

THE EFFECT OF ILO'S DECLARATION ON
FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK
ON THE EVOLUTION OF LEGAL POLICY IN BRAZIL:
AN ANALYSIS OF FREEDOM OF ASSOCIATION

by

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A thesis submitted in conformity with the requirements
for the degree of Master of Studies in Law

Graduate Department of Law
University of Toronto

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The Effect of ILO's Declaration on Fundamental Principles and Rights at Work on the Evolution of Legal Policy in Brazil: An Analysis of Freedom of Association

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2009

Abstract

This dissertation analyzes the effects of the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, taking as a case study ILO's promotion of freedom of association in Brazil. It suggests that the 1998 Declaration's promotional approach offers mechanisms that have the capacity to change a country's behaviour. In the case of Brazil, this change would involve reform of a corporatist trade union law that violates the principle of freedom of association. The peculiarities of compliance with the freedom-of-association principle represent a significant challenge to the ILO, especially when a country lacks the political will to comply with the principle. This dissertation shows that the 1998 Declaration provides mechanisms – information, qualification of the bureaucracy and support of independent actors – that can be used in these situations even outside the scope of a cooperation program to reform the law and modify public policy.

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Introduction

In 1998, the ILO approved the Declaration on Fundamental Principles and Rights at Work. The Declaration guarantees as fundamental rights: the abolition of forced labour, the end of discrimination at work, the end of child labour and the freedom of association and collective bargaining. The Declaration also establishes a follow-up mechanism, which includes the reporting of enforcement of reports about those rights and the development of cooperation programs between the ILO and its member states. The Declaration is a non-binding international norm. Instead of creating new obligations for the member states, the ILO chose to emphasize, through the Declaration, that all ILO members have the obligation under the ILO Constitution to respect and promote the fundamental rights.

The adoption of the 1998 Declaration by the ILO was surrounded by an intense debate about its meaning for the international regulation of labour.¹ Besides it being the first time that the ILO used the concept of fundamental rights,² the 1998 Declaration has a promotional character. One conclusion reached in this debate was that the Declaration's ability to improve the guarantee of the fundamental rights by member States would be an essential element to consider in deciding whether the Declaration was an effective normative answer to the challenges faced

¹ The main studies of this debate were the following. Alston, Philip & Heenan, James, "Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?" (Winter / Spring, 2004) 36 N.Y.U. J. Int'l L. & Pol. 221 at 221-264. Langille, Brian. "Core Labour Rights – The True Story (Reply to Alston)" (2005) 16 EJIL 409 at 409-437. Maupain, Francis. "Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights" (2005) 16 EJIL 439.

² It is the first time the ILO adopts a norm namely to guarantee fundamental rights. Even though as Langille and Jerks remark the organization has been protecting basic human rights through its conventions. See Jenks, Wilfred, *Law, Freedom, and Welfare* (London: Stevens; Dobbs Ferry, N.Y.: Oceana, 1963) at 103; Langille, Brian, "Core Labour Rights-The True Story (Reply to Alston)" (2005) 16 EJIL 409 at 424.

by the ILO and its member States.³ Ten years after the adoption of the Declaration, we now have evidence upon which to base a study of its effects. The main objective of this dissertation is to analyze whether the ILO Declaration has been effective in promoting the guarantee of fundamental rights, taking as a case study, the guarantee of one of the fundamental rights, freedom of association, in Brazil.

Brazil's example provides us with a case of a developing country facing the challenges of globalization. Despite recent economic successes, Brazil has been unable to solve some very basic labour problems, which contribute to its social and economic inequality. A prosperous and sustainable future will not be possible if this reality is not changed. Labour law has an important role to play in this matter because it can provide fundamental guarantees to all workers and promote democracy in labour relations.

In order to begin this analysis, one must consider the following aspects of the Brazilian labour scenario. First, the country has ratified 79 of the 188 ILO conventions. Of the eight conventions guaranteeing fundamental rights, only Convention 87 has not yet been ratified. Therefore, there is evidently a political will to cooperate with the ILO. Second, in Brazil – as in most countries – ratification is only the first step in a long process towards effective implementation of these rights. Since 1988, labour rights have been recognized as fundamental rights by the federal constitution, but the level of enforcement is still low and there is inadequate

³ For example, Maupain and Helfer agree that the examination of the Declaration's efficacy is one of the main elements in the debate on its meaning in international labour law. Analysing the follow-up mechanism of the Declaration, Maupain explains, "no meaningful assessment of the value of the follow-up can thus be made without taking account of the concrete impact made by this new approach". Maupain, Francis, "Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights" (2005) 16 EJIL 439 at 446. See also Helfer, Laurence R., "Understanding Change in International Organizations: Globalization and Innovation in the ILO". (2006) 59 Vand. L. Rev. 649 at 711.

recognition of freedom of association. Third, for more than twenty years, there has been an ongoing debate in the country about modernization of labour law. The debate over trade union structure dominates the reform process because of the argument (with which we agree) that in order to create a labour system based on negotiation and dialogue, rather than on direct State intervention, effective representation must precede other reforms. As a result, the debate about labour reform itself has become anachronistic: while new problems derived from economic and technological transformations arise, demanding new answers from labour law, we keep debating a reform of corporatist legal institutions that have no connection to the current problems faced by workers.

Among other problems that the guarantee of freedom of association faces in Brazil, the restrictions imposed by the corporatist legal order constitute the source from where other problems arise. The fact that the corporatist trade unions do not adequately represent workers and the disincentive for workers participation in trade unions that result from the corporatist rules contribute immensely to the lack of culture of negotiation, the lack of trust among the social partners and the persistence of an anti-negotiation posture among employers. In a context like this, the existence of anti-union practices and even violence against workers is no surprise.⁴ Given how essential this problem is to the development of democratic labour relations in Brazil, this dissertation focuses on the effects of the 1998 Declaration in promoting the reforms necessary to change the Brazilian corporatist system.

⁴ See ILO, Committee on Freedom of Association, *Complaint against the Government of Brazil presented by the International Confederation of Free Trade Unions (ICFTU)* Report No. 327, Case(s) No(s). 2156 on a murder of a trade union leader, President of the Sergipe Citriculture Workers' Trade Union, on line: ILO – ILOLEX < <http://www.ilo.org/ilolex/english/casframeE.htm>>. See also International Trade Union Confederation, *Internationally Recognised Core Labour Standards in Brazil*, Report for the WTO General Council Review of the Trade Policies of Brazil (Geneva, 9 -11 March 2009) at 4-5, on line International Trade Union Confederation < <http://www.ituc-csi.org/spip.php?rubrique161>>.

A major challenge for this type of research is to evaluate changes in Brazil's policy and outcomes.⁵ Any research that intends to analyze the effects produced by the adoption of an international norm, such as the Declaration, must address some methodological issues. In his analysis of the ILO, Helfer identifies three methods by which to analyze the Declaration's efficacy: the examination of the formal compatibility between the fundamental conventions and the domestic law, of the real world changes brought about by the Declaration, and of a state's compliance with the convention.⁶ This dissertation will adopt the third method: an analysis of the state's compliance in enforcing the fundamental principles guaranteed by the Declaration. The reasons for this choice are the following.

The first method involves the formal compatibility of the national legal order with the principles guaranteed by the Declaration. The study of formal compatibility of national law with international law is important given the need for national legal information in the field of international and comparative labour law. Notwithstanding this importance, formal compatibility does not offer many elements on which to base a critical analysis of the effects of the Declaration, because the promulgation of a law is only the first – even though very important – step towards the effective guarantee of a right.

⁵ We suggest that we cannot evaluate the effects of the Declaration exclusively on the changes (or lack of changes) occurred in the country. The relation between the ILO technical cooperation projects and domestic changes are not as clear-cut as it might appear. The debate about how institutions change is a complex issue and the international aid is only one element in many other that can justify why institutions change or not. For example, other elements in this debate are cultural, geographic, historical aspects of the country. See T. Cartothers, *Promoting the Rule of Law Abroad: the problem of knowledge* (Washington: Carnegie Endowment for International Peace, 2003).

⁶ Helfer, Laurence R., "Understanding Change in International Organizations: Globalization and Innovation in the ILO". (2006) 59 *Vand. L. Rev.* 649 at 700-701. On the research developed about the ILO since its origin, see Van Daele, Jasmien, "The International Labour Organization (ILO) in Past and Present Research" (2008) 53 *Internationaal Instituut voor Sociale Geschiedenis*. Specifically about the effects of technical cooperation in the national orders, Van Daele explains that a pure legally approach predominated in the 1970s. Van Daele, Jasmien, "The International Labour Organization (ILO) in Past and Present Research" (2008) 53 *Internationaal Instituut voor Sociale Geschiedenis* 485 at 501.

An alternative to pure formal examination⁷ would be to inquire about real world changes⁸ (Helfer's second method) brought on by the Declaration, through interviews, collection of data and development of methods to evaluate the data. This approach has been followed by several important works in the field of international labour regulation, which examine states' compliance with international labour standards and the linkage of these standards with economic performance and trade competitiveness.⁹ These works have contributed to the unveiling of the role of international labour standards protection in countries' development,¹⁰ thus basing the debate more on empirical than on ideological arguments.

Concerning these two methods listed by Helfer, the examination of formal compatibility between the conventions and domestic law leads us to an extremely restricted, but more juridical, analysis, while the analysis of real world changes brought about by the Declaration leads us to a wider examination that requires the use of methods outside of the legal field. However, this dilemma between the two choices is not real, unless a legal analysis only meant a formal

⁷ Or *de jure*. Kucera, D., (ed.), *Qualitative indicators of labour standards: comparative methods and application* (Geneva: ILO; The Netherlands: Springer, 2007) at 2-3.

⁸ Or *de facto*. For example, the analysis in Kucera, D., (ed.), *Qualitative indicators of labour standards: comparative methods and application* (Geneva: ILO; The Netherlands: Springer, 2007). See also Compa, Lance, "Monitoring International Labour standards: assessing assessments: a survey of efforts to measure countries compliance with freedom of association standards", (2003) 24 *Comp. Lab. L. & Pol'y J.* 283 at 283.

⁹ For example, Kucera, David, "Core Labor Standards and Foreign Direct Investment" (2002) 141 *International Labor Review*; Kucera, D. & Sarna, R.; *How Do Trade Union Rights Affect Trade Competitiveness?* (Geneva: Policy Integration Department Statistical Development and Analysis Group International Labour Office, March 2004); Flanagan, Robert J., *Globalization and Labor Conditions: Working Conditions and Worker Rights in a Global Economy* (Oxford, New York: Oxford University Press, 2006); Organization for Economic Co-operation and Development (OECD), *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade* (Paris: OECD, 1996); OECD, *International Trade and Core Labour Standard* (Paris: OECD, 2000); Doumbia-Henry, Cleopatra & Gravel, Eric, "Free Trade Agreements and Labour Rights: Recent developments" (2006) 145 *International Labour Review* 185; Daude, C., *et al*, *Core Labour Standards and Foreign Investment in Latin America and the Caribbean: Does Law Enforcement of Labour Standards Attract Investors?* (Uruguay: Inter-American Development Bank, 16 October 2003), on line: Inter-American Development Bank <<http://www.iadb.org/res/publications/pubfiles/pubS-181.pdf>>.

¹⁰ See Langille, Brian. *What Is International Labour Law For?* (Geneva: International Institute for Labour Studies, 2005) at 18, on line: International Institute for Labour Studies <<http://www.ilo.org/public/english/bureau/inst/download/langille.pdf>>.

compatibility test between the national law and the principles guaranteed by the Declaration. Helfer's third method concerning a state's compliance can make a distinct contribution from a legal perspective to the development of the international regulation of labour.

This third methodological approach is a legal analysis of the Declaration's effects, which uses fundamental principles as paradigms to evaluate the enforcement of domestic law and links this evaluation to the analysis of cooperation programs between the ILO and Brazil. This methodological approach makes good use of the knowledge produced by the two previous approaches – formal knowledge of the law and of the social and economic knowledge of trade union and collective bargaining contexts, as these types of studies contribute to the analysis of a country's compliance. Moreover, it facilitates the study of legal values and specificities of labour conflicts that take part in the process of law enforcement. This approach is not a pure, formal, juridical analysis of the law in the books; it will therefore allow us to identify both the countries' reasons for non-compliance and whether the technical cooperation programs meet the challenges faced by the states.

This analysis will contribute to the debate over the adequacy of the Declaration as an international tool to promote the guarantee of fundamental labour rights. In addition, analysing the specificities of a national context instead of a broader comparative analysis facilitates the comprehension of the challenges faced by the ILO's technical cooperation programs, which were established in the Declaration's follow-up mechanisms.

Using this method, the dissertation will follow two lines of analysis. First, this study will examine Brazil's compliance with the ILO fundamental principles. Second, the dissertation will analyze the Brazil–ILO technical cooperation projects, both specifically designed to promote freedom of association, and others more broadly designed that affect freedom of association. In

addition, “smaller scale activities involving technical assistance and advice, research and training”¹¹ developed by the ILO in Brazil are also considered.

The first part of the study delineates the context within which the 1998 Declaration can be understood: the changes the ILO has been through since its creation, identifying three central moments in the ILO's history (its creation, the approval of the Declaration of Philadelphia and the adoption of the 1998 Declaration). The dissertation examines the Declaration's content and summarizes the debate in the literature about its adoption, focusing on the opposition between an enforcement view on the ILO's activities and a promotional view sought in the 1998 Declaration.

The second part describes the Brazilian corporatist trade union system and identifies the incompatibilities between the corporatist rules and the principle of freedom of association. This part undertakes an examination of the law and court decisions concerning freedom of association. Next, the dissertation analyzes the reasons for Brazil's non-compliance, considering the formal incompatibility between the 1988 Constitution and the Convention 87, and the political economy elements of the Brazilian trade union context.

The third part then uses these analyzes to examine the design and implementation of the technical cooperation programs. Considering the importance of the national context, it poses the following questions: what is the role of the ILO is in promoting changes in this context, and who the ILO's national partners are in promoting changes. The dissertation describes the ILO's cooperation programs involving the promotion of freedom of association that Brazil is a part of

¹¹ ILO – Committee on Technical Cooperation, *Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: Technical cooperation priorities and action plans regarding freedom of association and effective recognition of the right to collective bargaining* (Geneva: ILO, 2008) at 4, on line: ILO <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_099009.pdf>.

and assesses the projects' achievements and limitations. Next, the dissertation describes the ILO–Brazil technical cooperation projects on other three fundamental rights guaranteed by the 1998 Declaration, drawing a portrait of the ILO's activities in the promotion of fundamental rights in the country. Section III.3 analyzes the peculiarities of the principle of freedom of association that can contribute to the difficulties faced by the ILO in promoting this right. The dissertation then proposes that the instruments provided by the 1998 Declaration can overcome these difficulties, facilitating ILO action in order to prepare the country for changes in its trade union system. The conclusion, considering the case study, focuses on the main research question: has the ILO Declaration been effective in promoting fundamental rights?

Chapter 1

The ILO and the Declaration: history, changes and challenges

The 1998 Declaration¹² on Fundamental Principles and Rights at Work exemplifies how the International Labour Organization (ILO) has needed to adapt to new realities throughout its history.¹³ As the British government delegate, M. Tomlinson, remarked about the future of the ILO during the 1944 International Labour Conference, “[t]hroughout its existence it has shown itself capable of adaptation to meet changing circumstances and to satisfy changing needs. . . . It is in fact because of its resilience and vitality that it is desirable to examine its aims and purposes and to restate them in terms appropriate to the needs of the present day”.¹⁴

The origin of the 1998 Declaration also constitutes a story about some of these changes: the ones the ILO have administered in order to adapt itself to the changes that labour have borne since globalization.¹⁵ Therefore, in order to comprehend the relevance of the 1998 Declaration in

¹² The Declaration was approved in the 86th session of the International Labour Conference. The ILO is composed of three organs: the International Labour Conference, the Governing Body and the International Labour Office. The Office is the only permanent organ of the ILO. The Governing Body meets three times a year (March, June and November) and the Conference once a year (June). See Von Potobsky, Geraldo *et al.* *The International Labor Organization: The International Standards System and Basic Human Rights* (Boulder, CO: Westview Press, 1996).

¹³ I agree with Charnovitz when he says that “[t]here is no perfect point in time to begin a survey of recent developments in the ILO. In all organizations, new initiatives reflect, to some extent, those that have gone on before, and this is especially true for the ILO, which was established to address perennial social problems.” Charnovitz, Steven. “The International Labour Organization in its Second Century” in: *Max Planck Yearbook of United Nations Law* 4 (Boston: M. Nijhoff, 2000) at 151. Other recent examples are the campaign for the ratification of the fundamental conventions, the decision to apply Article 33 of the ILO Constitution in Myanmar’s case and, more recently, the approval of the 2008 Declaration on Social Justice for a Fair Globalization on 10 June 2008.

¹⁴ ILO. *Record of Proceedings. International Labour Conference*, 26th Session, Philadelphia, 1944 at 27.

¹⁵ Supiot, Alain. *Crítica del Derecho del Trabajo* (Madrid: Ministerio del Trabajo y Asuntos Sociales, 1996) at 55. As Supiot reminds us “El enigma del trabajo no cesa de resurgir bajo formas nuevas, y de minar la validez de las respuestas imaginadas para resolverlo”. About labour law and globalization, see Bercusson, Brian & Estlund, Cynthia, eds., *Regulating Labour in the Wake of Globalisation – New Challenges, New Institutions* (Oxford: Hart Publishing, 2008).

achieving the ILO's goals, it is essential to analyze some of the central moments in the history of this organization. Through a study of these moments we can draw a picture in which the Declaration does not constitute an isolated initiative of the ILO in response to globalization, but an initiative connected with a history of transformations that affected labour and demanded a response from the ILO. The paper aims to show, as described by Langille, "the ILO as the subject and not the object of change".¹⁶ This Chapter therefore examines the three decisive moments in the ILO's history: its creation in 1919, the adoption of the Declaration of Philadelphia in 1944 and the approval of the 1998 Declaration.

1 The first stage: the formation of the ILO and the use of conventions as universal paradigms

The ILO resulted from almost a century of struggles to defend international labour regulation.¹⁷ Two arguments attempt to justify international labour law: that human labour conditions should be guaranteed to all workers regardless of their nationality and that labour regulation should not affect a country's trade competitiveness.¹⁸ The need to guarantee labour conditions is founded on the value of social justice, and as it affects all workers, it expresses the idea of universality of

¹⁶ Langille, Brian. "Core Labour Rights – The True Story (Reply to Alston)" (2005) 16 EJIL 409 at 420.

¹⁷ See the analysis on the origins of the ILO developed by Gilliard, Edward M. "The International Labor Organization." (1930) 36 AJS 233 at 234; Périgord, P. H. *The International Labor Organization* (New York, London: D. Appleton and Company, 1926) at 23; Follows, J. W. *Antecedents of the International Labour Organization* (Oxford: Clarendon Press, 1951) at 1.

¹⁸ These two arguments are expressed by principles in the Preamble of the ILO constitution. Langille, Brian. "Re-reading the Preamble to the 1919 ILO Constitution in Light of Recent Data on FDI and Worker Rights" (2003) 42 Colum. J. Transnat'l L. 87 at 89.

labour conditions. The guarantee of labour conditions concretizes the ILO's constitutional principle: "Whereas universal and lasting peace can be established only if it is based upon social justice".¹⁹

The second argument is instrumental, considering that universal labour conditions – or at least universal among the industrialized countries – prevents labour from being an element in trade competition among nations.²⁰ In the words of Albert Thomas, the first ILO Director General, "The post-War monetary, financial and economic crises which completely destroyed international equilibrium forced into the background the question of competition based on unequal conditions of labour".²¹ This argument is also present in the Preamble of the ILO Constitution.²²

Although the pioneers who defended the international regulation of labour were motivated by moral reasons,²³ the pragmatic argument also had an important role in facilitating the creation of domestic labour orders. The international recognition of basic labour conditions would allow

¹⁹ ILO, Constitution, Preamble, 1919.

