regarded merely as a commodity or article of commerce.'[6]

Perhaps due to the mondial perspective of the ILO's visionary first Director Albert Thomas,[7] the ILO quickly recognized the role of employment policy in world economic order. In a prescient 1923 report, for example, the International Labour Office declared:

> In the course of years – in the course of a century – economic lines, drawn ever tighter, have been tied among the peoples. National economies have become more and more independent. Beside and above them, or, to put it better, among them, a world economy has been formed. And the common problem in which are united these various problems may be stated in these terms: give to world economy its fundamental law.[8]

Two years later, in discussing the forthcoming International Economic Conference organized by the League of Nations, Thomas opined:

> I believe that the proposed Economic Conference can have no true utility, or exercise any genuine educative and moral effect, unless it has the courage to make a real attempt to find out how, in Edgard Milhaud's phrase, a world economy can be developed out of the interdependence of national economies, and how such a world economy can be given formal status … .[9]

In myriad ways, Thomas recognized that the ILO's mandate to write an international labour code was part of the broader ongoing League of Nations effort to write transnational ground rules for the emerging interdependent world economy.

The ILO was the only original League of Nations institution to emerge from World War II. Indeed, the ILO emerged stronger owing to a renewal of the international labour law revolution in the form of the 1944 Declaration of Philadelphia. Connecting the dots from ILO's founding to its re-emergence in post World War II planning, the Declaration postulates a new bottom line for international economic policy. To wit, because 'lasting peace can only be established if it is based on social justice,' … 'all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they

---

[5] Id.

[6] Treaty of Versailles, June 28, 1919, Part XIII, Art. 427.

[7] ILO, EDWARD PHELAN AND THE ILO: THE LIFE AND VIEWS OF AN INTERNATIONAL SOCIAL ACTOR (2009).

[8] WALLACE McCLURE, WORLD PROSPERITY AS SOUGHT THROUGH THE ECONOMIC WORK OF THE LEAGUE OF NATIONS (New York: The Macmillan Company, 1933) 279 note 38, translating ILO, ENQUÊTE SUR LA PRODUCTION, Rapport général, Tome V. Deuxième volume 1592 (1923).

[9] ALBERT THOMAS, INTERNATIONAL SOCIAL POLICY 108 (International Labour Office ed., 1948). Milhaud was a professor of political economy at the University of Geneva.

may be held to promote and not to hinder the achievement of this fundamental objective … .'[10]

This chapter will examine how the labour provisions in the Treaty of Versailles (1919) and the Declaration of Philadelphia (1994) provided legal and pragmatic context for the drafters of the GATT (1947), the UN Conference drafting the Havana Charter of the International Trade Organization (1948), and the WTO Agreement (1994). Where relevant, I will also cite to other sources of law such as the United Nations Conference on Food and Agriculture (1943), the World Bank Articles of Agreement (1944), and the United Nations (UN) Charter (1945).

The chapter proceeds in two parts: The first shows how some key ILO policy norms were internalized into the GATT and the WTO. The second demonstrates how the complaints procedure designed for the ILO became a model for the dispute settlement used in the GATT/WTO trading system.

2. THE LABOUR GOALS TRANSPLANTED INTO THE TRADING SYSTEM

Part 2 examines the origin of several international labour goals and shows the manner in which they were received by the trading system.

(a) Full Employment

The Treaty of Versailles made combating unemployment an international goal. The Treaty included the 'prevention of unemployment' within its list of 'conditions' for which 'improvement' is 'urgently required.'[11] In the midst of World War II, the Declaration of Philadelphia memorialized the solemn obligation of the ILO to further programs that will achieve 'full employment and the raising of standards of living.'[12] The World Bank Articles of Agreement had as one of its purposes to 'promote the long-range balanced growth of international trade … by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories.'[13] The UN Charter in Article 55 called for promoting 'higher standards of living, full employment, and conditions of economic and social progress and development,' and Article 59 instructed the UN to 'initiate negotiations' for 'the creation of any new specialized agencies required for accomplishment of the purposes set forth in Article 55.'[14] A year later, the UN did so by convening the UN Conference on Trade

[10] Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), May 10, 1944, Annex to the Constitution of the ILO, Part II(c).