²⁰ According to Langille, the violation of this principles "leads to a collective action problem, specifically a 'race to the bottom' in labor law policy, as other nations are 'forced' to lower their standards to compete in order to attract new, and retain existing, capital investment, jobs, and tax revenues. The result of this race is that all states end up with lower labor standards but with no gain or change in investment because every other state has made the same move". Langille, Brian. "Re-reading the Preamble to the 1919 ILO Constitution in Light of Recent Data on FDI and Worker Rights" (2003) 42 Colum. J. Transnat'l L. 87 at 91.

²¹ Thomas, Albert. "Preface" in ILO. *The International Labour Organisation: The First Decade* (London: Unwin Brothers Ltd., 1931) at 11.

²² According to the Preamble of the ILO Constitution: "Whereas also 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".

²³ Concerning Daniel Legrand, Mahaim explains that "though he conceived of a genuine 'international labor legislation', he was inspired by moral, religious and humanitarian motives. The effects of foreign competition, with which he was acquainted and whose significance he appreciated, were to him of only secondary importance". Mahaim, E. "The Principles of International Labor Legislation". (1933) 166 Annals of the American Academy of Political and Social Science 10 at 11–12.

countries, at least the industrialized ones, to regulate labour in a similar path, avoiding the fear that some countries could acquire a comparative advantage for not regulating labour.²⁴

These two principles – the substantive principle of social justice and the instrumental principle of avoiding labour as an element of comparative advantage – remain central even today to understanding the goals and role of the ILO. All the debates about trade and labour, social dumping and comparative advantage, labour and development revolve around these two principles. The principles justified the internationalisation of labour regulation and the creation of the ILO.

The movement for the international regulation of labour met strong resistance from employers and governments.²⁵ For example, in the case of one of the pioneers in the defense of labour regulation, Robert Owen,²⁶ governments reacted negatively to his 1818 memorial

²⁴ According to Von Potobsky *et al*, “These demands had a humanitarian foundation, but industrialists and governments feared that they would lose out to competitors if they took unilateral protective action, which would raise the costs of production in their own countries. This led to calls for *international* social regulation through which such measures could be adopted simultaneously by many different countries”. Von Potobsky, Geraldo *et al*. *The International Labor Organization: The International Standards System and Basic Human Rights* (Boulder, CO: Westview Press, 1996) at 3.

²⁵ On the other hand, the movement could count on different defenders: workers’ associations, entrepreneurs, intellectuals and governments.

²⁶ “The industrialist Robert Owen was the first to raise the idea of international action, proposing the creation of a Labor Commission in the Holy Alliance Congress in 1818. The initial proposals for international legislation were made by Charles Hindley of England, the Belgian Edouard Ducpétiaux, the Frenchmen J. A. Blanqui, Louis René Villarmé and, above all, the industrialist Daniel Le Grand. Le Grand issued a series of appeals beginning in 1844, and drafted proposals which he sent to various governments in order to ‘protect the working class from early and heavy labor’, and to protect workers from exploitation while preserving the commercial strength of their countries”. Von Potobsky, Geraldo *et al*. *The International Labor Organization: The International Standards System and Basic Human Rights* (Boulder, CO: Westview Press, 1996) at 3. According to Follows, however, the founder of the idea of an international labour law was the Englishman Charles Hindley, member of the parliament from 1835 to 1857. “His suggestion of labour legislation by foreign treaty was based upon the idea that foreign competition might force British factories to operate for longer hours than would be conducive to the well-being of the work-people”. Follows, J. W. *Antecedents of the International Labour Organization* (Oxford: Clarendon Press, 1951) at 10.

presented to the Saint Alliance Congress, which asked countries²⁷ to create norms to protect workers from exploitation and ignorance.²⁸ A Prussian governmental official then argued that governments did not want the prosperity and independence of the masses. How else could governments control them?²⁹

Similarly, in 1890, the first intergovernmental labour conference in Berlin³⁰ was not successful, because states had no intention of adopting any labour treaty on the issues discussed there.³¹ The lack of previous preparation to the conference,³² states' hostility to the ideal of legal interference in the labour market and the secret opposition of Bismarck to the conference contributed to its failure.³³ The Swiss government offered the most advanced proposal: defending the adoption of bilateral and plurilateral treaties, the formation of an organ responsible for centralizing and publishing information and statistics and for organizing new conferences.³⁴ At the end, however, only the German proposal was approved, stating that each state would prepare a report on its domestic conditions.

²⁷ Great Britain, Austria, Prussia and Russia.

²⁸ Owen proposed norms on the prohibition of child labour, reduction of working hours and prohibition of work on Sundays. Gilliard, Edward M. "The International Labor Organization." (1930) 36 n. 2 AJS 233 at 234.

²⁹ Périgord, P. H. *The International Labor Organization* (New York, London: D. Appleton and Company, 1926) at 23.

³⁰ Germany organized the first conference, despite the efforts of the Swiss government, which, in 1881 and 1889, had tried to join the government of different countries in an official meeting to discuss labour issues. Mahaim, E. "The Principles of International Labor Legislation." (1933) 166 *The Annals of the American Academy of Political and Social Science* 10 at 11.

³¹ "With the exception of Germany and Switzerland, most of the states that sent representatives to the Berlin Conference seem to have taken the attitude that they were simply doing Wilhelm II a favour". Follows, J. W. *Antecedents of the International Labour Organization* (Oxford: Clarendon Press, 1951) at 133.

³² For example, each state would propose only what was already regulated by its domestic law.

³³ Bauer, S. "Past Achievements and Future Prospects of International Labour Legislation". (1921) 31 n. 121 *The Economic Journal* at 29.

³⁴ Follows, J. W. *Antecedents of the International Labour Organization* (Oxford: Clarendon Press, 1951) at 138.

The Swiss proposal to form an international labour organ would proceed only in 1900 in Paris during a Labour Law Congress organized by two law professors, Paul Cauws and Raoul Jay.³⁵ Four themes were discussed there: hours of work, night turns, labour inspection and the formation of an association for the legal protection of workers.³⁶ Despite countries not being willing to adopt treaties on these issues, one development was achieved: the formation of the International Association for the Legal Protection of Workers.³⁷ The Association grew very fast, and in 1912 already counted 15 national associations. Because of its political neutrality and its constitution – intellectuals, professors and private associations – it won the support of various governments to the adoption of international labour treaties.³⁸ For instance, the Association proposed the adoption of the two first multilateral international labour law treaties³⁹ and, between 1904 and 1914, 23 bilateral or plurilateral labour treaties were adopted.⁴⁰

³⁵ Valticos, Nicolas. *Traité de Droit du Travail* (Paris: Librairie Dalloz, 1970) at 277. Official and non-official delegations participated in the congress, such as the Netherlands, Russia, United States, Austria, Belgium and Mexico. Lowe, B. E. *The International Protection of Labor; International Labor* (New York: Macmillan, 1935) at 38.

³⁶ Lowe, B. E. *The International Protection of Labor; International Labor* (New York: Macmillan, 1935) at 39.

³⁷ This initiative was preceded by the Brussels congress, in 1897, in which an international association of friends of international law was created. See National Industrial Conference Board. *The International Labor Organization of the League of Nations* (New York: Century, 1922) at 14. According to Lowe: “The creation of an official international office was opposed as conducive to complications under the excessive burden of responsibility which would be imposed by the superintendence of political, industrial and commercial relations of international consequence; but a private office being deemed admissible and desirable, the matter was resolved in this latter sense by providing for the formation of the ‘International Association for the Legal Protection of Labor’”. Lowe, B. E. *The International Protection of Labor; International Labor* (New York: Macmillan, 1935) at 39.

³⁸ Périgord, P. H. *The International Labor Organization* (New York, London: D. Appleton and Company, 1926) at 70.

³⁹ The two first international conventions, dealing with the prohibition of the use of white and yellow phosphorus and the night work of women, were proposed by the Association in a governmental 1906 Conference in Berne. The three Berne Conferences (1905, 1906 and 1913) were important forums to the Association as a space for the debate and adoption of international treaties. Périgord, P. H. *The International Labor Organization* (New York, London: D. Appleton and Company, 1926) at 70.

⁴⁰ For example, the 1904 treaty between Italy and France, guaranteeing to the citizens of both countries social security benefits, establishing the cooperation between the countries in labour issues and declaring the support to the legal protection of labour. National Industrial Conference Board. *The International Labor Organization of the League of Nations* (New York: The Century co, 1922) at 15–16.

Moreover, the Association as a private office preceded the ILO, facilitating the future agreement among states to create an international organization. The two central activities⁴¹ of the Association were research and information to help countries to regulate labour.⁴² When the ILO was created, the Office and its *Bulletin* were incorporated to the ILO structure.⁴³

The organization of international conferences, the formation of the association and the adoption of the first treaties indicated that the problem of exploitation of labour was not confined anymore to the action of a few individuals, but it was visible in the actions and discourses of governments, workers and intellectuals.

Various labor organizations were formed by the labor class; several European countries had witnessed the rise of socialism; and communism was sweeping over Russia.... The American Federation of Labor was carrying on a vigorous campaign in the United States. This body was organized in 1881, and by 1910 it had a membership of over 2.000.000. ... Both national and local efforts were made in all these countries to deal with the situation. Hostilities had broken out between labor and capital. Newspapers were published and books were written against the unjust distribution of wealth, labor was maintaining that it should get

⁴¹ Among the objectives of the Association were the following goals: “to serve as a bond of union to all who believe in the necessity for labor legislation; to organize an international labor office; to facilitate the study of labor legislation in all countries and to provide information on the subject; to promote international agreements on questions relating to conditions of labor”. Périgord, P. H. *The International Labor Organization* (New York, London: D. Appleton and Company, 1926) at 66.

⁴² As Valticos explains: “Part of the mandate of these new bodies was to conduct extensive research into certain subjects so as to provide a solid foundation for the formulation of regulations that governments could then subscribe to. One of the forms this activity took was the publication by the International Labour Office of a *Bulletin* containing the texts of the most important laws promulgated in the various countries”. (Free translation) Valticos, Nicolas. *Traité de Droit du Travail* (Paris: Librairie Dalloz, 1970) at 277.

⁴³ Only the title of the Bulletin changed to Legislative Series. Périgord, P. H. *The International Labor Organization* (New York, London: D. Appleton and Company, 1926) at 67.

a larger share of the products of its toil, strikes and lockouts were resorted to with more or less disastrous effects on the general public, and various governments were giving attention to the situation with diplomatic emphasis.⁴⁴

The scenario described by Gilliard was the social-political environment when the First World War started. According to Von Potobsky, Bartolomei de La Cruz and Swepston, during the war the inhuman labour conditions became even more evident, which intensified the trade union's movement for an international regulation of labour:

trade union organizations from several countries, both belligerents and neutrals, met in a number of conferences and congresses and agreed that a mechanism for international legislation should be created, and that clauses guaranteeing certain fundamental rights for workers should be included in the Peace Treaty.⁴⁵

The trade unions held congresses and prepared their proposals to a peace conference that would occur supposedly after the end of the war. For instance, during the Leeds Congress in 1916, a series of principles proposed by the American Federation of Labor was approved to as a proposal to be presented in the peace conference. Many of these principles were adopted by the Part XIII of the Versailles Treaty.⁴⁶ The Leeds Congress approved the following resolution:

The Conference declares that the treaty of peace which will end the present war and which will give to peoples freedom, political and economic independence, must also place beyond the reach of capitalistic international competition and

⁴⁴ Gilliard, Edward M. "The International Labor Organization." (1930) 36 n. 2 AJS 233 at 234.

⁴⁵ Von Potobsky, Geraldo *et al.* *The International Labor Organization: The International Standards System and Basic Human Rights* (Boulder, CO: Westview Press, 1996) at 4.

⁴⁶ Périgord, P. H. *The International Labor Organization* (New York, London: D. Appleton and Company, 1926) at 77.

secure for the workers of all countries a minimum of moral and material guarantees regarding the right to work, the right to organize, regulation of imported labor, social insurances, hours of work, the health and safety of the workers.⁴⁷

During the Peace Conference in Paris, a Commission on International Labour Legislation was created with the goal of preparing a proposal to be included in the Peace Treaty. The inclusion of international labour law in the peace Conference resulted from a confluence of factors that made that moment politically ideal to an international agreement on labour, as Périgord explains:

It is no doubt this persistent agitation, the desire of many employers for economic peace and recovery, the newly acquired political influence of Labor, the very real fear, then, of the spread of Bolshevism to restless and disorganized sections of Europe, coupled with the prestige of President Wilson, clearly in sympathy with the masses, which brought about the immediate and unexpected appointment of a commission to report on the question of international legislation.⁴⁸

The commission was tripartite, and constituted by representatives from the United States, United Kingdom, France, Italy, Japan, Belgium, Cuba, Poland and Czechoslovakia. The president of the American Federation of Labour, Samuel Gompers, was the president of the commission. After 35 meetings, a Labour Charter was finalized and submitted to the Conference,

⁴⁷ United States Bureau of Labor, Bulletin N. 254, p. 123. *Apud* Périgord, P. H. *The International Labor Organization* (New York, London: D. Appleton and Company, 1926) at 78.

⁴⁸ Périgord, P. H. *The International Labor Organization* (New York, London: D. Appleton and Company, 1926) at 82.

recommending the creation of the ILO and establishing the fundamental principles of international labour law. The Charter was approved in the 4th Plenary Session of the Peace Conference, on 11 April 1919, and became Part XIII of the Versailles Treaty (Articles 387–427). The ILO was created in 1919 by the Treaty of Versailles, as the international organization responsible for the promotion of social justice.⁴⁹ In October of 1919, the first International Labour Conference was held in Washington.⁵⁰ At this point, the first stage of ILO's history begins.

During this period from 1919 to the Second World War, the ILO's main mission was to help the member States to systemize their national labour legislation. Since labour law inaugurated the specific regulation of a part of our life – work –⁵¹ many different types of labour problems were waiting for a legal response, and there were no parameters of what would be the fair legal response. The ILO conventions performed then as paradigms of what should be fair concerning labour. The first ILO conventions⁵² approved in 1919 exemplified this mission, as

⁴⁹ Part XIII, Versailles Treaty, 28 June 1919.

⁵⁰ See Versailles Treaty Annex. First Meeting of Annual Labour conference, 1919. It was then decided to establish the headquarters of the ILO in Geneva and the first ILO general director was elected: Albert Thomas, a French minister during the First World War. Concerning the choice of Geneva as the headquarters, Follows considers that “Destiny performed an act of poetic justice in selecting the shore of Lake Geneva for the International Labor Office. Not only was Daniel Legrand, the most ardent advocate of international labour protection, a native Swiss, but the Swiss Government itself was the first to call a conference of industrial states for the purpose of settling the labour question internationally”. Follows, J. W. *Antecedents of the International Labour Organization* (Oxford: Clarendon Press, 1951) at 97. The United States (USA) hosted the first Conference, but decided not to join the ILO or to sign the Versailles Treaty. Thus, no official American delegation was sent to the Conference. The Conference invited North-American workers and employers to send their delegates. The USA became a member in 1934. Lowe, B. E. *The International Protection of Labor; International Labor* (New York: Macmillan, 1935) at xxxviii.

⁵¹ Langille, Brian. *What Is International Labour Law For?* (Geneva: International Institute for Labour Studies, 2005) at 5–6, on line: International Institute for Labour Studies
<<http://www.ilo.org/public/english/bureau/inst/download/langille.pdf>>.

⁵² The conventions were the following: C1 Hours of Work (Industry) Convention, 1919; C2 Unemployment Convention, 1919; C3 Maternity Protection Convention, 1919; C4 Night Work (Women) Convention, 1919; C5 Minimum Age (Industry) Convention, 1919; C6 Night Work of Young Persons (Industry) Convention, 1919.

they mainly deal with basic labour conditions, such as minimal age for work,⁵³ hours of work, compensation and protection against unemployment.⁵⁴

This paradigm function is not conditioned by the ratification of the conventions, since the mere adoption of a treaty defining a labour condition can influence national legislators independently of the ratification.⁵⁵ These conventions represented a shared understanding of what was right. Since ratification may not always occur, even though the convention served as a paradigm, the effect of the conventions on national legislations was hard to measure. Nevertheless, labour conditions have improved since the first pioneer movements defending legal protection (international and national) of labour in the late 18th century. Likewise, since they were derived, labour laws have had their international dimension institutionalized and regulated through the creation of the ILO in 1919. Thus, international labour law has contributed to the successful story of the transformation of the proletariat into employees. The ILO

⁵³ Concerning the two conventions on prohibition of child labour (C5 Minimum Age – Industry and C6 Night Work of Young Persons – Industry), the ILO treaties were a model not only to national legislations, but also to the future human rights movement. According to Charnovitz, “The example of the ILO was an important inspiration to the human rights movement. At its first meeting in 1919, the ILO approved two conventions on child labor, thereby showing that more broadly conceived human rights treaties were possible. According to René Cassin, principal author of the Universal Declaration of Human Rights, the Constitution of the ILO demonstrated that fundamental individual freedoms could be given a contractual foundation among states”. Charnovitz, Steven. "The International Labour Organization in its Second Century" at 2 on line: Selected Publications of Steve Charnovitz <<http://www.geocities.com/charnovitz/pub.htm>>.

⁵⁴ According to Donoso Rubio, from 1919 to 1939, the “ILO had adopted 67 conventions and 66 recommendations. As intended by the framers of the ILO, these instruments dealt with the most urgent aspects of working conditions and employment such as hours of work and control of working conditions for women and children”. Donoso Rubio & Ignacio A. “Economic Limits on International Regulation: A case Study of ILO Standard-setting”. (1998) 24 *Queen's Law Journal* 189 at 198.

⁵⁵ For example, the regulation of paid vacation in Brazil and the of women’s work follow conditions defined in ILO conventions even before the country ratified the conventions.

conventions have performed the role of universal paradigms of what is fair in labour, helping to build the values that now characterize labour laws in all countries.⁵⁶

Even though not the whole world enjoys the same standards as in Europe, universality is one of ILO's principles.⁵⁷ Besides, since its inception, the ILO has had a diverse membership. From the 44 members in 1919, 26 were neither European nor industrialized.⁵⁸ Moreover, even if we consider the working conditions of only European workers at the beginning of the last century, we can still notice the revolution brought about by labour law and international labour law.⁵⁹

⁵⁶ Analyzing the normative work of the ILO Conventions and its importance, Drake remarks "It may be that continued exposure to international labour standards, the moral sanction of the world community and the tripartite structure of the ILO will ultimately allow some systemic transformation of the international legal environment to take place so that the awareness of a shared humanity comes to replace the arid dialogues of power politics. If no such effective international order is established, demographic and other problems may well be solved by the traditional method – war". Drake, C.D., "ILO. The First Fifty Years" (6 Nov. 1969) 32 *The Modern Law Review* 664 at 667.

⁵⁷ The strategy of the ILO concerning "the automatic membership in the ILO of Members of the League who would otherwise have taken at that time little or no interest in ILO affairs, and the possibility of membership in the ILO of states which were not Members of the League, were major factors in the progress of the ILO towards universality during the inter-war years". Jenks, C. W. *Universality and Ideology in the ILO* (Geneva: ILO, 1969), on line ILO <www.ilo.org/public/libdoc/ilo/1969/69B09_150_engl.pdf>.

⁵⁸ The original members states were Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Cuba, Czech Republic, Denmark, El Salvador, France, Germany, Greece, Guatemala, Haiti, Honduras, India, Iran, Italy, Japan, Liberia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, South Africa, Spain, Sweden, Switzerland, Thailand, United Kingdom, Uruguay and Venezuela. ILOLEX. Database of international labour standards on line: ILOLEX <<http://www.ilo.org/ilolex/english/mstatese.htm>>.

⁵⁹ Analyzing the work conditions of European workers, Jay considers that "El obrero tiene el derecho de vivir, pero no entendemos por tal sólo, el derecho á no morirse de hambre, sino también el derecho á tener una *vida humana*. Y ocurre, que las condiciones del trabajo que el obrero está obligado á aceptar, son tales, que debe renunciar á tener esa *vida humana*. ...¿No es evidente que en casos tales, la justicia social exigirá imperiosamente la intervención dela ley?" Jay, Raúl. *La Protección Legal De Los Trabajadores* (Madrid: Revista de Legislación y Jurisprudencia 1900) at 8.