[11] Treaty of Versailles, Part XIII, Section I, Preamble.

[12] Declaration of Philadelphia, Part III(a).

[13] Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, Art. I(iii).

[14] Charter of the United Nations, June 26, 1945.

and Employment (1946–48) which spearheaded the negotiation of the GATT and drafted the Charter of the International Trade Organization (ITO).

The GATT's Preamble recognizes that trade and economic relations 'should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand … .'[15] The ITO Charter devoted its entire Chapter II to 'Employment and Economic Activity.' Declaring that the 'avoidance of unemployment … is not of domestic concern alone … ,' the Charter called on each member to take action 'designed to achieve and maintain full and productive employment' within its own territory.[16] In 1994, when the Uruguay Round negotiators drafted a Preamble for the WTO, they replicated the GATT language (quoted above) regarding 'full employment'. Although the 'full employment' Clause of the WTO Preamble has been mentioned by WTO panels or the Appellate Body in four cases, 'full employment' has not yet done any heavy lifting as context to interpret the meaning of a contested trade law provision.

(b) Trade and Development

The nations at the Hot Springs Conference on Food and Agriculture (1943) affirmed the need to 'promote the full and most advantageous employment of their own and all other people and a general advance in standards of living' and to 'reduce barriers of every kind to international trade … .'[17] The Declaration of Philadelphia called for effective action 'to promote the economic and social advancement of the less developed regions of the world … .'[18] As noted above, the UN Charter promotes 'conditions of economic and social progress and development.' When Part IV (Trade and Development) was added to the GATT in 1965, the parties stated a set of 'principles and objectives' one of which is 'recognizing that international trade as a means of achieving economic and social advancement should be governed by such rules …' as are consistent with the principles and objectives.[19] These milestones show the broad emergence, in the mid-twentieth century, of an international norm to promote transnational economic and social development. (Indeed, in 1973, Judge Gerald Fitzmaurice posited an international 'duty of Samaritanism'.[20]) This norm can be seen in the agriculture, labour, and trade regimes, and of course in the World Bank.

Despite its deleterious effects on other countries, the legitimacy of shielding the domestic economy from international competition was endorsed in the GATT. The original GATT in Art. XVIII (Adjustments in Connection with Economic Development) stated that the contracting parties recognize that 'special governmental assistance

---

[15] General Agreement on Tariffs and Trade, Oct. 10, 1947, Preamble.

[16] Havana Charter for an International Trade Organization, March 24, 1948, Chapter II, Arts. 2(1), 3(1). The Charter did not go into force.

[17] United Nations Conference on Food and Agriculture, June 3, 1943, Final Act, Part XXIV, paras. 1(a),(g), reprinted in 8 DEPARTMENT OF STATE BULLETIN 537, 546, 552 (1943).

[18] Declaration of Philadelphia, Part IV.

[19] GATT Art. XXXVI:1(e).

[20] Sir Gerald Fitzmaurice, The future of public international law and of the international legal system in the circumstances of today, in LIVRE DU CENTENAIRE 1873–1973 (Institut de Droit International, 1974) 196, 324, para. 112(G).

may be required to promote the establishment, development or reconstruction of particular industries or particular branches of agriculture, and that in appropriate circumstances the grant of such assistance in the form of protective measures is justified.'[21] Unlike the GATT, however, the ILO has never endorsed 'protective measures' as a strategy for economic development. The most extended discussion of international trade in the ILO occurred in 1976 (in the midst of the GATT Tokyo Round), when the ILO convened its World Employment Conference to consider the job creation challenges from an expanding international division of labour. The tripartite ILO Conference agreed that 'the industrialised countries should continue to pursue and expand trade liberalisation policies in order to increase imports and manufactures and semi-manufactures from developing countries … .'[22] In addition, the Conference declared that 'Adjustment assistance is considered preferable to import restrictions.'[23] This prioritization of worker adjustment over import restrictions has been a significant achievement by the ILO that, unfortunately, both the GATT and the WTO have failed to endorse.