2 The second stage: Declaration of Philadelphia and the expansion of the ILO

The second stage in ILO's history begins with the Second World War and the changes in the international, political and economic scenarios.⁶⁰ These changes motivated the adoption of the Declaration of Philadelphia in 1944.⁶¹ Indeed, the future of the ILO was the first item in the agenda of the International Labour Conference held in Philadelphia. M. Goodrich, chairman of the Governing Body, explained the future of the ILO at the opening of the Conference: "In its essential terms, the challenge to this Conference is to fit the Organisation for the tasks that it must perform in a world very different from that of 1919".⁶²

The Declaration of Philadelphia reaffirms the constitutional ILO principles⁶³ and expands the role of the ILO beyond the limits of employment conditions and normative work.⁶⁴ As a

⁶⁰ The transformation of the international scenario is symbolized by the end of the League of Nations and the creation of the United Nations (UN) system. As Drake points out, the ILO "has evinced a remarkable gift for survival in the face of catastrophes such as the collapse of the League itself and, with it, the failure of collective solidarity which in turn led to the Second World War". Drake, C.D. "ILO. The First Fifty Years" (6 Nov. 1969) 32 *The Modern Law Review* 664 at 664. While the political transformations involved the Cold War, the independence of the ex-European colonies, and the movement against the apartheid regime; the economic transformations are marked by the end of the great depression.

⁶¹ On the debates concerning the approval of the Declaration, see Lee, E. "The Declaration of Philadelphia: Retrospect and Prospect" (1994) 133 *International Labour Review* 467 at 474–478. When the Second World War was declared, the ILO headquarters was moved from Geneva to McGill University in Montreal.

⁶² ILO. *Record of Proceedings. International Labour Conference*, 26th Session, Philadelphia, 1944 at 7.

⁶³ The principles that labour is not a commodity, that freedom of expression and of association are essential to sustained progress, that poverty anywhere constitutes a danger to prosperity everywhere and that all human beings, irrespective of race, creed or sex have the right to pursue both their material well being and their spiritual development in conditions of freedom and dignity, of economic security and of equal opportunity. ILO. Preamble of the Declaration of Philadelphia.

⁶⁴ In the 1941 Atlantic Charter, signed by Winston Churchill and Franklin Roosevelt, this intent is made very clear: "securing for all (countries and peoples), improved labor standards, economic advancement, and social security (as well as) freedom from fear or want". See "Resolution endorsing the Atlantic Charter". ILO. 25 *Official Bulletin* April 1944.

result, the ILO broadened its activities from employment conditions to issues related to the function of the labour market, such as employment policies, informality, work productivity, migration, social security, housing, maternity protection, child welfare, etc;⁶⁵ and from pure labour legislation to economic and social policies.⁶⁶

Additionally, as the expansion in the role of the ILO demanded new forms of action, specifically concerning the design and implementation of social policies,⁶⁷ the ILO started to focus on technical cooperation along with its standards setting activities. The Declaration of Philadelphia intended to change the focus from a “‘legislative’ standards-setting function to informational and operational activities, the latter comprising the use of UN funds as well as ILO funds”.⁶⁸ The focus on technical cooperation was not approved without opposition. According to Lee, there was a fear among workers’ delegates that technical cooperation activities would prevail over the standards-setting work of the ILO, and that this shift would be supported by the

⁶⁵ Declaration of Philadelphia, Article III. For example, the 82 Convention on Social Policy, 1964; 110 Convention concerning Employment of Plantation Workers, 1958; 117 Social Policy (Basic Aims and Standards) Convention, 1962; 122 Employment Policy Convention, 1964. The World Employment Programme constituted another example (See Drake, C.D., “ILO. The First Fifty Years” (6 Nov. 1969) 32 *The Modern Law Review* 664 at 666). See Lee, E. “The Declaration of Philadelphia: Retrospect and Prospect” (1994) 133 *International Labour Review* 467 at 480. Donoso Rubio & Ignacio A. “Economic Limits on International Regulation: A case Study of ILO Standard-setting”. (1998) 24 *Queen's Law Journal* 189 at 205–206.

⁶⁶ “The mass unemployment and poverty which emerged during the Great Depression starting in 1929 was a dramatic illustration of the pervasive impact that economic policies could have on labour conditions and, consequently, of the limitations of labour legislation as the sole means of action.” Lee, E. “The Declaration of Philadelphia: Retrospect and Prospect” (1994) 133 *International Labour Review* 467 at 468 & 470. This new approach is shown in the adoption of conventions, such as the 122 Convention on employment policy and the 142 convention on human resources development.

⁶⁷ Lee, E. “The Declaration of Philadelphia: Retrospect and Prospect” (1994) 133 *International Labour Review* 467 at 479.

⁶⁸ Drake, C.D., “ILO. The First Fifty Years” (6 Nov. 1969) 32 *The Modern Law Review* 664 at 665. Connected with the adoption of the Universal Declaration of Human Rights, the United Nations started a programme of technical assistance and cooperation. See Landy, E. “Shaping a Dynamic ILO System of Regular Supervision: The Valticos Years” in Javillier, Jean-Claude & Gernigon, Bernard, orgs. *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos* (Genève: Bureau du Travail, 2004) at 12; and Simpson, W. “Standard-setting and Supervision: A System in Difficulty” in Javillier, Jean-Claude & Gernigon, Bernard, orgs. *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*

Employers' Group.⁶⁹ At the end, technical cooperation was approved not as a substitute for the standards setting function and as the “only way in which to make a reality of the standards the Organization was setting through Conventions”.⁷⁰

This debate is similar to the debate concerning the focus on technical cooperation brought by the 1998 Declaration, even though the two declarations are different in its content: while the Declaration of Philadelphia introduced something new in expanding the role of the ILO from employment conditions to social and economic policies related to the labour market; the 1998 Declaration refocused the activities of the ILO, targeting the four fundamental rights, yet linked to a new concept of decent work.⁷¹ Moreover, the Declaration of Philadelphia was approved in the context of post great depression and the Second World War, but it was applied during the period of splendour of the welfare state; the 1998 Declaration was approved in a not so labour-friendly context.

Another important concern of the Declaration was to establish the cooperation of the ILO with other international organizations. As Stafford remarks “In 1944, the I.L.O. was the one surviving active international organisation; in 1953, it is one of several”.⁷² Of especial interest to

(Genève: Bureau du Travail, 2004) at 59–61.

⁶⁹ Lee, E. “The Declaration of Philadelphia: Retrospect and Prospect” (1994) 133 *International Labour Review* 467 at 479.

⁷⁰ Lee, E. “The Declaration of Philadelphia: Retrospect and Prospect” (1994) 133 *International Labour Review* 467 at 479.

⁷¹ According to Donoso Rubio, the “ILO appears to be moving away from advocating the expansive goals defined in great detail in post Second World War social policy conventions. Instead, since the early 1990s, the ILO has recommitted itself to its original purpose and refocused its operations on protecting fundamental labour rights”. Donoso Rubio & Ignacio A. “Economic Limits on International Regulation: A case Study of ILO Standard-setting”. (1998) 24 *Queen's Law Journal* 189 at 191.

⁷² “The I.L.O. has, therefore, had to align its own post-war programme with those of other organisations and to

the ILO were the new economic organizations, the Bretton Woods institutions,⁷³ since one of the principles expressed by the Declaration delineated the ILO as the international organization responsible for guaranteeing social justice in the light of national and international economic and financial policies.⁷⁴ The idea was of cooperation among the international organizations in a way that economic and financial issues – including international trade – would be linked to labour issues, as was stated in chapter II of the Havana Charter, which constituted the International Trade Organization (ITO), dedicated to the matter of economic activity and employment.⁷⁵ This cooperation was explained by the US governmental delegate, Miss Perkins, during the 1944 Conference:

whenever international economic arrangements are being consummated, whether it be a matter of international loans, or the redistribution of shipping, or an agreement with reference to air transport, the negotiations

shape its activity in order to contribute effectively to the accomplishment of the objectives of the United Nations as a whole”. Stafford, B. “The International Labour Organisation – Its Origins and Story” in (Part I, 1952/1953) XXIX Journal of the Statistical and Social Inquiry Society of Ireland 109 at 119.

⁷³ The International Trade Organization, the World Bank and the International Monetary Fund (IMF).

⁷⁴ According to the Declaration of Philadelphia, Article II: “*c*) 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 insofar as they may be held to promote and not to hinder the achievement of this fundamental objective; *d*) it is a responsibility of the International Labour Organization to examine and consider all international economic and financial policies and measures in the light of this fundamental objective; *e*) in discharging the tasks entrusted to it the International Labour Organization, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate”. See Lee, E. “The Declaration of Philadelphia: Retrospect and Prospect” (1994) 133 International Labour Review 467 at 468.

⁷⁵ Havana Charter, 1948. Its article 7 included the cooperation between the ILO and the ITO, declaring that: “The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have common interest in the achievement and maintenance of fair labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labor 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”.

should bear constantly in mind the possibility of utilizing those negotiations and instruments as a means of improving labour standards, and the ILO should be in a position to make appropriate suggestion to these other bodies.⁷⁶

Unfortunately, this was not how it happened. The ITO never was constituted, since the Havana Charter never achieved the minimum number of ratifications; and the General Agreement on Tariffs and Trade (GATT) did not foresee any collaboration with the ILO, nor a linkage between international trade principles and social justice.⁷⁷ Moreover, the ILO acted in isolation from the economic organizations within the UN system, as became evident by the perspective growing hostile to labour protection cultivated by these organizations, specifically the World Bank and the IMF.⁷⁸

The ILO isolation in the UN system, however, did not prevent the organization from achieving some of its goals concerning social progress. For that the ILO counted with the

⁷⁶ ILO. *Record of Proceedings. International Labour Conference*, 26th Session, Philadelphia, 1944 at 24. Nonetheless, the US workers' delegate, M. Watt, did not agree with this view: "I think we must avoid making everyone's business our concern. If our efforts are spread over too wide an area of interest, our effectiveness would be like to become quite remote". ILO. *Record of Proceedings. International Labour Conference*, 26th Session, Philadelphia, 1944 at 39.

⁷⁷ On the change of views from the ITO to the GATT, Wilkinson points out that: "the failure of the ITO to emerge triumphant from a politically fraught ratification process sealed the fate of an institutionalized linkage between trade regulation, full employment and fair labor standards... Only the GATT's retention of the aim of promoting full employment in its preamble betrayed something of the relationship its more elaborate relative was intended to encompass". Wilkinson, R. "The WTO in Crisis. Exploring the Dimension of Institutional Inertia" (2001) 35 *Journal of World Trade* 397 at 408.

⁷⁸ See Stiglitz, Joseph E., *Globalization and its Discontents* (New York: Norton, 2002) at 13. See also Haworth, N. *et al.* "The International Labour Standards Regime: A Case Study in Global Regulation" (2005) 37 *Environment and Planning* at 1943

member States as partners.⁷⁹ At least from the end of the Second World War until the petrol crises in the 1970s (1973 and 1979), in different degrees, states were protecting labour.⁸⁰

In the last two decades of the last century, this balance achieved by the ILO shifted.⁸¹ Since then, the intensification of economic globalization has delineated new international and national contexts to labour relations, in which new technologies, productive decentralization, trade policies, and migration processes have become essential questions about the way to achieve the guarantee of humane conditions of work.⁸² In this new context, the ILO system has been criticized for the lack of enforcement of its treaties.⁸³ Critics say that the ILO has no *teeth* since it has no power to impose its norms, and states have no will to guarantee international labour standards and instead only create benefit for themselves from the economic opportunities in the global market.⁸⁴ These are the changes that ended the second era in the ILO history and began the third and present one, within which the 1998 Declaration was adopted.

⁷⁹ See Trubek, David M. *et al.* “Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks” (2000) 25 n. 4 *Law and Social Inquiry* 1187 at 1190.

⁸⁰ This period called “the golden age” of capitalism is described by Dahrendorf as the period when it has been possible to combine within the limits of the state – the welfare state – economic development, social cohesion and political freedom. See Dahrendorf, R., *Quadrare il cerchio. Benessere economico, coesione sociale e libertà politica*, 4^a ed. (Bari: Laterza, 1995). See also Lee, E. “The Declaration of Philadelphia: Retrospect and Prospect” (1994) 133 *International Labour Review* 467 at 481.

⁸¹ As Lee explains: “The shift in intellectual climate and policy thinking posed a severe challenge to the central tenets of the Declaration of Philadelphia”. Lee, E. “The Declaration of Philadelphia: Retrospect and Prospect” (1994) 133 *International Labour Review* 467 at 482.

⁸² See Donoso Rubio & Ignacio A. “Economic Limits on International Regulation: A case Study of ILO Standard-setting”. (1998) 24 *Queen's Law Journal* 189 at 190–19. Recent studies on labour and globalization include: Flanagan, Robert J., *Globalization and Labor Conditions: Working Conditions and Worker Rights in a Global Economy* (Oxford, New York: Oxford University Press, 2006); and Craig, J. & Lynk, M., *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006).

⁸³ Other criticisms concern “the unmanageable number of instruments (the ILO) had produced, for producing conventions which were inflexible and for failing to take into account the economic implications of its conventions once integrated into domestic legislation”. Donoso Rubio & Ignacio A. “Economic Limits on International Regulation: A case Study of ILO Standard-setting”. (1998) 24 *Queen's Law Journal* 189 at 207–208.

⁸⁴ Collingsworth, Terry, “International Worker Rights Enforcement” in Compa, Lance A. & Diamond, Stephen F., eds., *Human Rights, Labor Rights, and International Trade* (Philadelphia : University of Pennsylvania Press, 1996)

3 The third stage: The 1998 ILO Declaration

Since the 1970s,⁸⁵ the ILO had been evaluating its standards-setting activities. According to Donoso Rubio, three criticisms of the functioning of the organization's law provoked this process: the excessive number of conventions, the lack of flexibility of very detailed conventions and the non-consideration of the domestic economic effects of the ratification of the conventions by member states.⁸⁶

An outcome of this process came in 1994 with the report of the Director General, M. Michel Hansenne, to the 81st Session of the International Labour Conference, "Defending Values, Promoting Change: Social Justice in a Global Economy – An Agenda for the ILO".⁸⁷ In the Report, the Director General identified the end of the cold war and economic globalization as the events that had "rocked, if not the very foundations of our Organization, then at least its most

at 229–233. According to Helfer, "A principal reason for the ILO's inconspicuous profile is a widely held perception that the organization is powerless to combat the workplace abuses that globalization can engender". Helfer, Laurence R., "Understanding Change in International Organizations: Globalization and Innovation in the ILO" (2006) 59 Vand. L. Rev. 649 at 652.

⁸⁵ See Donoso Rubio & Ignacio A. "Economic Limits on International Regulation: A case Study of ILO Standard-setting". (1998) 24 Queen's Law Journal 189 at 221–224.

⁸⁶ See Donoso Rubio & Ignacio A. "Economic Limits on International Regulation: A case Study of ILO Standard-setting". (1998) 24 Queen's Law Journal 189 at 221–224.

⁸⁷ Report of the Director General to the 81st Session of the International Labour Conference, *Defending Values, Promoting Change: Social Justice in a Global Economy – An Agenda for the ILO* (Geneva: International Labour Office, 1994).

tried and tested methods of work”.⁸⁸ The decrease in the number of ratifications, the growing numbers of countries that approved new instrument, but did not ratify them and the significant number of conventions not pertinent anymore were among the problems referred to by the report.⁸⁹ In this context, the report proposed that the organization should create new ways to promote basic social rights,⁹⁰ asking whether the ILO could “improve compliance with our basic standards by somehow changing the underlying philosophy of our supervisory system?”⁹¹ As a result, the report initiated a debate that “helped to re-focus ILO operations around the protection of basic labour rights”.⁹²

Two other events also delineate the context, within which the ILO would advance the report’s proposal. The first was the World Summit for Social Development in 1995.⁹³ The Copenhagen Declaration on Social Development expressed the commitment among the states for

⁸⁸ Report of the Director General to the 81st Session of the International Labour Conference, *Defending Values, Promoting Change: Social Justice in a Global Economy – An Agenda for the ILO* (Geneva: International Labour Office, 1994) at 3.

⁸⁹ Report of the Director General to the 81st Session of the International Labour Conference, *Defending Values, Promoting Change: Social Justice in a Global Economy – An Agenda for the ILO* (Geneva: International Labour Office, 1994) at 43–45.

⁹⁰ Report of the Director General to the 81st Session of the International Labour Conference, *Defending Values, Promoting Change: Social Justice in a Global Economy – An Agenda for the ILO* (Geneva: International Labour Office, 1994) at 42. According to the Director-General, there were seven conventions expressing these rights: C. 87 and C. 98 (freedom of association and collective bargain), C. 1100 and 11 (non-discrimination at work), C. 29 and 105 (prohibition of forced labour), and C. 138 (prohibition of child labour).

⁹¹ Report of the Director General to the 81st Session of the International Labour Conference, *Defending Values, Promoting Change: Social Justice in a Global Economy – An Agenda for the ILO* (Geneva: International Labour Office, 1994) at 51.

⁹² Donoso Rubio & Ignacio A. “Economic Limits on International Regulation: A case Study of ILO Standard-setting”. (1998) 24 *Queen's Law Journal* 189 at 227.

⁹³ The Copenhagen Declaration on Social Development, Commitment 3: “Pursue the goal of ensuring quality jobs, and safeguard the basic rights and interests of workers and to this end, freely promote respect for relevant International Labour Organization conventions, including those on the prohibition of forced and child labour, the freedom of association, the right to organize and bargain collectively, and the principle of non-discrimination”. See Swepston, Lee, “Closing the Gap between International Law and U.S. Labor Law” in Gross, J., ed., *Workers’ Rights as Human Rights* (Ithaca: Cornell University Press, 2003) at 58.

the promotion of basic labour rights, naming explicitly the prohibition of forced labour, of child labour and the rights of freedom of association, collective bargaining and equality at work as basic labour rights. The second event was the WTO Singapore Conference in 1996. In the context of the debate on a trade and labour linkage, the opposition against a social clause⁹⁴ during the conference avoided the progress of this debate in the WTO. As a result, in the WTO Singapore Declaration, the member States reaffirmed the role of the ILO as the “the competent body to set and deal with” internationally recognized core labour standards.⁹⁵

Even though the WTO Singapore Declaration also meant that countries were not willing to attribute any trade sanctions to labour violations, the 1997 Report of the Director General to the International Labour Conference, tries to benefit from this political momentum.⁹⁶ The Report

⁹⁴ Developing countries, including Brazil, argue that a social clause would constitute a dissimulated protectionist measure. According to Salazar-Xirinachs and Martinez-Piva, “Most Latin American and Caribbean (LAC) countries are quite willing to cooperate on labor issues globally in the context of the International Labor Organization (ILO), and hemispherically in the context of the Labor Initiative in the Inter-American system, but are generally opposed to linking trade and labor issues in the WTO and in bilateral or regional Free Trade Agreements, particularly under any approach involving trade restrictions or sanctions”. Salazar-Xirinachs, J. M. & Martinez-Piva, J. M., “Trade, Labor Standards and Global Governance: a perspective from the Americas” in Griller, Stefan, ed., *International Economic Governance and Non-Economic Concerns: Economic Law Facing new Challenges* (Vienna/New York: Springer, 2002) at 327.

⁹⁵ WTO Singapore Ministerial Declaration: “4. We renew our commitment to the observance of internationally recognized core labor standards. The International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration”. In relation to the cooperation between the ILO and the WTO, Wilkinson argues that: “As empirical evidence has shown, and in stark contrast to the model of institutional co-operation advocated by the ITO, neither is there co-operations between the two bodies, nor is there a legal foundation for such co-operation”. Wilkinson, R. “The WTO in Crisis. Exploring the Dimension of Institutional Inertia” (2001) 35 *Journal of World Trade* 397 at 411. Nevertheless, in 2007, the two organizations published a joint study: ILO & WTO, *Trade and Employment. Challenges for Policy Research* (Switzerland: WTO Secretariat, 2007).

⁹⁶ As the report remarks: “[T]he many flattering references made recently to ILO standard setting ... have clearly shown us the extent of the renewed expectations and hopes placed in this aspect of our work and, consequently, our historic responsibility to act without delay so as not to fall short of these expectations”. Report of the Director General to the 85th Session of the International Labour Conference, *The ILO, Standard Setting and Globalization* (Geneva: International Labour Office, 1997) at 2–3 and at 8. For an analysis of what this moment meant to the

goes beyond the use of the article 19.5. e) of the ILO Constitution⁹⁷ to core labour standards, and questions whether “even in the absence of ratification of the relevant Conventions, all member States, *by virtue of their acceptance of the Constitution, and the objectives and principles of the ILO*, are not bound to a minimum of obligations with respect to fundamental rights”.⁹⁸ From this question, the idea of a declaration that would “express and clarify” this new focus on fundamental rights was proposed to be part of the 1998 International Labour Conference’s agenda.⁹⁹

During that one year, the Office and the Governing Body held discussions about the viability, necessity and design of such of a declaration. A series of questions about the possible declaration were then debated, such as, “Why a Declaration?”, “Which fundamental rights?”, “What follow-up?”, “By which bodies?”.¹⁰⁰ These questions will be analyzed in the sections bellow. In its meeting of November 2007, the Governing Body decided to include the adoption

relevance of the ILO as an international player, see Langille, Brian, “The ILO and the New Economy: Recent Developments” (1999) 5 *Int’l J. Comp. Lab. L & Ind. Rels.* 229 at 229–257. Langille also presents (p. 243) an analysis of the Director-General’s efforts to turn this negative political moment (the refusal of attributing any trade sanctions to labour violations) into a positive moment for the ILO.

⁹⁷ After its 1994 Report, the Director General initiated a process by which member states that had ratified the fundamental conventions had to send a report to the ILO explaining “the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention” ILO Constitution, Article 19.5 e). As remarked by Langille, “This ‘1995 Initiative’ of the Director-General bore some fruit in terms of ratification of the core Convention. In his June 1998 report to the Conference, the Director-General was able to report 77 additional ratifications of the various instruments by the end of the 1997”. Langille, Brian, “The ILO and the New Economy: Recent Developments” (1999) 5 *Int’l J. Comp. Lab. L & Ind. Rels.* 229 at 239.

⁹⁸ Report of the Director General to the 85th Session of the International Labour Conference, *The ILO, Standard Setting and Globalization* (Geneva: International Labour Office, 1997) at 8.

⁹⁹ Report of the Director General to the 85th Session of the International Labour Conference, *The ILO, Standard Setting and Globalization* (Geneva: International Labour Office, 1997) at 9.

¹⁰⁰ Governing Body *Follow-up on the discussion of the Report of the Director-General to the 85th Session (1997) of the International Labour Conference* (Geneva: ILO, November 1997) at paragraph 2.

of a declaration on fundamental rights in the agenda of the Conference.¹⁰¹ The Declaration was approved by the Conference¹⁰² after two weeks of intense debate in the Committee on the Declaration of Principles.¹⁰³

The Preamble of the 1998 Declaration recalls the ILO constitutional principle of social justice and contextualizes the organization within the reality brought by globalization, expressing that: “Whereas economic growth is essential but not sufficient to ensure equity, social progress and the eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions”.¹⁰⁴ The body of the 1998 Declaration is divided in two parts: a substantive one and a procedural one.

The first part proclaims the obligation of all members to respect the principles concerning fundamental rights, irrespective of their having ratified or not the fundamental convention. The fundamental rights declared are: “freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation”.¹⁰⁵ In addition, the 1998 Declaration expresses the ILO’s obligation to assist countries to respect the fundamental rights through “technical cooperation

¹⁰¹ *Governing Body Follow-up on the discussion of the Report of the Director-General to the 85th Session (1997) of the International Labour Conference* (Geneva: ILO, November 1997) at paragraph 2.

¹⁰² Without any opposition votes, but with some abstentions.

¹⁰³ See *Report of the Committee on the Declaration of Principles*. 86th Session International Labour Conference (Geneva: ILO, June 1998). Langille describes the process of adoption of the 1998 Declaration as “a very hard fought political and diplomatic marathon at the June 1998 International Labour Conference, and in the months preceding it. Uncertainty as to whether the Declaration would be adopted existed, literally, to the very last moment of the June conference”. Langille, Brian, “The ILO and the New Economy: Recent Developments” (1999) 5 *Int'l J. Comp. Lab. L & Ind. Rels.* 229 at 231.

¹⁰⁴ Preamble of the ILO Declaration on Fundamental Principles and Rights at Work.

¹⁰⁵ ILO Declaration on Fundamental Principles and Rights at Work at Article 2.

and advisory services”.¹⁰⁶

Finally, Article 5 constitutes an anti-protectionism clause, as it express that the Declaration should not be used for protectionist purposes and to question countries’ comparative advantage. Ironically, this debate, which did not concern the fundamental rights themselves, was one of the most intense in the negotiation process. More ironic is that this Article did not stop the Declaration from being used by bilateral trade agreements, such as the ones negotiated by United States,¹⁰⁷ and, as observed by Doumbia –Henry, the Declaration has already served as a normative model for initiatives within the context of international cooperation, direct foreign investment, global production networks and even informal economic institutions.¹⁰⁸

In the second part – the procedural one – the Declaration launched a follow-up mechanism as an instrument to give effectiveness to the Declaration.¹⁰⁹ The follow-up was based on two mechanisms: individual annual reports by all countries that have not ratified the fundamental conventions¹¹⁰ and an annual global report presented¹¹¹ by the Director-General on the situation of fundamental rights in the member States – each year, one fundamental right is analyzed.¹¹¹ These reports perform a double role.

¹⁰⁶ ILO Declaration on Fundamental Principles and Rights at Work at Article 3.

¹⁰⁷ The ILO Declaration on Fundamental Principles and Rights at Work, Article 5, “Stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up”.

¹⁰⁸ Doumbia-Henry, Cleopatra & Gravel, Eric, “Free Trade Agreements and Labour Rights: Recent developments” (2006) 145 *International Labour Review* 185 at 188. For example, the OECD Guidelines for Multinational Enterprises and the United Nations' Global Compact.

¹⁰⁹ ILO Declaration on Fundamental Principles and Rights at Work at Article 4.

¹¹⁰ The annual reports are constituted by an introductory analysis by ILO Declaration experts and by a compilation of country reports. They are based on the obligation set up by the Article 19.5e) of the ILO Constitution.

¹¹¹ The first Global Report was published in 2000 on freedom of association and collective bargain (“Your voice at Work”). To access all global reports, see <http://www.ilo.org/declaration/follow-up/globalreports/lang--en/index.htm>.

While the individual reports concern more an internal audience, helping to identify to the ILO where action is needed more, the global reports act to an external audience, describing the most problematic and the successful cases and analyzing the current situation of the fundamental rights. Even though the Declaration stresses being a purely promotional instrument,¹¹² the global reports act as a “shame” method when exposing problematic cases.

4 Why a Fundamental Rights Declaration?

In order to comprehend the meaning the 1998 Declaration, one question seems to be central: why did the ILO adopt a fundamental rights declaration. Even though the use of a declaration was not new in 1988, in face of the critiques on the organization’s lack of power to enforce its own treaties, why did the ILO choose an international norm with no enforcement effects? In addition, for what reason, for the first time, did the ILO adopt the concept of fundamental rights? These two questions will be analyzed below.

In the idea of fortifying ILO actions with regard to core labour rights, an initial issue concerned the format within which this idea could be concretized: by strengthening the traditional ILO supervisory methods, or by approving a new instrument that would make explicit the Constitution and the Declaration of the Philadelphia principles concerning core labour

¹¹² As Swepton explains, “The innovation is that the declaration is a purely promotional and not a supervisory instrument. Reports under it are not a new form of complaints mechanism, but a basis for finding out what is happening in the world in these four areas and for carrying out another new feature of the declaration: an obligation for the ILO to assist its members in reaching these goals”. Swepton, Lee, “Closing the Gap between International Law and U.S. Labor Law” in Gross, J., ed., *Workers’ Rights as Human Rights* (Ithaca: Cornell University Press, 2003) at 58.

rights.¹¹³ As argued by the ILO Director General, the option of approving a new instrument, such as a declaration, presented the advantage of clarifying the constitutional interpretation that “the respect of these basic rights is inherent in the membership of the ILO, even if the particular Member has not been bound by more detailed obligations resulting from the ratification of the corresponding Conventions”.¹¹⁴ It was used, then, as an analogy with the interpretation applied to the Committee on Freedom of Association, which also deals with countries who did not ratify conventions.¹¹⁵ The two questions that will be studied now arise from the use of the terms “declaration formula”:¹¹⁶ why adopt a declaration and what does this option mean.

The first question must be analyzed in relation with the other types of norms available to the ILO. The ILO has three kinds of norms: conventions, recommendations and declarations.¹¹⁷ Only the conventions are treaties, since they can be ratified by member States.¹¹⁸ Considering these options, why then was the declaration formula chosen to promote core labour standards? We suggest that there were two reasons for this.

One, the declaration attributes a great deal of importance to the matters that are being expressed by it. For instance, the use of the declaration formula has not been unusual in the ILO’s history, yet it differentiates itself from the conventions and recommendations’ of massive

¹¹³ Report of the Director General to the 85th Session of the International Labour Conference, *The ILO, Standard Setting and Globalization* (Geneva: International Labour Office, 1997) at 9.

¹¹⁴ Report of the Director General to the 85th Session of the International Labour Conference, *The ILO, Standard Setting and Globalization* (Geneva: International Labour Office, 1997) at 9.

¹¹⁵ The relationship between the 1998 Declaration and the Committee on Freedom of Association will be analyzed in the Section I.5.

¹¹⁶ Maupain, Francis, “Refoundation or Lost (and Last) Opportunity? The new ILO declaration on social justice for a fair globalization. (2009) [unpublished] at 7.

¹¹⁷ The resolutions are norms that deal with the ILO’s internal affairs, and not oriented to the member states.

¹¹⁸ For an analysis of the 1998 Declaration and the traditional sources of international public law, see Duplessis, Isabelle. “La déclaration de l’OIT relative aux droits fondamentaux au travail: Une nouvelle forme de régulation efficace?” (2004) 59 *Relations Industrielles* 52 at 56-60.

production.¹¹⁹ The declarations are reserved for very significant occasions, when the Organization's fundamental goals or principles are involved. Since its creation, the ILO has used this formula four times. The first ILO declaration was the Declaration of Philadelphia adopted in 1944, and annexed to its Constitution, when it acquired the status of a treaty. The second was the Declaration on Apartheid adopted in 1964. The 1998 Declaration was the third declaration adopted by the ILO.¹²⁰ Finally, in June 2008, the ILO approved its more recent declaration – the ILO Declaration on Fair Globalization –, which promotes the Decent Work Agenda.¹²¹ Thus, the use of a declaration situates the promotion of core labour standards in this very significant place among these other fundamental declarations.

Two, despite the importance the declaration adds to what is being expressed, it does not create an international obligation to the states.¹²² Neither ILO declaration adds any formal obligations to the ILO Members. In fact, the declarations' *methods of implementation* are filled with terms such as “assistance”, “capacity building”, “technical cooperation”, “expert advice” and “tripartite dialogue”. There are no references to any methods of enforcement – not even the

¹¹⁹ There is no rule establishing how treaties and international norms should be named. Usually, the term “declaration” is used. As Langille points out, the ILO Constitution does not foresee the approval of declaration, “nor for that matter, does the constitution of any other international organization”. Langille, Brian, “The ILO and the New Economy: Recent Developments” (1999) 5 Int'l J. Comp. Lab. L & Ind. Rels. 229 at 245.

¹²⁰ See Kellerson, Hilary, “The ILO Declaration of 1998 on fundamental principles and rights: A challenge for the future” (1998) 117, n° 2 International Labour Review 223 at footnote 3.

¹²¹ According to the ILO, the Decent Work Agenda expresses the four strategic objectives of the organization: fundamental labour rights and international labour standards; employment and income opportunities for men and women; social protection and social security; and social dialogue and tripartism, on line: Decent work for All <http://www.ilo.org/global/About_the_ILO/Mainpillars/WhatIsDecentWork/lang--en/index.htm>.

¹²² On the other hand, a declaration can express principles, and principles, in International Law, are a legal source. As expressed by Article 38 of the International Court of Justice, “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

“public shame” method used by the ILO’s traditional supervisory mechanisms. As Langille suggests, “The idea of a Declaration is both evocative and evasive in the ILO context”.¹²³ On the one hand, the use of a softer instrument facilitated the agreement that approved the 1998 Declaration. On the other hand, this declaration’s limitation constituted a concern for the workers’ group during the discussion on the necessity of a declaration.

As reported by the Committee on Legal Issues and International Labour Standards (LILS) in the Governing Body meeting on March 1887, the workers’ group worried that adopting a declaration on the fundamental principles expressed by conventions instead of strengthening the supervisory mechanisms concerning fundamental conventions would be a step backwards.¹²⁴ However, the option to reinforce the supervisory mechanisms could apply only to states that had ratified the conventions; otherwise, the constitutional option is the use of article 19.5.(c). To put it differently, concerning the countries that had not ratified the convention, the ILO could only ask for more detailed reports and in shorter periods. As the LILS argued, it is not legal to extend the obligations of the convention to a country that did not ratify the treaty – unless, of course, the ILO Constitution is changed.¹²⁵ In this context, a declaration could make a positive contribution to the choice of actions available to the ILO. Therefore, the adoption of a declaration in fact amplified the means of action of the ILO, since there was no enforcement mechanism available.

¹²³ Langille, Brian, “The ILO and the New Economy: Recent Developments” (1999) 5 Int’l J. Comp. Lab. L & Ind. Rels. 229 at 245.

¹²⁴ ILO, Committee on Legal Issues and International Labour Standards (LILS), *Standard-setting policy: the strengthening of ILO supervisory procedures* (Geneva: ILO, 268th Session March 1997) at paragraph 14. Besides the declaration idea, as explained by LILS in this report, the other option would be to include the protection of the fundamental rights in the ILO Constitution.

¹²⁵ ILO, Committee on Legal Issues and International Labour Standards (LILS), *Standard-setting policy: the strengthening of ILO supervisory procedures* (Geneva: ILO, 268th Session March 1997) at paragraph 18. The case of the Committee on Freedom of Association will be discussed on section I.6.

Finally, the second question related to the 1998 Declaration concerns the use of the concept of fundamental rights. The Declaration is the first time the ILO has used the concept of fundamental rights. During the negotiation process, the Director-General argued that the idea of fundamental rights would give focus to the ILO activities dispersed throughout more than 180 conventions.¹²⁶ Nevertheless the coherence of this argument, it is also true that by using the label “fundamental rights”, the organization tried to strengthen its regulation in the context of economic globalization without actually using enforcement mechanisms. The use of fundamental rights, thus, reveals the situation endured by the ILO in which the legitimacy of labour regulation was put in question by its lack of efficacy.¹²⁷ In declaring the fundamentality of certain labour rights, the organization aimed to protect these rights from economic and political questioning, while legitimizing its action on the basis of their fundamentality.¹²⁸

5 The debate on the 1998 Declaration

¹²⁶ In March, 2009, the ILO count included 188 Conventions and 199 Recommendations.

¹²⁷ See Navarro, Vicenç, *Neoliberalismo y Estado del bienestar* (Barcelona: Ariel, 1997) at. 62. As argued by Hayek: "tal ideal (a justiça social) es inaplicable en una economía de mercado. No puede haber, en efecto, justicia allí donde nadie se ocupa de ejercer tal función. Por otro lado, la justicia sólo adquiere sentido en un esquema normativo basado en la conducta individual. Ninguna concebible norma relativa a este último tipo de conducta, desarrollada en una economía de mercado propiciadora de la mutua prestación de bienes y servicios, podría producir efecto distributivo alguno que, en rigor, pudiera merecer el calificativo de justo o injusto." Hayek, Friedrich A., *Democracia, Justicia y Socialismo* (Madrid: Union Editorial, 1985) at For an analysis of the ILO “identity crisis”, see Langille, Brian, “The ILO and the New Economy: Recent Developments” (1999) 5 Int’l J. Comp. Lab. L & Ind. Rels. 229 at 229–257.

¹²⁸ On this meaning of fundamental labour rights, see Fudge, J. “The New Discourse of Labour Rights: From Social to Fundamental Rights?” (2007) 29 Comp. Lab. L. & Pol’y J. 29 at 39. Fudge argues that the fundamental rights discourse is a new discourse of labor rights that is being used not only by the ILO but also by European Union and Mercosur, for example, and not only in the international, but also in the national field. Fudge, J. “The New Discourse of Labour Rights: From Social to Fundamental Rights?” (2007) 29 Comp. Lab. L. & Pol’y J. 29 at 31.

After adopting the 1998 Declaration, a mid-2000s debate involving Alston, Langille and Maupain¹²⁹ reveals the central questions on the new declaration. While Alston's two papers (co-authored by Heenan) criticize the 1998 Declaration for its choice of fundamental labour rights and for its promotional approach, Langille and Maupain defended the list of rights guaranteed and the option of a declaration.

Alston argues that the focus of the Declaration on the four fundamental rights could lead to neglecting the international labour code constituted by 185 ILO conventions. In addition, he criticizes the Declaration's promotional character, arguing that it intended to replace the ILO's traditional approach, which involves the enforcement of legal obligations originated from the conventions.¹³⁰ Overall, Alston felt that the 1998 Declaration undermined the ILO's traditional system.

Concerning Alston's argument on the fundamental rights, the choice of the particular rights protected by the Declaration constitutes an important aspect of the 1998 Declaration's adoption, since it leads us to two central questions. First, why were those four rights chosen among all the rights expressed by the more than 181 ILO conventions at the time? Second, what consequences, if any, resulted from this choice?

Alston and Heenan argue that listing only four labour rights as fundamental minimizes the

¹²⁹ Maupain, Francis, "Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights" (2005) 16 n.3 EJIL 439; Alston, Philip & Heenan, James, "Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?" (2004) 36 N.Y.U. J. Int'l L. & Pol. 221; Langille, Brian, "Core Labour Rights-The True Story (Reply to Alston)". (June 2005) 16 EJIL 409;

¹³⁰ Alston, Philip & Heenan, James, "Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?" (2004) 36 N.Y.U. J. Int'l L. & Pol. 221 at 223.

importance of all other labour rights recognized by the other ILO conventions.¹³¹ They claim that the 1998 Declaration “is playing a central role in efforts to replace the broader labor rights agenda with a narrow focus on a much more limited corpus of four core labor standards”¹³²

A similar critique of the Declaration’s list of rights concerning its substantive effects is presented by Wet. She argues that “those categories of labour standards not included in the 1998 Declaration were relegated to second class standards”,¹³³ since the rights protected by the Declaration “have benefited from additional promotional activities and resources made available for technical assistance”.¹³⁴

Maupain puts this critique as a direct question, namely, “Is the emphasis upon fundamental rights a boost for, or a break in, the protection of other labour rights?”,¹³⁵ a question to which he answers no. According to Maupain, in previous situations the ILO emphasized the fundamental goals and objectives, not meaning to undermine the rest of the system; in particular, he points to the cases of the old article 41 of the ILO Constitution and of the Declaration of Philadelphia’s

¹³¹ According to the authors, the Declaration emphasized a “small group of four core labor standards identified in the Declaration, at the expense of the much broader body of labor standards reflected in the International Labor Code”. Alston, Philip & Heenan, James, “Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?” (Winter / Spring, 2004) 36 N.Y.U. J. Int’l L. & Pol. 221 at 231.

¹³² Alston, Philip & Heenan, James, “Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?” (Winter / Spring, 2004) 36 N.Y.U. J. Int’l L. & Pol. 221 at 231.