(c) Special and Differential (S&D) Treatment

The Treaty of Versailles (Part XIII) stated several 'general principles' including the nuanced proposition that 'differences of climate, habits and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment.'[24] The Treaty also provided that in framing any convention or recommendation, the ILO Conference 'shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the needs of such countries.'[25]

The Declaration of Philadelphia noted that while its principles 'are fully applicable to all peoples everywhere,' the 'manner of their application must be determined with due regard to the stage of social and economic development reached by each people … .'[26] Although the ILO refrained from imposing strict uniformity in its earliest labour conventions,[27] it abandoned such de jure reverse discrimination in favour of a

---

[21] GATT Art. XVIII, 4 U.S.T. 639 at 665. The similar current provision is found in GATT Art. XVIII:2 and is elaborated on in Art. XVIII:4(a).

[22] Declaration of Principles and Programme of Action adopted by the Tripartite World Conference on Employment, Income Distribution and Social Progress, June 1976, para. 69, reprinted in EMPLOYMENT, GROWTH AND BASIC NEEDS. A ONE-WORLD PROBLEM 179, 197 (Report of the Director-General 1976).

[23] Id.

[24] Treaty of Versailles, Part XIII, Art. 427.

[25] Id. Art. 405.

[26] Declaration of Philadelphia, Part V.

[27] See, for example, Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week (No. 1), Nov. 28, 1919, 135 BFSP 10. This Convention, like the 188 other ILO Conventions since then, consisted of binding obligations. Thus, the claim by some commentators, such as Eric Posner and Alan Sykes, that ILO labour

more pragmatic approach of helping developing countries raise their standards and of allowing some conditional ratification.[28]

Lower obligations for developing countries entered the trading system in 1966 when the GATT added a Part IV (Trade and Development) espousing the principle that less-developed countries are not expected to take market opening actions 'inconsistent with their individual development, financial and trade needs … .'[29] During the Tokyo Round GATT negotiations, a new term 'special and differential treatment' was introduced and incorporated into most of the Tokyo Round Codes in 1979.[30] The 1994 WTO Agreement contains a panoply of S&D provisions that remove or lower the obligations that would otherwise have applied to least developed or developing countries. For example, least developed countries are not required to eliminate export subsidies.[31]

The concept of more flexible, tailored treatment for developing countries had its origins in the original ILO Constitution.[32] While the S&D norm dead-ended intellectually at the ILO many decades ago, the norm was reincarnated in WTO theology and law. Ironically, the resistance to market opening in developing countries permitted by the WTO probably wreaks more economic havoc than could have come from overly ambitious high labour standards.

(d) Migrant Worker Protection

Both the trade and labour regimes have sought to protect the economic rights of aliens. The Treaty of Versailles was the earliest multilateral instrument to call attention to the need for 'protection of the interests of workers when employed in countries other than their own.'[33] The first concrete action occurred in 1925 when the ILO enacted the Equality of Treatment (Accident Compensation) Convention (No. 19) which contains a binding obligation to grant to foreign nationals of other parties the same treatment granted domestically to nationals.[34] But no further international legislation ensued before World War II. At the Havana Conference in 1948, the governments adopted a resolution stating that 'it is advantageous to countries which require or receive and to countries which supply workers on a seasonal or temporary basis to adopt regulations

---

'standards are not legally binding' is nonsense. See ERIC A. POSNER & ALAN O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW 110 (2013).

[28] This flexibility practice is discussed in ERNST B. HAAS, BEYOND THE NATION STATE 246, 283, 556 (1964). Haas notes that there was some practice of allowing states to ratify contingent on ratification by their major competitors in world trade.