¹³³ Wet, Erika de, “Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work”. (November 2008) 09 n. 11 German Law Journal 1429 at 1449.

¹³⁴ Wet, Erika de, “Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work”. (November 2008) 09 n. 11 German Law Journal 1429 at 1449.

¹³⁵ Maupain, Francis, "Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights" (2005) 16 n.3 EJIL 439 at 443.

fundamental principles.¹³⁶ Moreover, he argues that the rights in the 1998 Declaration were chosen in order to empower workers to achieve the conditions guaranteed by the other labour rights.¹³⁷ This view is followed by the ILO Director-General:

The reasons for regarding certain rights as indeed being fundamental, irrespective of levels of development, has become clearer as a result of the debate that has resulted from the increasing interdependence of economies and societies. Those rights are in a sense a precondition for all the others in that they provide for the necessary implements to strive freely for the improvement of individual and collective conditions of work, account being taken of the circumstances of the countries concerned.¹³⁸

Even though this dissertation will focus on Alston's critique of the Declaration's promotional approach, a brief analysis of his first argument on the fundamental rights can provide a more comprehensive understanding of this debate. This dissertation suggests that the ILO Declaration may not have delegitimized other labour rights. More than ten years after the adoption of the 1998 Declaration, its core labour rights do not seem to have undermined the

¹³⁶ Maupain, Francis, "Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights" (2005) 16 n.3 EJIL 439 at 447. In addition, Langille reports that the ILO had in previous times recognized the centrality of rights "dealing with basic human rights". Langille, Brian, "Core Labour Rights-The True Story (Reply to Alston)". (2005) 16 EJIL 409 at 424.

¹³⁷ Maupain, Francis, "Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights" (2005) 16 n.3 EJIL 439 at 448.

¹³⁸ Governing Body Follow-up on the discussion of the Report of the Director-General to the 85th Session (1997) of the International Labour Conference (Geneva: ILO, November 1997) at item 16.

other rights in the ILO system, since the number of ratifications of the other conventions has even grown since 1998.¹³⁹

Outside the ILO system, the 1998 Declaration has been used as a paradigm by treaties without hindering the recognition of other labour rights. For example, the US model of bilateral trade agreements¹⁴⁰ recognizes as core labour rights acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health, in addition to the rights guaranteed by the 1998 Declaration.¹⁴¹

The restricted list of the 1998 Declaration may be one of its strongest points, which facilitates its promotion and appeal to states, employers, trade unions, non-governmental association and donors. The Declaration is simple and direct; its normative power is not divided among many rights. As pointed out earlier, the Declaration was adopted in the context of the globalization, when old labour violations became more explicit and new labour violations arrived. Since the ILO had no power to impose international labour rights or to arrest countries that violated these rights, the organization needed a straightforward instrument, one that is easy

¹³⁹ On the ILO ratification campaign, see Helfer, Laurence R., “Understanding Change in International Organizations: Globalization and Innovation in the ILO” (2006) 59 Vand. L. Rev. 649 at 709.

¹⁴⁰ The bilateral trade agreements of USA with Colombia, Panama and Peru.

¹⁴¹ At the national level, no country has deregulated or denied compliance with a labour right, because that right was not recognized by the 1998 Declaration. For example, even though there is cooperation between Brazil and the ILO in the field of the 1998 Declaration, the Brazilian Constitution recognizes a list of 34 fundamental labour rights, and this wider recognition was not questioned because of the more restricted list in the 1998 Declaration. The 34 sections of the Article 7 of the 1988 Federal Constitution that guarantee workers’ rights express the following principles: prohibition of unfair dismissal, fair labour conditions (regarding remuneration, working hours and rest), protection of children, prohibition of any kind of discrimination at work, protection of health and safety, free collective bargaining. Most of the rights guaranteed by Article 7 are regulated by the labour code or by specific laws and are fully enforceable. Nevertheless, some of those rights are still waiting to be embodied in a law, and until then they have no enforceability. Examples include protection in the face of automation and the right of participation in the management of the enterprise.

to understand, easy to disseminate and easy to apply. Despite the ILO's lack of enforcement, the 1998 Declaration has been recognized for its utility.¹⁴²

The utility of the 1998 Declaration is an important virtue ignored in Alston's second critique. Instead of asking how the ILO is able to promote real changes, he focuses on the danger of the 1998 Declaration's model replacing the ILO's supervisory mechanisms. Alston's argues that the Declaration moves "towards an approach that is fundamentally promotional, rather than grounded in firm legal obligations and involving targeted institutional responses to violations of labor rights."¹⁴³ His critique involves two issues that relate to each other. The first refers to the functioning of the ILO itself: the relationship between promotional mechanisms and supervisory mechanisms. The second refers to the general background of this discussion: the need to maintain an enforcement perspective about the ILO. This last issue poses a central question with regard to the analysis of the effects of the 1998 Declaration: what effectively moves ILO members to change their behavior. This question expresses a pragmatic perspective that can be related to the questions formulated by Langille: "In short, is the idea of core labour rights a good thing? Was the old regime a good thing? Is the resulting change a good thing?"¹⁴⁴

6 The 1998 Declaration and the supervisory mechanisms

¹⁴² This recognition can be seen by the use of the 1998 declaration in different treaties, organizations and NGOs.

¹⁴³ Alston, Philip & Heenan, James, "Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?" (2004) 36 N.Y.U. J. Int'l L. & Pol. 221 at 223.

¹⁴⁴ Langille, Brian, "Core Labour Rights-The True Story (Reply to Alston)" (June 2005) 16 EJIL 409 at 411.

Starting with an analysis of the relationship between the promotional and supervisory mechanisms, this dissertation explains the different approach brought about by the Declaration to the ILO's monitoring system:¹⁴⁵ from a complaint-based traditional monitoring mechanism towards technical cooperation procedures established by the Declaration.¹⁴⁶

In this context, the idea of adopting a declaration first justified itself by analogy with the model of the Freedom of Association Committee, since in that case there would be no need for countries to ratify the convention to be subjected to the supervision of the committee.¹⁴⁷ The analogy, however, stops at the issue of non-ratified conventions, because the model adopted by the 1998 Declaration is significantly different from the model of the supervisory organs, such as the Freedom of Association Committee and the Committee of Experts.

The model of the supervisory organs is constituted by three procedures: regular reports by member States to be sent to the Office “on the measures which it has taken to give effect to the provisions of Conventions to which it is a party”¹⁴⁸; representations “by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party”;¹⁴⁹

¹⁴⁵ “Monitoring focuses on implementation and compliance. It includes procedures for determining whether an International Organization’s (IO) member nations are adhering to the organization's rules and norms and how the IO responds to the compliance information that it discovers.” Helfer, Laurence R., “Understanding Change in International Organizations: Globalization and Innovation in the ILO” (2006) 59 Vand. L. Rev. 649 at footnote 24.

¹⁴⁶ We will explore what Helfer calls “a softer ‘managerial’” approach to centralization that emphasizes information sharing and technical assistance to help ILO member states “develop policies which are individually and collectively rational.” Helfer, Laurence R., “Understanding Change in International Organizations: Globalization and Innovation in the ILO” (April 2006) 59 Vand. L. Rev. 649 at 678.

¹⁴⁷ Report of the Director General to the 85th Session of the International Labour Conference, *The ILO, Standard Setting and Globalization* (Geneva: International Labour Office, 1997) at 9.

¹⁴⁸ ILO Constitution 1919 at Article 22.

¹⁴⁹ ILO Constitution 1919 at Article 24.

complaints by any of the members “if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified”.¹⁵⁰ The representations and complaints are special procedures, while the reports constitute the general procedure of the international supervisory system designed by the ILO Constitution. In all three cases, member States must have ratified the convention in order to be subject to the procedure (with the exception of the supervision made by the Committee on Freedom of Association, which will be analyzed below).

To analyze the reports sent by the member States, the Governing Body created a Committee of Experts on the Application of Conventions and Recommendations (CEARC) in 1926, constituted by 20 independent experts, which examines states’ compliance with the conventions. The CEARC then publishes its report, focusing on the more problematic situation of countries. This report is then discussed by the tripartite Conference Committee on the Application of Standards. The problems faced by this system have been already discussed by other authors.¹⁵¹ In effect, though, the number of ratified conventions () and member States (185) have rendered the annual examination of the reports impossible. One of the solutions found was to make the reporting period longer and to have the conventions examined only briefly,¹⁵² focusing mainly on the compatibility of a country’s domestic law with international conventions rather than on the effective compliance of member States.

¹⁵⁰ ILO Constitution 1919 at Article 26.. A complaint can be initiated also by the Governing Body, or by any delegate of the Conference.

¹⁵¹ For example, Simpson, William R., “Standard-setting and Supervision: A System in Difficulty” in: Javillier, Jean-Claude & Gernigon, Bernard, eds., *Les normes internationales du travail: un patrimoine pour l’avenir. Mélanges en l’honneur de Nicolas Valticos* (Genève: Bureau international du Travail, 2004).

¹⁵² Simpson, William R., “Standard-setting and Supervision: A System in Difficulty” in: Javillier, Jean-Claude & Gernigon, Bernard, eds., *Les normes internationales du travail: un patrimoine pour l’avenir. Mélanges en l’honneur de Nicolas Valticos* (Genève: Bureau international du Travail, 2004) at 51.

Besides the CEARC, the other central organ in this system is the Committee on Freedom of Association (CFA). In 1950, right after the adoption of Conventions 87 and 98, the Governing Body created the Fact-Finding Conciliation Commission on Freedom of Association. The Commission examined complaints against states that had or had not ratified the conventions; in the case of the latter, the state had to give its consent. Due to this last condition, the Commission examined its first case only in 1964 and only six cases in total.¹⁵³

The CFA had been created in 1951 to make a preliminary analysis of the cases taken to the Commission. However, with the failure of the Commission, the CFA enlarged its role and started to also examine the substantive aspects of the complaints. The CFA, however, did not need the consent of the states, even when the convention had not been ratified.¹⁵⁴ The CFA thus acquired its own importance in the ILO system. The justification for the CFA comes from a constitutional interpretation, according to which ILO members are obligated to comply with the organization's principles.¹⁵⁵ Although it has a more political character, since it constitutes a tripartite organ composed by nine members of the Governing Body, the CFA develops its work in a quasi judiciary way; "quasi judiciary" because it cannot impose sanctions. The CFA receives complaints against member States, applies the principle to specific situations and elaborates suggestions. The CFA Digest exemplifies this role as it is seen as a type of jurisprudence code.

¹⁵³ Gravel, Eric *et al*, *The Committee on Freedom of Association: Its Impact Over 50 Years* (Geneva: International Labour Organization, 2001) at 9.

¹⁵⁴ As explained by Gravel *et al.*, "Because, originally, it was only intended as a preliminary and internal stage in the functioning of the ILO, it was not designed on the model of the Fact-Finding and Conciliation Commission. It did not therefore require the prior consent of the State to examine allegations in the absence of the formal ratification of the Conventions on freedom of association". Gravel, Eric *et al*, *The Committee on Freedom of Association: Its Impact Over 50 Years* (Geneva: International Labour Organization, 2001) at 10.

¹⁵⁵ Gravel, Eric *et al*, *The Committee on Freedom of Association: Its Impact Over 50 Years* (Geneva: International Labour Organization, 2001).

Comparing these two supervisory organs, Compa explains that the “CEARC reports, published annually, are quite technical, usually involving texts of laws and how they comport with conventions already ratified. COFA reports are usually more pointed because they respond to complaints and address concrete problems of workers' rights violations”.¹⁵⁶ In synthesis, the two organs deal mostly with issues relating to ILO conventions and to the principle of freedom of association.

With the 1998 Declaration, the ILO chose a different way to reach the same ultimate goal of all these mechanisms, that is, to reach member States' compliance. Instead of examining the compatibility of domestic law with the conventions or applying ILO principles to regulate specific cases,¹⁵⁷ the 1998 Declaration focused on the promotion of the fundamental principles and rights, offering as central means of action, technical cooperation and assistance. Its Article 3 describes three situations in which the organization has the obligation to assist member States:

- (a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;
- (b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of these Conventions; and
- (c) by helping the Members in their efforts to create a climate for economic and social development.

¹⁵⁶ Compa, Lance, “Monitoring International Labour Standards: Assessing Assessments: A Survey of Efforts to Measure Countries Compliance with Freedom of Association Standards” (2003) 24 *Comp. Lab. L. & Pol'y J.* 283 at 306.

¹⁵⁷ On the meaning of the principle of freedom of association, see Valticos, Nicolas, “Les Méthodes de la Protection Internationale de la Liberté Syndicale” in *Académie de Droit International, Recueil des Cours* (Leyde: A. W. Sijthoff, 1975) at 95, I Tome 144 de la collection.

While the immediate goal is the ratification and implementation of the fundamental conventions, the organization also has a role to assist members not ready yet to ratify the conventions to promote the ILO principles and to build foundations that will make possible a change in this situation in the future. Besides, the 1998 Declaration's reports mechanisms follow a different logic than those of the regular reports: the individual reports constitute a way to indicate to the organization the points where a country needs greater assistance from the organization than a way to be subject to the control of the organization's supervisory organs. Therefore, it is clear that the 1998 Declaration reaches situations that are different and beyond the range of the supervisory organs.

Alston describes a picture of the ILO system according to which these two different mechanisms perform together. Thus, the firm legal obligations expressed by the conventions can perform roles other than only enforcement:

- (i) seeking to influence public opinion by giving legitimacy to particular standards of conduct, (ii) empowering domestic labour rights' proponents (employees, sympathetic actors within government, progressive employers or other labour market actors, and welfare providers); (iii) providing a firm reference point for courts, government officials, labour inspectors and others when called upon to determine the acceptability of particular practices; (iv) putting pressure on governments to measure up to standards which they themselves had accepted; (v) providing both domestic and international fora of tripartite composition in which the issues could be debated; (vi) establishing a system in which technical co-operation could be provided by the ILO in situations in which a lack of political will was not the major stumbling block;

and (vii) providing a baseline against which bilateral or multilateral promotion of labour rights could be undertaken.¹⁵⁸

As an employer's representative remarked, in an ideal world, these mechanisms should be used together, but it is easier to say it than to do it.¹⁵⁹ Since questions on the compatibility between these two mechanisms are not a new issue in the history of the ILO,¹⁶⁰ previous studies have already observed the organization's difficulties in making the standard and the promotional mechanisms complementary. For example, Langille described the separation between the two worlds of the ILO: development and law.¹⁶¹ Other authors analyzed the difficulties faced by the ILO in performing each of these activities, making it clear that in practice the mechanisms of the organization remain separated. Simpson reports the lack of involvement of technical cooperation officers with standard-related issues;¹⁶² Wet indicates the ILO's difficulties in using the

¹⁵⁸ Alston, Philip, "Facing Up to the Complexities of the ILO's Core Labour Standards Agenda." (2005) 16 EJIL 467 at 472-472.

¹⁵⁹ Interview with Jean-François Retournaud, Director of the Bureau for Employers' Activities (ACT/EMP), Geneva, February 2009.

¹⁶⁰ Concerning the analysis of the period after the adoption of the Declaration of Philadelphia, Landy considers that "[i]n the early years there was some doubt as to the interplay between operational activities and ILO standards. But already in 1958 the Conference Committee on Standards recognized that the "two concepts are in fact closely interrelated and supplement each other at every stage." It remains clear to this day that from the specific perspective of ILO supervision, experience in the field is a valuable tool in appreciating the difficulties governments may encounter in giving effect to standards and that, hopefully, technical expertise may point a way to a solution, thus demonstrating the mutually reinforcing potential of the two methods of action". Landy, E. "Shaping a Dynamic ILO System of Regular Supervision: The Valticos Years" in Javillier, Jean-Claude & Gernigon, Bernard, orgs. *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos* (Genève: Bureau du Travail, 2004) at 12.

¹⁶¹ Langille, Brian. *What Is International Labour Law For?* (Geneva: International Institute for Labour Studies, 2005) at 22, on line: International Institute for Labour Studies <<http://www.ilo.org/public/english/bureau/inst/download/langille.pdf>>.

¹⁶² Simpson, W. "Standard-setting and Supervision: A System in Difficulty" in Javillier, Jean-Claude & Gernigon, Bernard, orgs. *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos* (Genève: Bureau du Travail, 2004) at 53.

resources available for technical cooperation;¹⁶³ and Standing concludes that the technical sectors are mostly separated from the standards sectors.¹⁶⁴ Although the supervisory organs have made recommendations to the ILO for technical cooperation,¹⁶⁵ these organs act more like courts, making judgments, instead of linking the identification of the problem to giving assistance to countries on how to resolve the situation.¹⁶⁶ While the promotional sectors of the ILO focus on technical cooperation, assistance, capacity building, soft mechanisms and setting good examples, the standard's sectors direct their efforts to the conventions, their ratification and the implementation of the conventions by a country's domestic laws.

This separation causes a certain polarity of positions among academics (see above the Langille and Alston debate) and inside the ILO itself. On the one hand, the defenders of the standards-setting approach and traditional supervisory mechanisms claim that the promotional mechanisms constitute a way to give publicity to the ILO principles and to gather resources, but

¹⁶³ Wet, Erika de. Wet, Erika de, "Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work". (November 2008) 09 n. 11 German Law Journal 1429 at 1446–1447.

¹⁶⁴ Standing, Guy. "The ILO: an agency for globalization?" (2008) 39 n.3 Development and Change 355 at 376. According to Standing, "While officials try to suggest that all is integrated, in reality the departments have different objectives and priorities...". Standing, Guy. "The ILO: an agency for globalization?" (2008) 39 n.3 Development and Change 355 at 376.

¹⁶⁵ For example, in 2009, an individual observation made by the Committee of Experts on the Application of Conventions and Recommendations concerning freedom of association in Venezuela, the committee "the Government to request the technical assistance of the ILO for the establishment of" dialogue bodies. CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Bolivarian Republic of Venezuela (ratification: 1982) 2009, on line: ILOLEX < <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloilc&document=230&chapter=3&query=C087%40ref%2B%23YEAR%3D2009&highlight=&querytype=bool&context=0>>.

¹⁶⁶ According to Kari Tapiola, the challenge is to decide whether the supervision should be used for making judgments or for identifying problems and give assistance on how to deal to resolve these problems. Interview with Kari Tapiola, Executive Director of the Standards and Fundamental Principles and Rights at Work Sector (ED/NORM), Geneva, February 2009.

it has no content, since these mechanisms are not based on the standards.¹⁶⁷ On the other hand, the critics of the standards-setting mechanism argue that this system has become more and more irrelevant, as, for instance, the conventions became more detailed and less flexible and, consequently, the number of ratifications decreased.¹⁶⁸ Thus, the promotional mechanisms constitute a more effective way to reach member States' compliance.

I suggest that this incompatibility is due to the view that the supervisory mechanisms performed a type of enforcement of the standards. The truth is that there is no enforcement of ILO's standards. Even the supervisory mechanisms act to promote and persuade countries to comply with the standards.¹⁶⁹ Next this dissertation analyzes the background that created this incompatibility and returns to the question "what effectively moves ILO members to change their behavior". In other words, whether the Declarations way chosen by the ILO is more effective in acquiring compliance than the enforcement option.

7 The promotional and the enforcement view

¹⁶⁷ According to Horacio Guido, "the Declaration opens your mind, shows the fundamental principles, gives publicity" and increase donations. The supervisory mechanisms come after a convention is ratified and then, the legal department starts to act, giving technical support on the content of the conventions. Without this legal approach, the ILO action would be constituted only by promotion, propaganda, and no content (expertise). Interview with Horacio Guido, ILO Freedom of Association Branch, Geneva, February 2009.

¹⁶⁸ According to Creighton, "the average number of ratifications for each of the 34 Conventions adopted since 1978 is 20.1. If Convention 182 is excluded, the rate drops to 16.05". Creighton, Breen, "The Future of Labour Law: Is There a Role for International Labour Standards?" in Bernard, Catherine *et al*, eds., *The Future of Labour Law* (Oxford ; Portland, Or.: Hart, 2004) at 260.

¹⁶⁹ For an analysis of the methods of persuasion used by the ILO, see Wet, Erika de, "Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work". (November 2008) 09 n. 11 German Law Journal 1429.

Thus far we have noted the following: the ILO has been criticized for the lack of enforcement of its treaties in tackling the challenges to labour protection brought about by economic globalization. This situation has as its main elements social dumping, unfair comparative trade advantage, and the race to the bottom. All of them figure as symbolic conceptions of the difficulties faced in finding a balance between the interests of the developing and the developed countries with regard to trade liberalization and labour protection.¹⁷⁰ As a survival strategy in this environment of globalization, the ILO has chosen to focus its activities on broad themes, such as fundamental labour rights and decent work. The ILO has done this by adopting two declarations: the 1998 Declaration on Fundamental Principles and Rights at Work and, more recently, the 2008 Declaration on Fair Globalization. These arrangements are not considered treaties and their juridical status is dubious.

Some legal theories, for example, legal positivism, suggest that enforcement is the element that gives legal value to a norm; that is, enforcement turns a norm into a law.¹⁷¹ A norm that cannot be enforced is not valid. This assumption presents some challenges to international law. In domestic law, rules without sanctions are acceptable, because they are part of a system that, as a whole, is enforceable by the state, which holds a monopoly on the legitimate use of force. In international law, all subjects are sovereign states. Therefore there is no such system enforceable by one sovereign state. The validation of international law is based on the consent of those states

¹⁷⁰ According to Trebilcock and Howse, “Many in developed countries see the much laxer environmental and labour standards that often prevail in developing countries as a threat to their more stringent standards by precipitating a race to the bottom. On the other hand, many in developing countries see the insistence by interests in developed countries on developing countries adhering to the same e.g. environmental or labour policies that prevail in many developed countries (a race to the top) as a frontal assault on essential features of their international comparative advantage”. Trebilcock, M. & Howse, R., “Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics” (1998) 6 *European Journal of Law and Economics* 5 at 7.

¹⁷¹ See Brunnee, J. & Toope, S. J. “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39 *Colum. J. Transnat'l L.* 19 at 22–23.

reached during the negotiation of each treaty. Thus one cannot presume that the system as a whole is enforceable.

Another challenge is that in international law, being valid does not mean that the law is enforceable. A significant number of international treaties are not enforceable (for example, the ILO conventions). Following the enforcement approach, the conclusion is that such international laws have a dubious legal value.¹⁷² However, this conclusion is very narrow and anti-productive, since all non-enforceable treaties will be left out of the definition of law. Moreover, a growing number of international issues are regulated by arrangements defined as ‘soft law’ since they are neither available for ratification nor are they enforceable. This narrow definition of law will exclude many important agreements from the sphere of international law.

Let us take the case of the ILO and its three kinds of norms – conventions, recommendations and declarations. Although no sanctions are imposed in the case of non-compliance in the ILO system, ILO conventions are treaties since they can be ratified by member States. The enforcement mechanisms (general and individual reports, complaints and representations) have a promotional character.¹⁷³ Recommendations and declarations, on the other hand, cannot be ratified and hence would not even pass the test of being an international treaty.¹⁷⁴ Recommendations specify the terms of the conventions and act as a guide to member

¹⁷² See Brunnee, J. & Toope, S. J. “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39 *Colum. J. Transnat'l L.* at 22–23.

¹⁷³ With the exception of Article 33 of the ILO Constitution, which was applied one time only in the case of Myanmar’s practices of forced labour. See Maupain, Francis, “Is the ILO Effective in Upholding Labour Rights?: Reflections on the Myanmar Case” in Alston, Philip, *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005).

¹⁷⁴ See Vienna Convention on the Law of Treaties, from 1969, Article 2.1.b). According to Brownlie, ratification, is “the international process that makes possible the internalization of a treaty through a formal exchange or deposit of ratification instruments”. Brownlie, Ian, *Princípios de Direito Internacional* (Lisboa: Fundação Calouste Gulbenkian, 1997) at 631.

States about how to internalize the more general conventions' provisions. The third type of ILO norms – the declarations – constitutes arrangements that express the organization's principles, goals and agendas.

Thus, in international labour law, there is an international organization that has reacted to the challenges of globalization and to criticism about its lack of power with normative arrangements that can hardly be defined as international law. This situation presents us with a dilemma. On the one hand, we could continue to defend the enforcement approach. The logical consequence of this view is to regard the trajectory of the ILO as a failure to create compliance with international labour rights, since no ILO treaty has enforcement power. On the other hand, we could perhaps change our comprehension of what is important in international labour law in order to better understand the ILO's more recent evolution since the adoption of the 1998 Declaration. For this, the question of what kind of problem international labour law is trying to resolve is central, and will be analyzed next.

Much of the criticism of the ILO system has been based on the persistent exploitation of labour promoted by social dumping. Social dumping is the practice of a state offering lower regulatory labour standards to obtain comparative advantages in trade and to attract foreign investors.¹⁷⁵ By accepting that low labour standards improve trade competitiveness and that countries allow low labour standards in order to be more competitive, the social dumping argument produces a negative consequence for international labour law: the creation of a false prisoners' dilemma game. According to the social dumping argument, maintaining high labour standards (and their enforcement) represents a high economic cost to countries and is therefore a

¹⁷⁵ For an analysis of social dumping, see Macklem, Patrick, "Labour Law beyond Borders" (2002) 5 n.3 JIEL 605 at 624.

risk to countries' comparative advantage. If this were the case, social dumping would pose a coordination problem for international labour law: countries would not maintain strong labour standards at the risk of not being competitive.¹⁷⁶ The social dumping argument therefore portrays the international protection of labour standards as a prisoners' dilemma. The question then is whether this portrait is true.

In a prisoners' dilemma, the rational dominant choice for states would be to increase their gains in comparative advantage by exploiting labour and thus by violating international labour standards (ILS). Therefore, by deregulating the labour system or by failing to enforce labour rights, a country could acquire a trade advantage in relation to its trade competitors. The situation becomes more complex because the competitor states will also try to acquire similar trade advantages by violations of ILS. This logic will create a "race to the bottom", in which states become involved in a deregulatory race by offering increasingly low labour standards. The "race to the bottom" is promoted by states' fear of losing foreign investments and trade competitiveness. Nobody will comply with ILS because the pay-offs for violating them are too high, as we can see in the following picture.

*Social Dumping Prisoners' Dilemma*¹⁷⁷

Figure 1

#2 Country

¹⁷⁶ As Langille explained: "In order for this to be the case, it must be true that investment really is attracted by lower labour standards. So that the choice to lower standards is "dominant", i.e. in a nation's economic self-interest no matter what other nations do. This is the required precondition for the race to the bottom". Langille, Brian. *What Is International Labour Law For?* (Geneva: International Institute for Labour Studies, 2005) at 17–18, on line: International Institute for Labour Studies <<http://www.ilo.org/public/english/bureau/inst/download/langille.pdf>>.

¹⁷⁷ The values attributed to the pay-offs in the Figures 1 and 2 are arbitrary.

	C	D
C	(2,2)	(1,6)
D	(6,1)	(1,1)

#1 Country

While this is true, in order to complete this analysis, it is important to observe that the social dumping prisoners' dilemma shown above involves only developing countries, because developed countries will not exploit labour in order to acquire a trade advantage over developing countries. Thus, the pay-offs for violating the ILS are low for developed countries. Therefore, the pay-offs change when we re-conceive the game with a developed and a developing country.

Figure 2

#2 Developed Country

	C	D
C	(2,6)	(1,1)
D	(6,1)	(4,1)

#1 Developing Country

In this game, we can see that the highest pay-offs for a developing country is through unilateral defection, while the highest pay-offs for a developed country is through mutual compliance. Thus, from the social dumping perspective, the only way to increase compliance of

developing countries with ILS is to create some costs associated with their violation,¹⁷⁸ even though international labour law system does not have instruments to do this and hence is not able to change states' behavior.¹⁷⁹

At this point, it is easy to realize that the ILO system will not change this game. The enforcement approach is not effective for the ILO system because, among the ILO's norms, only the conventions are treaties and even those are not enforceable. The ILO system is not effective in this game because this system – conventions, recommendations and declarations – does not entail enough retaliation and reputation costs and gains. In the social dumping prisoners' dilemma, the 1998 and the 2008 declarations will not change states behavior and the ILO is not a relevant player. However, the social dumping prisoners' dilemma is the wrong way to characterize international labour regulation.

The social dumping argument is inconsistent with findings in the literature. Several studies have addressed this question, including the works of Flanagan, Doumbia-Henry and Gravel, Kucera, and the OECD reports.¹⁸⁰ All of these studies confirm that the social dumping argument

¹⁷⁸ Guzman, Andrew T., *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008) at 38. The goal would be to turn the prisoners' dilemma game into a coordination game.

¹⁷⁹ This system is not effective in this game because international labour law does not entail enough retaliation and reputation costs and gains. The only example of retaliation in the history of the ILO is Myanmar's case due to a persistent practice of forced labour. And even that was not enough to change the country's behavior.

¹⁸⁰ Kucera, David, "Core Labor Standards and Foreign Direct Investment" (2002) 141 *International Labor Review*; Kucera, D. & Sarna, R.; *How Do Trade Union Rights Affect Trade Competitiveness?* (Geneva: Policy Integration Department Statistical Development and Analysis Group International Labour Office, March 2004); Flanagan, Robert J., *Globalization and Labor Conditions: Working Conditions and Worker Rights in a Global Economy* (Oxford, New York: Oxford University Press, 2006); Organization for Economic Co-operation and Development (OECD), *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade* (Paris: OECD, 1996); OECD, *International Trade and Core Labour Standard* (Paris: OECD, 2000); Doumbia-Henry, Cleopatra & Gravel, Eric, "Free Trade Agreements and Labour Rights: Recent developments" (2006) 145 *International Labor Review* 185; Daude, C., *et al*, *Core Labour Standards and Foreign Investment in Latin America and the Caribbean: Does Law Enforcement of Labour Standards Attract Investors?* (Uruguay: Inter-

erroneously attributes a negative role to labour standards in the construction of a comparative advantage. According to the OECD: “Low labour standards may, in some cases, even act as a deterrent to FDI, due to investors’ concerns about their reputation elsewhere in the world and their fears of social unrest in the host country”.¹⁸¹

Of course ILS violations do happen in countries intending to be more competitive. However, the lack of evidence of social dumping found in these studies indicates that these violations cannot be automatically characterized as social dumping. In order for the violation of ILS to be fully comprehended and combated, other elements should be considered. These include poverty, corruption, lack of political will and lack of democracy.¹⁸² The predominance of this argument confuses more than clarifies the debate on international labour standards by imposing two assumptions that are not valid, namely, that low labour standards improve trade competitiveness and that countries allow low labour standards in order to be more competitive.

Even though the prisoners’ dilemma does not apply to international labour regulation, developing states generally view compliance with ILS as linked to losses in trade competitiveness, and developed states generally view violation of ILS as linked to social dumping.¹⁸³ As Kucera explains, “A race to the bottom does not depend on investors being truly

American Development Bank, 16 October 2003), on line: Inter-American Development Bank <<http://www.iadb.org/res/publications/pubfiles/pubS-181.pdf>>.

¹⁸¹ OECD, *Foreign Direct Investment for Development. Maximising Benefits, Minimising Costs Policy Brief* (Paris: OECD, October 2002), at 4–5, on line: OECD <<http://www.oecd.org/dataoecd/61/12/2763043.pdf>>.

¹⁸² See Kucera, David, “Core Labor Standards and Foreign Direct Investment” (2002) 141 *International Labor Review* 31 at 31–69.

¹⁸³ Developing and developed countries do not share the same view on the relationship between compliance with ILS and trade competitiveness. While to developed countries, the search for becoming more competitive can lead to a race to the bottom; to developing countries, in attracting investments by offering low cost labour, they are

attracted to countries with lower labour standards. Perception, true or false, will suffice”.¹⁸⁴ As states continue to see themselves as part of a prisoners’ dilemma game, social dumping becomes a more important concern than respect for ILS.

The ILO strategy should then emphasize among its member States how false this perception is in order to make cooperation possible. With globalization, the balance reached by the ILO during the years of welfare and social states has changed. The challenge is to rebuild the link between states and the protection of labour; the challenge is to go beyond the enforcement approach to try to understand how the ILO’s conventions and declarations can change states’ behavior.

First, even if the ILO’s norms do not count as provisions for enforcement, instead of disregarding them as effective mechanisms to reach compliance with ILS, we should seek to comprehend their specific ways in which they secure compliance. The ILO’s decision to use declarations, such as the 1998 Declaration on Fundamental Rights at Work, should not be questioned on the basis that declarations are not hard law. The debate should be about whether the Declaration is capable of changing a state’s behavior or not.

Underlying the criticism of the ILO, which pressures for greater enforcement, is a belief that formalization and enforcement is the path to progress. According to this view, declarations

exploring their comparative advantage to attract more investment and jobs. For an analysis of this dichotomy, see Langille, Brian, “Debates on Trade Liberalization and Labour Standards” in Bratton, William *et al*, *International Regulatory Competition and Coordination. Perspectives on Economic Regulation in Europe and the United States* (Oxford: Clarendon Press, 1996) at 479–490.

¹⁸⁴ Kucera, D. & Sarna, R.; *How Do Trade Union Rights Affect Trade Competitiveness?* (Geneva: Policy Integration Department Statistical Development and Analysis Group International Labour Office, March 2004) at 31.

are part of a secondary, less important international order. However, the formal recognition of ILO norms is not the major challenge faced by the ILO. Despite the lack of enforcement, the domestic experience in many countries shows that, even when an ILO convention is not ratified, it influences labour legislation, acting as the optimal point to be reached by national legislation. Moreover, in the case of other countries, the ratification of an ILO convention has no effect on domestic law in reality. In addition, enforcement, and sanctions are not realistic claims. These are not available to the ILO.

I agree with Alston when he suggests that the conventions perform roles different from that performed by enforcement,¹⁸⁵ such as to influence, to pressure, to create a model – all of these being promotional mechanisms. However, the one thing they do not do is to enforce labour standards. To continue with a bureaucratic court-like structure that acts as if these conventions had enforcement power might not be the most effective way to reach compliance.

The focus of the ILO should be to cooperate with its member States in building a new image for ILS related to development and growth.¹⁸⁶ As Langille argues, in emphasizing the linkage between ILS and more developed societies, the ILO can change states' views about compliance with ILS.¹⁸⁷ The next step is to evaluate the role that has been performed by the

¹⁸⁵ Alston, Philip, "Facing Up to the Complexities of the ILO's Core Labour Standards Agenda." (2005) 16 EJIL 467 at 472.

¹⁸⁶ Langille, Brian. *What Is International Labour Law For?* (Geneva: International Institute for Labour Studies, 2005) at 19–20, on line: International Institute for Labour Studies <<http://www.ilo.org/public/english/bureau/inst/download/langille.pdf>>.

¹⁸⁷ In a social dumping situation, the rational choice for a state would be to try to be more competitive in trade, even if it meant violation of ILS. The denial of social dumping – and, consequently, of this correlation between poor labour standards and trade competitiveness – can persuade states that their best interests are in the guaranteeing of ILS in order to achieve a more developed society. Langille, Brian. *What Is International Labour Law For?* (Geneva: International Institute for Labour Studies, 2005) at 19–20, on line: International Institute for Labour Studies <<http://www.ilo.org/public/english/bureau/inst/download/langille.pdf>>.

1998 Declaration to achieve these goals, specifically, by promoting the respect of fundamental labour rights.

Chapter 2

Freedom of Association in Brazil

A proposal to ratify ILO Convention 87 is the oldest law proposal in the Brazilian congress. Although the power to ratify treaties belongs to the President, a prior National Congress authorization of the ratification is required. In the case of Convention 87, the presidential request for authorization was sent to the Congress in 1949 (Message #256) – a year after the adoption of the Convention by the International Labour Conference. Nearly six decades later, the request is still in the Congress awaiting action: it has been approved by the House of Representatives, but is awaiting approval from the Senate.¹⁸⁸ According to Senator José Eduardo Dutra, analyzing the proposal to ratify Convention 87:

For more than half a century now, the Brazilian Congress is divided between the embarrassment of rejecting the convention for being unconstitutional, ceding to pressures from corporativist trade unions, and national and international demands for the adoption of one of the ILO's fundamental standards.¹⁸⁹

¹⁸⁸ The procedure for the internalization of international treaties starts with an exposition of reasons from the Minister of the Foreign Affairs, requesting to the President to send a message to the National Congress ask for the ratification. The process continues in the Congress, being evaluated by the pertinent commissions and leads to the plenary assembly. If approved, a legislative decree, signed by the President of the Senate is issued and published. The President of the Republic, then, has the authorization to ratify the international act and to make it valid in Brazil by means of a Presidential Decree, which will be published. We should note that despite the fact that the Brazilian law demands an internalization process, Brazil applies the treaty itself. After the treaty is validated in the national juridical order, it has direct effect in the Brazilian domestic law with no previous adaptation between the treaty and the national norms. This kind of internalization process causes, at least in the labour field, certain ignorance about the ratified ILO conventions, as these are part of the labour code.

¹⁸⁹ Senado Federal, Ata da 32ª Reunião Ordinária da Comissão de Constituição, Justiça e Cidadania, da 4ª Sessão Legislativa Ordinária, da 51ª Legislatura, realizada em 11 de dezembro de 2002, para a apreciação do Projeto de Decreto Legislativo nº 58-B, de 1984 referente à Mensagem nº 256, de 1949, do Poder Executivo, on line Senado Federal – Atividade Legislativa <http://www.senado.gov.br/sf/atividade/materia/detalhes.asp?p_cod_mate=603>.

Currently, the debate about the ratification of Convention 87 faces a central legal hurdle: the convention is not compatible with the 1988 Federal Constitution. The Constitution mandates that each category of workers must be represented by only one trade union (Subparagraph II, Article 8). However, despite this legal obstacle being the dominant issue in the debates about freedom of association in Brazil, the constitutional debate about the ratification of Convention 87 only hides more structural problems that affect the trade union system, as it provides the country with a “good” formal excuse to give to the ILO supervisory organs for not complying with the principle of freedom of association.¹⁹⁰

In this context, the second part of this dissertation has three goals: to describe the Brazilian trade union system, to identify its incompatibilities with the principles of freedom of association and to analyze the reasons for Brazil’s non-compliance with this principle. This chapter starts by presenting a brief overview of the Brazilian labour laws, and goes on to examine the roots of the Brazilian corporatist trade union system. The incompatibilities of the Brazilian order with the principle of freedom of association are discussed, and the reasons for the country’s non-compliance are analyzed. The chapter concludes by disregarding the formal excuse of the unconstitutionality of Convention 87 and suggesting that deeper political economy problems are the ones that must be faced and attacked.

1 The Brazilian Labour Law system

¹⁹⁰ See section II.4.

The Brazilian system is characterized by a strongly regulated employment relationship, and the state's constant intervention in collective bargaining and in the resolution of labour conflicts. While labour legislation over-regulates all aspects of the employment relationship, the labour courts have an extensive role in solving all labour conflicts. Next, the central configurations of this labour system will be described.

Within Brazil's federal legal system, labour law is a federal competency: that is, the states have no power to regulate labour, and the judicial labour system is federal, with three tiers of courts. The Superior Labour Court (TST) is the highest labour court and has jurisdiction over the whole country. The Regional Labour Courts (TRTs) have jurisdiction over the states, while local labour courts have local jurisdiction (one city or more) and only deal with individual labour disputes. The Supreme Federal Court (STF) has jurisdiction over labour issues involving constitutional matters.

The labour court system has a very broad jurisdiction, resolving not only individual but also collective conflicts.¹⁹¹ Labour courts hear not only all the usual employment-related disputes – encompassing both individual and collective issues – but also disputes involving independent contractors, non-competition covenants, professional services contracts (lawyer–client disputes, for example).¹⁹² If the collective bargaining fails, the parties in mutual agreement¹⁹³ can ask for the Labour Court arbitration.