[29] GATT Ad Art. XXXVI, para. 8.

[30] ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 86–87 (2011).

[31] Agreement on Subsidies and Countervailing Measures, Arts. 27.2(a).

[32] Christopher D. Stone, Common But Differentiated Responsibilities in International Law, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 276, 278 (2004).

[33] Treaty of Versailles, Part XIII, Preamble.

[34] Convention concerning Equality of Treatment for National and Foreign Workers as regards Workmen's Compensation for Accidents (No. 19), June 5, 1925, 134 BFSP 393, Art. 1(2).

which will mutually safeguard their interests and also protect both the migrants and the domestic workers against unfair competition or treatment;' and accordingly, the Conference called on the UN Economic and Social Council and the ILO to formulate conventions and model agreements 'to ensure mutually advantageous arrangements for their countries and fair conditions for the workers concerned.'[35] The ILO took up this challenge in 1949 with its comprehensive Migration for Employment Convention (No. 97)[36] and in 1975 with supplementary legislation. By contrast, the GATT took no parallel action in the decades after 1948 to address unfair treatment of migrant workers.

The advent of the WTO's General Agreement on Trade in Services (GATS) in 1994 has put migration, or at least temporary migration, back on the trade policy agenda. Under GATS, governments are required to give most-favoured-nation (MFN) treatment to foreign-service suppliers having commercial presence in a member's territory.[37]

The migrant worker issues demonstrate a constructive dialogue between the trade and labour regimes. The organic act creating the ILO set out a principle of international concern for the well-being of workers employed in foreign countries. The founding convention of the post-war trading system was not able to legislate on fair treatment of migrant workers, but instead asked the ILO to so legislate. The ILO duly responded with legislation. In 1994, trade negotiators took up one narrow slice of overall problem, namely temporary migrant service suppliers, and imposed an MFN rule.

(e) Fair Labour Standards

The Treaty of Versailles was the first multilateral instrument to champion fair labour standards in international commerce. Article 23 of the Covenant of the League of Nations declared that the Members of the League 'will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend … .'[38] Just under 30 years later, in Article 7 (Fair Labour Standards) of the ITO Charter, governments recognized 'that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity' and that 'unfair labour conditions, particularly in production for export, create difficulties in international trade, and accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.'[39]

The labour language in the Treaty of Versailles served as context for the drafting of ITO Article 7 which, since the Charter provided for dispute settlement,[40] constituted the

---

[35] UN Conference on Trade and Employment, Resolution to the Economic and Social Council Relating to Employment, March 1948, reprinted in ALSO PRESENT AT THE CREATION. DANA WILGRESS AND THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT AT HAVANA 237–8 (Michael Hart ed., 1995).

[36] Convention concerning Migration for Employment (No. 97), July 1, 1949, 120 UNTS 71.

[37] General Agreement on Trade in Services, Arts. I:2(c), II:1, Annex IV. Governments were permitted to maintain certain inconsistent measures. Natural persons seeking access to a Member's employment market are excluded from this MFN protection.

[38] Treaty of Versailles, Art. 23(a).

[39] ITO Charter, Art. 7(1).

[40] See ITO Charter, Art. 7(3).

first 'social clause' in a multilateral trade treaty. The ITO negotiators internalized key ILO norms, but because of the early demise of the ITO, its social clause was not implemented, and the Article 7 language was never incorporated into the GATT or the WTO.

In his recent treatise on international economic law, Ernst-Ulrich Petersmann calls attention to the parallelism between the 1919 view that labour law is so costly at home that one should encourage foreign countries to join in raising standards, and the 1947 view (in the GATT) that trade liberalization is so costly at home that one should encourage foreign countries to make equivalent concessions.[41] In other words, one could say that the GATT is premised on the notion that the failure of some nations to liberalize trade is an obstacle in the way of other nations which desire to liberalize trade. Petersmann criticizes the internal logic in both regimes as being predicated on a bogus 'race to the bottom prisoner dilemma' concept that reflects a misunderstanding of underlying economics. Of course, the ILO omitted from the Declaration of Philadelphia the mantra on the 'failure of any nation.' That omission may have reflected the ILO's learning during the previous 25 years that higher labour standards were beneficial to the country enacting them.

3. THE LABOUR ORIGINS OF TRADE DISPUTE SETTLEMENT

The ILO was the first global agency to have compulsory dispute procedure to adjudicate an alleged treaty violation. True, the Covenant of the League of Nations called for member governments to submit a dispute to arbitration, but doing so depended on an agreement by the parties that the dispute 'be suitable for submission to arbitration' and depended on prior or concurrent agreement by the parties on the forum.[42] By contrast, Part XIII of the Treaty of Versailles gave each ILO member government 'the right to file a complaint' when a member was not satisfied that another member was 'securing the effective observance of any convention which both have ratified … .'[43]

Besides a filing initiated by a government, the Treaty further provided for two alternative means of invoking the complaints procedure. One was a right of action by the Governing Body.[44] The other was a right of action by a delegate to the annual ILO Conference, meaning a government, worker, or employer delegate.[45]

After considering the complaint and any statement from the respondent government, the Governing Body may decide to refer the complaint to a Commission of Inquiry.[46] The Commission was to be appointed by the League's Secretary-General from a 'panel'

---

[41] ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY 182 (2012).

[42] Treaty of Versailles, Art. 13.

[43] Id., Art. 411.

[44] In its original incarnation, the ILO Governing Body consisted of 24 persons, 12 of which represented governments and 12 of which represented workers and employers, split equally.

[45] Treaty of Versailles, Art. 411.

[46] The government against whom the complaint is made is entitled to have a representative take part in the proceedings of the Governing Body. Id. Art. 411.

of persons with industrial experience nominated by ILO Members. The panel was divided into three sections consisting of employers, workers, and those of 'independent standing.'[47] The composition of the Commission cannot include panel nominees from any member 'directly concerned.'[48]

The Commission's role was to 'prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations (as it may think proper) as to the steps which should be taken to meet the complaint and the time within which they should be taken.'[49] The Commission was also tasked with indicating 'the measures, if any, of an economic character against a defaulting Government which it considers to be appropriate, and which it considers other Governments would be justified in adopting.'[50] The Commission's report was to be published.

One month after the report, the defaulting government was to inform the Secretary-General 'whether or not it accepts the recommendations contained' in the Commission's report and, if not, whether it proposes to refer the matter to the Permanent Court of International Justice (PCIJ).[51] In considering the referral, the PCIJ would have the authority to 'affirm, vary or reverse any of the findings or recommendations' of the Commission.[52] The PCIJ's decision could also indicate appropriate measures of an economic character against the defaulting government. The Treaty confirmed that the PCIJ decision 'shall be final.'[53]

The sophisticated enforcement process addressed both non-compliance and compliance. Following a failure to carry out the recommendations within the 'time specified', any other government could take the 'measures of an economic character' indicated in the report of the Commission or, if appealed, the decision of the Court.[54] Such enforcement measures could be continued until compliance was verified. The Treaty provided that at any time, the defaulting government could inform the Governing Body 'that it has taken the steps necessary to comply with the recommendations' of the Commission or the PCIJ and could request a new Commission of Inquiry 'to verify its contention.'[55] The report of such Commission could be referred to the PCIJ and if the Commission or (if appealed) the PCIJ sided 'in favour of the defaulting government,'

---

[47] Id. Art. 412. The Governing Body had the right to scrutinize the nominees and to reject a nominee by a two-thirds vote.

[48] Id. Art. 412.

[49] Id. Art. 414.

[50] Id. The negotiating history shows that in discussing measures of an economic character, the drafters had in mind measures against commerce. Edward J. Phelan, The Commission on International Labor Legislation, in THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION (Vol. 1) 169–70 (James T. Shotwell ed., 1934).