¹⁹¹ For example, in Ontario, Canada, the labour statute establishes that, when a collective agreement is in force, the parties must arbitrate any unsolved disputes. See Ontario Labour Relations Act, s. 48. In Brazil, the management–union disputes during the term of a collective agreement are resolved by labour courts.

¹⁹² Federal Constitution, article 114, Amendment 45, 2004.

¹⁹³ The common accordancy condition was added by constitutional amendment n. 45 in 2004. Since then, this condition has been the subject of ongoing controversy, which has spilled into the courts. Different courts have reached different decisions on whether this common accordancy should be made explicit by a joint petition to the

Brazil's body of formal labour law is composed of the Federal Constitution of 1988 and the 1943 Brazilian Labour Code (*Consolidação das Leis do Trabalho – CLT*).¹⁹⁴ The 1988 Federal Constitution was the first Constitution to establish labour rights as fundamental rights in Articles 7 to 11, alongside the more traditional individual rights.¹⁹⁵ Article 7 sets out a series of fundamental rights for urban and rural workers, in relation to employment, wages, social protection and working conditions.¹⁹⁶ Article 8 guarantees the freedom of association principle, but with important restrictions that will be analyzed below. Articles 9 and 10 deal with collective rights: the right to strike, workers' and employers' participation in collective public bodies and representation in the workplace.

The CLT is comprised of 922 articles and more than 2000 special laws,¹⁹⁷ covering the major aspects of individual and collective labour relations: apprenticeships, employment contracts, trade union organization, collective agreements, mediation, conciliation and arbitration commissions, application and collection of administrative fines, Labour Courts, Public Labour Prosecution and the

court, whether the refusal to negotiate and to the arbitration constitute a violation to this duty to negotiate and legitimize the arbitration even without the explicit accordance from the employer, or whether the silence of one of the parties concerning the request for arbitration constitutes an implicit common accordance.

¹⁹⁴ The CLT was promulgated by Federal Decree Law # 5.542 on 1 May 1943.

¹⁹⁵ Labour rights are set out in Title II – Fundamental Rights and Guarantees.

¹⁹⁶ The constitutional choice was to elaborate a rule-based article containing 34 subparagraphs, due to the lack of tradition in applying broad principles. In Article 7, the 34 lines guarantee worker's rights and express the following principles: prohibition of unfair dismissal, fair labour conditions (with regard to remuneration, working hours and rest), protection of children, prohibition of any kind of discrimination at work, protection of health and safety, free collective bargaining. Most of the rights guaranteed by Article 7 are regulated by the CLT or by specific laws and have full enforceability. Nevertheless, some of those rights are still waiting for a law to be made and so long such a law remains nonexistent, they have no enforceability. For example: protection in face of automation and participation in the management of the enterprise.

¹⁹⁷ Yeung, Luciana, "The Need for Modernization of Brazilian Labour Institutions" in IIRA, *Social Actors, Work Organization and the New Technologies in the 21st Century IIRA 14th World Congress* (Lima: Fondo Editorial, 2006) at 126: "There are, nowadays, over 2000 'complementary laws' specifically related to labour issues."

judicial process.¹⁹⁸ In addition, 363 consolidated jurisprudential rulings of the Superior Labour Court (*Enunciados dos TST*) are also part of the labour law system and play a major role in the resolution of labour conflicts.¹⁹⁹

Next, this analysis focuses on the trade union system, starting with a study of its corporatist features.

2 The Corporatist Trade Union Model

Understanding the Brazilian trade unions system is not possible without first understanding the corporatist structure that founded the authoritarian trade union institutions still present today.

²⁰⁰ This structure was founded on a view that the social texture was free of all conflicts, including labour-capital conflicts. Individual members of the society must have a common goal, and society's intermediary bodies must work to achieve this common goal. According to this view, instead of private organs for the representation of workers' interests, trade unions were organs that primarily must cooperate with the State to achieve a common goal, such as social peace and economic development. This is the context that justifies all types of regulations

¹⁹⁸ Yeung, Luciana, "The Need for Modernization of Brazilian Labour Institutions" in IIRA, *Social Actors, Work Organization and the New Technologies in the 21st Century IIRA 14th World Congress* (Lima: Fondo Editorial, 2006) at 126–127.

¹⁹⁹ Technically these *Enunciados* do not overrule statutes and regulations, and they do not serve as precedents for other decisions, but in practice they are applied as law.

²⁰⁰ Vianna stresses that what marks Brazilian labour law is not an excess of law, but instead, its systematization within a corporatist order. Vianna, Luiz Werneck, *Liberalismo e Sindicato no Brasil*, 4th edition (Belo Horizonte: Ed. UFMG, 1999) at 60.

restricting freedom of association in the name of the “public” role of trade unions.²⁰¹ Within a corporatist system, trade unions should act with the state to guide workers “in a specific way useful to the country and to the national collectively”.²⁰²

Regulation of labour in Brazil did not start with the corporatist rules. In the first two decades of the 20th century, the predominance of political liberalism resulted in a system based on individual contracts of employment and on a formal recognition of freedom of association. This system started to reveal its limitations when the rapid growth of the Brazilian labour force and the emerging reliance upon migrant workers²⁰³ created the social forces that stimulated the trade union movement despite the strong official repression.²⁰⁴

Thus, despite being still incipient,²⁰⁵ the labour movement was strong²⁰⁶ enough to worry the government when the crises of the coffee export model and the necessity of industrialization

²⁰¹ For an analysis of the definition of corporatism, see Novitz, Tonia & Syrpis, Phil, “Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism” (2006) 35 Ind Law J. 367 at 371-372.

²⁰² Vianna, Oliveira, *Problemas de Direito Sindical* (Rio de Janeiro: Max Limonad, 1943) at 11.

²⁰³ For example, “Between 1884 and 1903 Brazil received over one million Italians”. “In 1900 approximately 90 percent of Sao Paulo’s industrial work force, still small, was foreign”. Dulles, John W. F., *Anarchists and Communists in Brazil, 1900-1935* (Austin: University of Texas Press, 1977) at 4.

²⁰⁴ See Moraes, Evaristo de, *Tratado Elementar de Direito do Trabalho*, 2^a ed. (Rio de Janeiro: Livraria Freitas Bastos S.A., 1965) at v. I; Vianna, L. W., *Liberalismo e Sindicato no Brasil*, 4^a ed. (Belo Horizonte: Ed. UFMG, 1999); Lacerda, M. de., *A evolução legislativa do direito social brasileiro* (Rio de Janeiro: Editora Nova Fronteira, 1980); Moraes, Evaristo de, *Apontamentos de Direito Operário*, 4^a ed. (São Paulo: LTr, 1998).

²⁰⁵ Faoro describes the labour movement’s reality at the time as constituted by unorganized workers and weak trade unions: “despite laws that were adopted and not applied, labour demands, before 1930, did not have bargain power in society, nor official recognition. Lost between anarchism and communism, the labour movement was hostilized by dominant groups in the society, since it was viewed as a threat to the public order”. Faoro, Raymundo, *Os Donos do Poder* (Porto Alegre: Globo, 1979) at 718. See also Almeida, Maria Hermínia Tavares de, *A Revolução de 30: seminário realizado pelo Centro de Pesquisa e Documentação de História Contemporânea do Brasil (CPDOC) da Fundação Getúlio Vargas* (Brasília: Editora Universidade de Brasília, 1983) (Coleção temas Brasileiros, 54) at 359.

²⁰⁶ “The number of strikes in the city of São Paulo went from 12, between 1888 and 1900, to 81, between 1901 and 1914, to 107, from 1917 and 1920”. Santos, Wanderley Guilherme dos, *Cidadania e Justiça: a política social na ordem brasileira*, 3^a ed. (Rio de Janeiro: Campus, 1994) at 65.

changed the economic,²⁰⁷ and consequently, the political scenarios. This economic crisis led to a revolution in 1930 that had as protagonist the economic and political elite of the country, a revolution that resulted in the emergence of an authoritarian regime, known as the New State (*Estado Novo*), and led by president Getúlio Vargas.²⁰⁸ During this process, instead of being seen as one of the interlocutors in the debate on transformations affecting the country, trade unions were seen as a problem to be controlled. The New State interrupted the development of the country's labour movement by the imposition of the corporativist law.

The systematic regulation of the trade union system starts effectively after the 1930 revolution. In this context, the trade union law was part of a process to promote the country's industrialization, replacing the exported oriented agricultural economy. The restriction of freedom of association constituted a crucial element in this process, since the restriction of the autonomy of the social actors constituted part of the plan to eliminate labour conflicts that would be intensified with the country's industrialization.²⁰⁹

In order to achieve this, the state approved a series of laws controlling all stages of trade union life. The State was responsible to authorize trade unions' creation, to approve the trade union's statute and executive, recognize the right to represent workers by a trade union, attribute mandatory dues.²¹⁰ Finally the state had the power to intervene in the trade unions when they

²⁰⁷ For an analysis of the economic aspects of the first republican period (1889-1930) and the economic crisis of its final years, related specifically to coffee exports, see Fritsch, W., *External Constraints on Economic Policy in Brazil, 1889-1930* (London: MacMillan Press, 1988).

²⁰⁸ The authoritarian state, presided over by Getúlio Vargas, lasted from 1930 to 1945.

²⁰⁹ According to Wolkmer, "the emergence of labour regulation was not spontaneous, but a strategy within an authoritarian process to propel industrial development and the integration of the Brazilian bourgeois society". Wolkmer, Antônio Carlos, *Constitucionalismo e Direitos Sociais no Brasil* (São Paulo: Acadêmica, 1989) at 35.

²¹⁰ Gomes, A.de C., "Ideologia e Trabalho no Estado Novo" in Pandolfi, D. *Repensando o Estado Novo* (Rio de

were not acting in accordance with the common public goal. In addition, the government guaranteed a statue of individual employment rights much more advanced than what could be obtained by collective negotiation. This extremely authoritarian trade union structure combined with the guarantee of favourable conditions for individual workers became the hallmarks of Brazilian labour law.

This carefully constructed system was based on competing interests: the state's interests in avoiding labour conflicts and controlling trade unions;²¹¹ business's interests in maintaining an anti-negotiation posture, since the state would at the end resolve all labour conflicts; and trade union's interests in keeping the benefits secured by the corporativist system – mandatory representation and mandatory dues even without support of membership.²¹² The intense regulation of the CLT, the major role played by labour courts²¹³ and the corporativist trade union rules²¹⁴ constituted the structure of this system.²¹⁵ This basic structure continues to the current

Janeiro: Ed. Fundação Getulio Vargas, 1999).

²¹¹ For this, the state would regulate labour relations, even though without a concern with the efficacy of these rights.

²¹² Arturo Bronstein, analyzing Latin-America labour legislation, concludes: "(l)a nueva actitud obedeció probablemente a razones tanto políticas como económicas y éticas. En lo político guarda relación con el proceso de modernización, caracterizado por el desplazamiento del poder desde las oligarquías rurales hacia las clases medias urbanas, quienes buscaron una alianza tácita con el proletariado, en cuyo favor promulgaron una legislación generosa para la época. Además de ofrecer protección, las llamadas leyes obreras enviaban a los trabajadores el mensaje bismarquiiano de que su defensa debería venir del Estado y no de los sindicatos, cuya ideología predominante, anarquista o comunista, no podía sino inspirar desconfianza al poder de turno." Bronstein, Arturo S., "Reforma Laboral en América Latina: Entre garantismo y flexibilidad" (1997) 116 *Revista Internacional del Trabajo* 5 at 7.

²¹³ The labour courts were created in 1949. Decreto-lei nº 1.237. Until the 1946 Federal Constitution, the Labour Courts were administrative organs; after that they were recognized as judiciary organs.

²¹⁴ Two laws were adopted to delineate the corporativist system: Decree # 1.402, from 5 July 1939 and decree #2.381, from 9 July 1940. The first one established the unicity rule; the second decree fixed the categories the frame of categories (*enquadramento sindical*). The frame of categories identified all the categories in the labour market, thus allowing the formation of trade unions in order to represent these categories. The Ministry of Labour had the authority to include categories into this frame.

day and has survived periods of both authoritarian and democratic governments. That is the synthesis of the corporatist trade union structure that has regulated the labour movement in Brazil since last century: on one hand, an intensive regulation of individual employment; on the other hand, lack of freedom of association for workers.²¹⁶

3 The Corporatist Trade Union System and its incompatibility with the principle of freedom of association

In order to comprehend how the corporatist legal system works, we must first note that the Brazilian trade union structure is different from the structure in those countries where the social movement itself determines which trade unions will represent workers and the number of trade unions that hold representation rights. In Brazil, the law imposes the existence of only one trade union and one employer association with representation rights in a specific occupational category (for employees) or economic category (for employers). The law also imposes on each such union a territorial basis that is to be defined by the workers or employers involved, but which cannot be smaller than a municipal district. Finally, the law imposes trade union dues to be paid by members of a category represented by the one trade union.

²¹⁵ Pochmann, Márcio, *O trabalho sob fogo cruzado. Exclusão, desemprego e precarização no final do século* (São Paulo: Contexto, 1999) at 160. For a case analysis of the Brazilian trade union system, see Lang, Karen & Gagnon, Mona-Josée, *Brazilian Trade Unions: In(In)Voluntary Confinement of the Corporatist Past* (2009) 64 *Relations Industrielles / Industrial Relations* 250.

²¹⁶ Wolkmer, Antônio Carlos, *Constitucionalismo e Direitos Sociais no Brasil* (São Paulo: Acadêmica, 1989) at 43.

Even though this analysis focus on workers' trade unions, for ease of presentation, the following discussion uses the term "trade unions" to mean "trade unions and employer associations". In the Brazilian labour law system, both entities are *sindicatos* (the term for trade union, but also for employer associations), and they have parallel treatment. Laws granting rights, powers, or limitations to *sindicatos* apply equally to workers' unions and employers' associations.

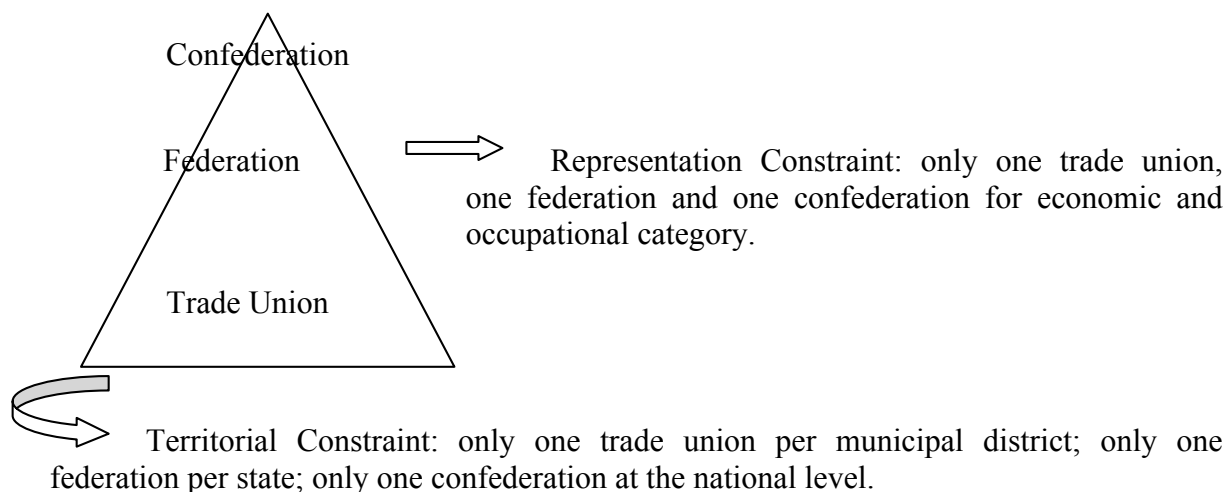
The requirement of a single imposed trade union is called *unicidade sindical*.²¹⁷ This phrase does not mean trade union unity, as some English speakers mistakenly assume. An approximate translation might be trade union "unicity", but for the fact that the word does not exist in English. *Unicidade* means "oneness" or "uniqueness". The thrust of the phrase "unicidade sindical" is trade union monopoly, whereby the law prohibits formation of any other union in the category and territory. The *unicity* rule is found in Article 8, Section II, of the Constitution,²¹⁸ and it applies to trade union organizations at every level; that is, it imposes the *unicity* rule on federations and confederations of trade unions and employer associations at the state and national levels.²¹⁹

²¹⁷ The *unicity* rule has its origin in the Decree #19.770/31, Article 9.

²¹⁸ 1988 Federal Constitution: "Article 8. Professional and trade union association is free, with regard to the following: II. It is forbidden to create more than one union, at any level representing a professional or economic category, in the same territorial base, which shall be defined by the workers or employers concerned, which base may not cover less than the area of one municipality;" [Free translation].

²¹⁹ The confederations and federations join this structure of the system (only one confederation for each category at national level, and only one federation at each state level).

How unicity works:



To further elaborate the particular features of this system, the notion of “category” is crucial to the application of the *unicity* rule. That notion determines which trade union will represent workers. However, “category” has two meanings, which are relevant to employees and employers respectively. One is the economic category defined by a common economic activity or by similar or connected economic activities – in this case, for employers. The other is the occupational or professional category defined by the work in the same economic activity or similar or connected economic activities – in this case, for employees.²²⁰ The law specifies that the category is the only level at which those groups can organize themselves. For each economic category (for example, metalworking enterprises) there should be a professional category

²²⁰ In Brazil, employers too organize in trade unions, by economic categories; and workers organize themselves in professional categories. According to the CLT, Article 511, §1º, “The solidarity of economic interests of those who undertake identical activities, similar or connected, constitute the basic social bond called economic category”, and §2º, “The similitude of life conditions resulting from the profession or work in common, from an employment relationship at the same economic activity or similar or connected economic activities, composes the elementary social expression understood as professional category” [Free translation].

(metalworkers). So when an enterprise is created, its category is defined by its major economic activity and all the workers in that enterprise irrespective of the jobs they hold would have to join the union in that category. For example, if the major operation of a company is mining then all the workers in a mining company would have to join the union established for mineworkers in that city.²²¹

It is clear that it is reasonable to constitute categories of workers and employers whose efforts coincide, as they are acting in the same economic area (metalworking, for example). However, the system does not guarantee the freedom of these actors to create representative trade unions for groups defined in accordance with their own convenience and their own interests, including groups drawn from different categories or at the enterprise level.

In synthesis, only one legally recognized union can represent a specific category of employees and only one employers' trade union can represent a specific economic sector. These trade unions represent workers and employers whether or not they are members or supporters of the union, and those workers and employers (again, whether or not they are members) are covered by the collective agreements that are negotiated by the trade union.

In addition, workers are charged compulsory trade unions dues whether or not they are members or supporters of the union.²²² These dues are deducted from workers' salaries by employers and remitted to the unions, federations, confederations, central trade unions and the

²²¹ The exceptions to this rule are professions which are recognized by law as special categories (for example, lawyers and journalists) represented by specific trade unions. For more, see Magano, Octavio Bueno, *Manual de Direito do Trabalho*, v. III (São Paulo: LTr, 1990).

²²² The mandatory dues (*imposto sindical*) was established by the Decree # 2.377/40. It was then incorporated to the CLT, Article 579: "The union dues and contributions must be paid by all those that participate in one certain economic or professional category, or of a liberal profession, in favor of the representative trade union of the same category or profession...." [Free translation]. The contribution is paid annually and, for the workers trade unions, is based on the remuneration for one day of work

Ministry of Labour. For honest, well-governed unions, it assures their stability and successful functioning. However, in some cases it has been a source of corruption as well, since there is no accountability of the use of these resources.²²³ An important effect of this mandatory representation and dues payment is that they do not promote union membership and workers' involvement in the trade unions as if a worker is part of a category, automatically he or she will be represented by the one trade union mandated by law.