[51] Treaty of Versailles, Art. 414. Note that the current ILO Constitution provides broader standing for referrals to the ICJ in that the complaining government may also appeal. ILO Constitution, Art. 29(2).

[52] Treaty of Versailles, Art. 418.

[53] Id., Art. 417.

[54] Id., Art. 419.

[55] Id., Art. 420.

then other governments would be required to 'discontinue the measures of an economic character that they have taken against the defaulting Government.'[56]

The ILO Constitution's procedures for adjudicating complaints were daring in bringing judicialization to international law. In the ILO, the obligations of labour conventions were binding and enforceable in a way that no international organization had ever attempted and in a way that even today, no multilateral organization achieves. Borrowing from the domestic law model of a first-level tribunal and an appellate court, the ILO Constitution dealt creatively with the problems of how to secure compulsory jurisdiction over sovereign states and how to induce compliance through economic sanctions.[57] The most cosmopolitan feature is the right of the ILO Governing Body and the non-government delegates to initiate complaints.[58] The most coercive feature was the procedure for authorizing and de-authorizing collective economic sanctions.[59] Such a collective sanction in that circumstance was absent from the arsenal of the League of Nations.

Of course, the ILO model was more impressive on paper than in practice. No Commissions of Inquiry were appointed before 1946 when the provisions for the Commission to indicate measures 'of an economic character' and the collective sanctions by governments were stripped out of the ILO Constitution. Commissions of Inquiry commenced in 1961 and in all but one case, the Commission's recommendations were accepted by the defendant government, and thus no appeals to the International Court of Justice (ICJ)[60] were needed; in the one case of non-acceptance, no ICJ appeal was lodged.[61]

Although the explicit recourse to measures of an economic character is absent from the current ILO constitution, its Article 33 provides that in the event of non-compliance with a recommendation of the Commission of Inquiry or an ICJ decision, the ILO Governing Body 'may recommend to the Conference such action as it may deem wise

---

[56] Id.

[57] Although the term 'sanction' does not appear in Part XIII, its negotiating history demonstrates the use of that term in 1919 in reference to the ILO provisions. Phelan, supra note 50, 168–9. By 1932, the ILO had consciously distanced itself from the use of sanctions. FRANCIS GRAHAM WILSON, LABOR IN THE LEAGUE SYSTEM 219 (1934).

[58] Several Commissions have been initiated by the Governing Body, worker, or employer delegates. Anne-Marie La Rosa, Links Between the ILO and the ICJ: A Less than Perfect Match, in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 119, 123–4 (Laurence Boisson de Chazournes et al eds, 2002). La Rosa suggests that flaws in the ICJ Statute may prevent appealability of such decisions. Id. at 126–9.

[59] Treaty of Versailles, Arts. 414, 418–420.

[60] The establishment of the Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice, was provided for in the Covenant of the League of Nations. It held its inaugural sitting in 1922 and was dissolved in 1946. The work of the PCIJ, the first permanent international tribunal with general jurisdiction, made possible the clarification of a number of aspects of international law, and contributed to its development.

[61] Nicolas Valticos, The International Labour Organization, in THE EFFECTIVENESS OF INTERNATIONAL DECISIONS 134, 149 (Stephen M. Schwebel ed., 1971); Francis Maupain, The settlement of disputes within the International Labour Office, 2 J. INT'L ECON. L. 273, 282–3 (1999).

and expedient to secure compliance therewith.'[62] This Article 33 power has only been used once and no specific economic measures were recommended.[63]

A key innovation introduced in the Treaty of Versailles was the focus on compliance by the defaulting state rather than having that state pay a reparation for its illegal action. In 1919, the principle of a reparation in international law was well recognized, meaning that a government violating a treaty had an obligation to undo the harm caused by the lack of effective observance of the treaty.[64] But the reparation principle is strikingly absent from Part XIII which seems to adopt a narrower remedy for a violation of labour conventions, namely, the taking of steps to meet the complaint.[65] Although authority to recommend a reparation is apparently not denied to a Commission, no Commission has recommended one.

The influence of the ILO's complaint procedures is apparent in the ITO Chapter VIII provisions on the 'settlement of differences.' While I am unaware of any documentation demonstrating that ITO negotiators copied ILO provisions, ILO representatives certainly attended the Havana Conference. Moreover, the labour standards provisions subject to Chapter VIII specifically mention the ILO.[66]

The ITO dispute procedures regarding treaty violations can be briefly summarized: Every member had a right to refer to the Executive Board[67] an allegation that a 'benefit accruing to it' under the Charter was being 'nullified or impaired' as a result of a 'breach by a member' of a Charter 'obligation'.[68] After investigating the matter, the Executive Board could decide that the matter did not call for further action, or could 'request the Member concerned to take such action as may be necessary for the Member to conform to the provisions of this Charter.'[69] The Executive Board was also empowered, under certain conditions, to release the member affected from trade obligations 'upon such conditions as it considers appropriate and compensatory.'[70] Such decisions of the Executive Board could be referred by a member concerned to the ITO

---

[62] ILO Constitution, Art. 33.

[63] See Adelle Blackett, Mapping the equilibrium line: Fundamental principles and rights at work and the interpretive universe of the World Trade Organization, 65 SASKACHEWAN LAW REVIEW 369, 383 (2002). See also the chapter by Langille in this volume.

[64] Treaty of Versailles, Art. 13; CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 23–4, 182–3 (1928).

[65] Treaty of Versailles, Art. 414.

[66] ITO Charter, Art. 7(3).

[67] The Executive Board was to consist of 18 representatives from governments elected by the plenary Conference. Eight of those slots were reserved for the members of 'chief economic importance.' ITO Charter, Art. 78. The reservation of Board positions for countries of chief economic importance was imported from the ILO Constitution which in 1946 reserved eight slots for members of 'chief industrial importance.' Instrument of Amendment Adopted by the International Labour Conference, 29(4) ILO OFFICIAL BULLETIN (1946).

[68] ITO Charter, Arts. 93(1), 94(1). Other causes of action existed but are not discussed in this chapter.

[69] Id., Art. 94(2)(d).

[70] Id. Art. 94(3), 95(1). As one of the drafters envisioned, this provision '… will operate in fact as a sanction and a penalty.' CLAIR WILCOX, A CHARTER FOR WORLD TRADE 149 (1949).

Conference[71] for review, and the Conference could 'confirm, modify or reverse' such action.[72] Any member prejudiced by a decision of the Conference had the right to seek an ICJ advisory opinion and thereafter, the ITO would be 'bound by the opinion of the Court' and would modify the Conference decision if it did not accord with the opinion of the Court.[73]

The WTO's dispute settlement understanding (DSU) was based on provisions of GATT dispute settlement and provisions from the ITO Charter. The DSU process is triggered when a WTO member 'complaining party' requests a panel to examine measures that are allegedly 'an infringement of the obligations assumed under a covered agreement … .'[74] The composition of the three-person panel is agreed to by the parties or, if there is no agreement, the WTO Director-General can compose the panel. An indicative list of qualified panelists is maintained by the WTO Secretariat based on names suggested by WTO members. Unless the parties to the dispute otherwise agree, the panel will not include citizens of members who are parties to the dispute. The report of the panel is to include 'findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.'[75] The panel report is automatically adopted by the WTO Dispute Settlement Body (DSB)[76] within 60 days unless it is appealed to the Standing Appellate Body. The Appellate Body 'may uphold, modify or reverse the legal findings and conclusions of the panel.'[77] When a panel or Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with that agreement.'[78] The Appellate Body report is automatically adopted within 30 days.

Following the adoption of a panel or Appellate Body report, the DSU provides for a process of 'Surveillance" of implementation.[79] The first step occurs at the next DSB meeting when the defendant member 'shall inform the DSB of its intentions' in respect of implementation.[80] The next step is for the parties or the DSB to set a 'reasonable period of time' for implementation.[81] If the defendant member fails to bring its measure into compliance within the reasonable period of time, then the party invoking the dispute may request DSB authorization to suspend concessions or other obligations (SCOO) under the WTO covered agreements. If there is a disagreement as to the existence of measures taken to comply or the consistency of such measures with WTO law, either party may seek a panel to adjudicate compliance. The compliance panel's report is subject to the same appeal and adoption procedures used for original panels.

---

[71] The Conference was a plenary body consisting of representatives of all of the ITO Members.

[72] ITO Charter, Art. 95(1).

[73] Id., Art. 96.

[74] DSU Arts. 3.8, 6.1. Other causes of action exist not discussed here.

[75] DSU 12.7.

[76] The DSB is composed of representatives from all WTO members.

[77] DSU Art. 17.13.

[78] DSU Art. 19.1 (internal footnotes omitted).

[79] DSU Art. 21.

[80] DSU Art. 21.3.

[81] Id.

Following a DSB-adopted decision finding non-compliance, the disputing parties will typically enter into arbitration to determine the amount of the SCOO set to be 'equivalent to the level of nullification or impairment.'[82] The arbitrator's decision is 'final.'[83] Thereafter the DSB will approve the SCOO plan if requested by the original complainant(s) and only those countries may impose the SCOO. Such a SCOO is to be 'temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed … .'[84] Table 29.1 details the mimetic influence of the ILO complaint procedures on the ITO and the WTO.

Table 29.1 Influence of ILO complaint procedures on the ITO and WTO

Provision	ILO (1919)	ITO (1948)	WTO (1994)
Cause of action against treaty violation by a government	Yes	Yes	Yes
Standing of a government to initiate dispute	Yes if state had ratified Convention	Yes	Yes
Standing of an organization's governing body to initiate dispute	Yes	No	No
Standing of a non-governmental actor to initiate dispute	Yes	No	No
Referral of dispute to *independent* first-level adjudicator	Yes, referral to the Commission of Inquiry	No, consideration by Executive Board	Yes, referral to WTO panel
Roster of potential adjudicators	Yes	N/A	Yes
Exclusion from tribunal of nominees/citizens from litigating states	Yes, nominees	N/A	Yes, citizens unless otherwise agreed
First-level tribunal reports findings and recommendations	Yes	Yes	Yes
Report required to be published	Yes	No	No, but published in practice
Report includes recommendation of time for implementation	Yes	No	Yes, but only for prohibited subsidies
Accused government asked to respond to report	Yes, whether it accepts the recommendations	No	Yes, regarding its intentions for implementation

[82] DSU Art. 22.4, 22.7.
[83] DSU Art. 22.7. See also Claussen, Ch 28 in this volume.
[84] DSU Art. 22.8.

Table 29.1 (cont.)

Provision	ILO (1919)	ITO (1948)	WTO (1994)
Independent proposal or determination of economic measures against defaulting country	Yes by Commission or PCIJ	No	Yes by arbitrator
Right to appeal findings of illegality to independent tribunal	Yes, to PCIJ	Yes, an appeal to the ICJ of the second-level Conference decision	Yes, to the Appellate Body
If violation is upheld, right of governments to take economic measures against defaulting government failing to comply	Yes, any government (collective sanction)	No, depends on decision of ITO Conference	Yes, but only the complaining governments
Options for appellate review	Affirm, vary or reverse	Confirm, modify or reverse (ITO Conference)	Uphold, modify or reverse
Adjudication of discontinuance of economic measures upon compliance	Yes, defaulting government may claim steps necessary to comply and that will be verified by PCIJ	No	Not de jure, but provided in WTO case law
Right of retrospective reparation	No	No	No

In summary, this chapter demonstrates the significance of the influence of the international labour order on the world trading system.