Moreover, the corporatist system violates the freedom of association principle. The system rules imposing a minimal territorial basis, trade union dues and only one trade union representing each category are incompatible with the freedom guaranteed by the Convention 87. Concerning the imposition of a minimal territorial basis, this rule does not allow workers to organize at the enterprise level, since the municipal level is smaller territorial basis for a trade union. The ILO Committee on Freedom of Association decided that this imposition violates the freedom to form and join unions as

the free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions and that workers should be free to decide whether they prefer to establish, at the primary level, a works union or another form of basic organization, such as an industrial or craft union.²²⁴

Besides violating the freedom to form and join unions, this rule restricts the protection against anti-trade union acts. In 2007, a complaint against the Brazilian government in the

²²³ In 2008, the mandatory dues constitute an income of R\$ 993,400,000, around USD 442,573,000. The last year the Ministry of Labour release an official information on the value of trade union dues collected was in 2006. Folha de S.Paulo - Imposto sindical arrecada R\$ 1,6 bi em 2008 - 05/02/2009. <http://www1.folha.uol.com.br/fsp/dinheiro/fi0502200904.htm> . Access on 08 February 2009.

²²⁴ ILO, Committee on Freedom of Association, *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition (2006) at Paragraph s 333 and 334.

Committee on Freedom of Association involved the lack of legal protection against anti-union acts for trade union members of an enterprise-based trade union. The government then recognized that

the judicial authority found that the individuals in question did not enjoy the right to trade union security, given that it is not possible, under the provisions of the legal system, to form trade unions whose jurisdiction - geographical area of activity - is smaller than a municipality nor to form a trade union at enterprise level.²²⁵

The committee request the government to reform the law in order to allow workers to forma trade unions at the enterprise level, what did not happen until now.

Concerning the mandatory trade union dues, the Committee on Freedom of Association also decided on the dues' incompatibility with the principle of freedom of association. Workers' freedom to form and join trade unions of their own choosing also encompasses the freedom of association to a trade union, which is manifested in three ways: freedom to join a trade union, freedom not to join a trade union and freedom to withdraw from a trade union.²²⁶ The mandatory trade union dues paid by workers associated or not to a trade union are incompatible with these freedoms. In a complaint against Brazil in 1989, the Committee decided that

the questions concerning the financing of trade union organisations, as regards both their own budgets and those of federations or confederations, should be governed by the by-laws of the trade unions, federations and confederations

²²⁵ ILO, Committee on Freedom of Association, *Complaint against the Government of Brazil presented by the National Association of Higher Education Teachers (ANDES-SINDICATO NACIONAL)* Report No. 346, Case(s) No(s). 2523 at Paragraph 345, on line: ILO – ILOLEX <<http://www.ilo.org/ilolex/english/casframeE.htm>>.

²²⁶ Gomes, Orlando *et alii*: *Curso de Direito do Trabalho*. R.J., Forense, 7th edition, vol. I, 1995, p.748.

themselves, and therefore, that constitutional or legal provisions which require contributions are incompatible with the principles of freedom of association.²²⁷

Finally, the trade union monopoly system violates the freedom to create trade unions.²²⁸ This violation is not very clear, as there is no express rule limiting the freedom to create trade unions in the Constitution or in the CLT, but it results from the unicity rule. According to this rule, only one trade union can represent workers; therefore workers have no freedom to create different trade unions to represent them. According the Committee on Freedom of Association,

It is derived from this principle that, although the Convention does not aim to make trade union pluralism compulsory, pluralism must be possible in every case, even if trade union unity was once adopted by the trade union movement. Systems of trade union unity or monopoly must not therefore be imposed directly by the law.²²⁹

Even though the 1988 Constitution “enhanced the freedom of trade unions vis-à-vis the State”, according to the Committee

the provisions of article 8 of Brazil's Constitution of 5 October 1988, concerning the prohibition of creating more than one trade union for a given occupational or economic category of workers, regardless of the level of organisation, in a given

²²⁷ ILO, Committee on Freedom of Association, *Complaint against the Government of Brazil presented by the International Confederation of Free Trade Unions (ICFTU)* Report No:265 Case(s) No(s):1487 at Paragraph 373, on line: ILO – ILOLEX < <http://www.ilo.org/ilolex/english/caseframeE.htm>>.

²²⁸ According to the ILO, “Less visible but equally pernicious restrictions of freedom of association exist where this right is denied or discouraged in practice as a result of pressure and interference in the activities of trade unions. Registration systems still allow the authorities to exercise undue discretion. Restrictions frequently take the form of excessively high membership requirements or requirements for previous authorization. Many countries have in fact abandoned legislation or practice which guarantees the dominant or monopoly position of one union, although significant exceptions still remain”. ILO. Report of the Director-General, *Freedom of Association in Practice: Lessons Learned. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2008) at x.

²²⁹ ILO, *International labour standards: a global approach. 75h anniversary of the Committee of Experts on the Application of Conventions and Recommendations* (Geneva: International Labour Office, 2001) at 37.

territorial area which, in no case, may be smaller than a municipality, and those concerning the financing of the confederal system, are not compatible with the principles of freedom of association.²³⁰

The restriction on the principle of freedom of association is clearly in the procedure to create and register trade unions, and although the *Constitution* prohibits the interference of the state in trade unions,²³¹ a simple investigation into the registration procedure reveals the ineffectiveness of this prohibition. In this procedure, the Labour Ministry has no power to authorize or not authorize the creation of a new trade union – as it could before the 1988 Constitution – but the Ministry is still responsible for registering the trade union, an essential action to maintain the *unicidade* system. When an enterprise establishes a new factory, there are two different situations in which a trade union can be formed. First, if the category does not already exist and therefore there is no pre-existing trade union representing that category, a new trade union can be formed within that category.

Second, if the category already exists – for example, metal workers – the existing trade union that already holds the category representation will automatically represent the workers in that factory. The workers can question the existence of the trade union and try to create a new trade union. However, because of the *unicity* rule, this new trade union can be registered as a trade union only if it does not represent the same category within the same territory. For

²³⁰ ILO, Committee on Freedom of Association, *Complaint against the Government of Brazil presented by the International Confederation of Free Trade Unions (ICFTU)* Report No:265 Case(s) No(s):1487 at Paragraph 372, on line: ILO – ILOLEX < <http://www.ilo.org/ilolex/english/casframeE.htm>>.

²³¹ 1988 Federal Constitution: “Article 8. Professional and trade union association are free, with regard to the following:

I - The law may not require authorization of the State for a union to be founded, except for authorization for registration with the competent agency, it being forbidden for the government to interfere or intervene in the Union;” [Free translation].

example, the new trade union can represent the same category within a smaller territory. If the existing trade union represents workers at the state level, the new trade union can represent workers at the municipal level. If the existing trade union already represents workers in the smallest territory allowed by the law – the municipal district – the only alternative to forming a new trade union is to propose the division of the already represented category.²³² For example, if the existing trade union represents hotels and restaurants, the new trade union can propose to represent hotel workers separately.

The formation of both a trade union for a new category and for an existing category follows the same procedure, regulated by the Ministry of Labour regulation n. 186/2008.²³³ However, in the case of an existing category, the Ministry of Labour will make the application public. If the existing trade union impugns the application to form the new trade union, there is a possibility of conciliation between the old and the new trade unions by the labour ministry. If the conciliation fails, trade unions can take the case to the labour court to decide which trade union will hold the representation. The labour court will consider whether the trade unions have the same territorial base or represent the same category. If one of these two situations occurs, the court will give preference to the trade union that already holds the representation. In the case of division of an already existing category, the new trade union must prove that in the new category

²³² See Article 571, Consolidação das Leis do Trabalho (CLT).

²³³ Workers should convoke a public general assembly for the founding of the trade union and the election of an executive. The trade union should then be registered in a public notary's office as a private association and get an identification number (Cadastro Nacional de Pessoa Jurídica). With this information, the workers must ask the Ministry of Labour for registration as a trade union. The solicitation must be done on line in the Trade Union National Cadster (Sistema do Cadastro Nacional de Entidades Sindicais – CNES), at <http://www.mte.gov.br/cnes/default.asp>. The application must contain the following information: the territorial base, the category that will be represented and details of the trade union executive leaders.

workers' activities are essentially different from the existing category.²³⁴ Therefore, a trade union can be formed regardless of membership. The essential element of the formation of a trade union is not membership, but the category that defines coverage.

In addition to violate freedom of association, the corporatist system offers two major incentives to promote trade union fragmentation: the possibility to receive compulsory dues contribution and the absence of any need to provide real representation. These two incentives have resulted in an excessive number of trade unions. The last national survey on trade unions in 2001 counted 11,416 worker trade unions and 4,545 employer trade unions for a total of 15,961; of this total, 64.3% are urban trade unions and 35.7% rural trade unions.²³⁵ In 2005, a survey undertaken by the Ministry of Labour revealed the existence of 23,726 union bodies registered with the Ministry of Labour – 23,077 trade unions, 620 federations and 29 confederations – and 8,405 new associations in the process of been registered as trade unions.²³⁶

The dismemberment of similar or connected categories, previously represented by a single trade union, contributes further to the increase in the number of trade unions. As the 1988 Constitution prohibits any state intervention in trade unions, trade unions themselves can create

²³⁴ Recently, the Superior Labour Court did not recognize the formation of a new trade union to represent workers of airplane industries that were already represented the metal workers trade union. According to the old trade union, the major company in the sector EMBRAER helped to form the new trade union. The court decided that the new category (airplane industry workers) was not essentially different from the existent category (metal workers). Proc. nº TST-RR-668/2006-083-15-00.6, 26 September 2008, on line: Tribunal Superior do Trabalho <[https://aplicacao.tst.jus.br/consultaunificada/inteiroTeor.do?act...blicacao=26/09/2008&query=Embraer%20or%20'Pedro%20Paulo%20Manus'](https://aplicacao.tst.jus.br/consultaunificada/inteiroTeor.do?act...blicacao=26/09/2008&query=Embraer%20or%20'Pedro%20Paulo%20Manus'>)>.

²³⁵ IBGE - Departamento de População e Indicadores Sociais, *Pesquisa Sindical 2001* (Rio de Janeiro: IBGE, 2001) at Análise dos resultados.

²³⁶ Ministério do Trabalho e Emprego, *Diagnóstico das Relações de Trabalho no Brasil*, online: MTE <www.mte.gov.br/.../DIAGNOSTICO_DAS_RELACOES_DE_TRABALHO_NO_BRASIL.pdf.

new categories or divide an existing category.²³⁷ There is no limit to this process of creating a category, as new categories are susceptible to further subdivision.²³⁸ However, even though the current corporatist Brazilian system produces such bad outcomes, the country has been enduring the corporatist trade union structure since the 1930s. Below, we analyze the reasons for the persistence of this situation.

4 Reasons for non-compliance with the principle of freedom of association

Examining the history of Brazil's trade unions system, we identify a few moments when it looked like the country was ready to eliminate its corporatist trade unions, but the changes never came. One of these moments was after the end of the New State in 1946, when the country had a brief democratic period until a military dictatorship that began in 1964 and lasted until 1985. During this period, a new democratic federal Constitution was approved, but the corporatist laws remained. The reason for this was the lack of pressure from society to change the system. Those who should be the most interested in this reform, the trade unions, were enjoying the benefits of being an official trade union. Swavely explains that the trade unions

²³⁷ According to the Labour Ministry, "1,950 professional categories and 1,700 economic categories were created since 1990. These numbers show that the process of creating a trade union today is limited only by the degree of creativity in the denomination of categories, most of them having no correlation with the real structure of economic and professional activities." Ministério do Trabalho e Emprego, *Diagnóstico das Relações de Trabalho no Brasil*, online: MTE < www.mte.gov.br/.../DIAGNOSTICO_DAS_RELACOES_DE_TRABALHO_NO_BRASIL.pdf.

²³⁸ For instance, workers in amusement parks formed one category that has been divided into two, with the creation of a union of workers in bingo halls (despite the fact that bingo is illegal in Brazil!). Other examples of the proliferation of new categories include those for astrologers, country musicians and even owners of pure breed English racehorses. Ministério do Trabalho e Emprego, *Diagnóstico das Relações de Trabalho no Brasil*, online: MTE < www.mte.gov.br/.../DIAGNOSTICO_DAS_RELACOES_DE_TRABALHO_NO_BRASIL.pdf.

used the CLT system as a “patron/client relationship with government officials who were willing to grant benefits, favors and services in return for the political support of organized labour groups”²³⁹.

Another of these moments came again with the re-democratization of the country after the military dictatorship. At the end of the 1970s, a trade union movement called the new unionism started in the ABC,²⁴⁰ an industrial region of the State of São Paulo, defying the corporatist structure and assuming more combative positions.²⁴¹ The new unionism was a movement that resulted in the creation of the central trade unions, which had been constituted outside the corporatist system, since they represent trade unions of different categories and they were positioned outside the confederative structure.²⁴²

Even though the new unionism had among its goals “union democracy and autonomy”,²⁴³ and had positioned itself in the defense of freedom of association, it was not strong enough to disseminate its ideals. The new unionism was born in the most industrialized region of the

²³⁹ Swavelly, P. “Organized Labor in Brazil” in Graham, L. & Wilson, R., *The Political Economy of Brazil: Public Policies in an Era of Transition* (Austin: University of Texas Press, 1990) at 263. This perverse use of from this structure by the trade unions’ workers and employers to benefit themselves is confirmed by Costa: “if this structure were negative in all moments to all sector of society, it is clear that the structure would not persist intact (since it was built), during a period in which various deep both economic and political modifications happen in the country. Costa, Sérgio, *Estado e Controle Social no Brasil* (São Paulo: T. A. Queiroz Editor, 1986) at 86.

²⁴⁰ The cities of Santo André, São Bernardo do Campo and São Caetano.

²⁴¹ Gacek, S. “Revisiting the Corporatist and Contractualist Models of Labor Law Regimes: a Review of the Brazilian and American Systems” (1994) 16 *Cardozo Law Review* 21 at 82.

²⁴² The new unionism resulted in the creation of CUT (Unified Labour Central), the major central trade union in Brazil. There are more than 10 trade union centrals in Brazil, such as *Força Sindical* (Union Strength), *Social Democracia Sindical* (Union Social Democracy) and the CGT (Workers’ General Confederation). The 2001 survey indicates that 65.85% of the trade unions are associated to CUT, 19.49% to Força Sindical, 6.71% to Social Democracia Sindical and 5.53 to CGT. IBGE - Departamento de População e Indicadores Sociais, *Pesquisa Sindical 2001* (Rio de Janeiro: IBGE, 2001) at 68.

²⁴³ Letter of Principles of the National Confederation of Workers in Industry. *Apud* Swavelly, P. “Organized Labor in Brazil” in Graham, L. & Wilson, R. *The Political Economy of Brazil: Public Policies in an Era of Transition*. Austin: University of Texas Press, 1990, p. 266.

country and reflected a reality that was not experienced by most trade unions located in less developed areas. The movement's discourse was seen then as the discourse of a "labour aristocracy" that did not reach the difficulties of most trade unions in Brazil.²⁴⁴ For those, the corporatist structure still represented the necessary State's aid without which they could not survive.

The lack of a uniform discourse from the labour movement was clear in the constitutional assembly in the making of the 1988 Federal Constitution. Since trade unions, federations, confederations and centrals hold different positions concerning freedom of association, the 1988 Constitution was approved recognizing freedom of association in its article 8th only to almost fully restrict this principle in the Section II of the same Article, where the Constitution recognizes the unicity rule.

After the approval of the 1988 Constitution, the issue of labour market flexibility emerged as a dominant topic. The Brazilian debate then generally focused on individual rights rather than collective rights, with little reference to the corporatist trade union system. The discussion tended to focus on costs associated with the Brazilian labour force and the inflexibility of not being able to negotiate lower working conditions than those guaranteed by law. This line of argument contended that labour laws must be changed to allow Brazilian businesses to become more competitive, both locally and internationally, to adapt labour relations to new means of production and to fight unemployment. The debate focused on the need for a broader scope for collective bargaining, including the negotiation of conditions below

²⁴⁴ Swavelly, P. "Organized Labor in Brazil". In: Graham, L. & Wilson, R., *The Political Economy of Brazil: Public Policies in an Era of Transition* (Austin: University of Texas Press, 1990) at 267.

those guaranteed by law.²⁴⁵ However, there was little reference to the subject of who would take part in the collective bargaining; that is, whether the trade unions were really representative or still part of the corporatist structure.²⁴⁶

These debates did not result in any major reform of labour law, but they showed how the trade union reform was the necessary foundation for the modernization of Brazil's labour relations, allowing greater freedom of association and scope for more representative collective bargaining. Labour law reforms that do not address the current obstacles to freedom of association will be empowering the trade union movement to bargain away statutory rights on behalf of workers, within a structure that is authoritarian and lacking representativeness. The maintenance of the corporatist structure perpetuates the inability of the corporatist trade union to participate effectively in social dialogue about the future of labour law in Brazil and the guarantee of core labour standards.

Indicating the change of perspective from increasing labour flexibility to removing the restrictions to freedom of association, the government of President Lula initiated a process in 2003 to reform labour law. The government created the National Labour Forum, as space of social dialogue about the labour law and trade union reform. The first item to be discussed by the forum was the trade union law. As we will see on section III.1, the Forum did not result in any concrete change, since the law proposal presented by the government to the Congress to change the trade union law was never even voted upon.

²⁴⁵ In Brazil, this process is called “negotiation over legislation” (*negociado sobre o legislado*).

²⁴⁶ For instance, in 2001, the President sent to the Congress a law proposal (# 5.483/2001) to change the CLT, allowing that conditions negotiated in collective agreements would prevail over the ones established by law. This proposal would start a general process of making labour laws flexible in Brazil without changing the corporatist structure. In 2003, the new President, Luís Inácio Lula da Silva, sent a message to the Congress (# 78/2003) withdrawing the law proposal.

In 2008, the Congress approved a law, #11.648, proposed by the federal government to recognize the central trade unions as part of the trade union system and, as a result to guarantee their right to receive mandatory trade union dues.²⁴⁷ The law guarantees to the central a share – 10% – of the compulsory trade union dues that are paid every year by all workers.²⁴⁸ The central unions were the only subjects outside the corporatist system that could have pressed for reforms leading to a more representative labour movement, but having a share of the compulsory contribution makes them a part of the old authoritarian corporatist system. Since this law includes the centrals in the corporatist system, it can delay a significant reform of the system.

Finally, whenever freedom of association is discussed in Brazil, the incompatibility of Convention 87 with the unicity rule is mentioned as the major obstacle to any change. For instance, in the 1998 Declaration's 2007 Annual Review, the Brazilian government argued: "It is currently still not possible to ratify C.87, since the Constitution (article 8 of the Constitution) runs contrary to the text of this Convention".²⁴⁹ Indeed, at a formal level, the unicity rule is the sole impediment to freedom of association. However, even in this case, ratification and internalization of the Convention may be possible, because of an amendment to Article 5 of the Constitution.

A Constitutional Amendment – EC 45 – was adopted in 2004, adding a Paragraph 3 to

²⁴⁷ Projeto de Lei / Câmara dos Deputados 1990/2007.

²⁴⁸ By law, the contribution was divided among the trade union (60%), the federation (15%), the confederation (5%) and the Ministry of Labour (20%).

²⁴⁹ Country Baselines under the 1998 ILO Declaration Annual Review (2000-2008)1: Brazil, on line: ILO <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_facb_bra.pdf>. See also the same argument on Paragraph 125 of the ILO, *Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, March 2007), on line: ILO <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_298_3_en.pdf>.

Article 5 of the 1988 Federal Constitution, which states that “treaties and international conventions on human rights which are approved, in each House of the National Congress, in two rounds, by three fifths of the votes of the respective members, are equivalent to constitutional amendments”. Paragraph 3 of Article 5 applies to Convention 87, as the convention is a human rights treaty.²⁵⁰ If ratified according to Paragraph 3 of Article 5 of the Federal Constitution, Convention 87 would have the same status as a constitutional amendment. As a result, the issue of Convention 87’s incompatibility with the unicity rule is one of conflict between two constitutional rules: the unicity rule having original constitutional power and Convention 87 having derivative constitutional power. Obviously, the constitutional amendment represented by ratification might be unconstitutional in view of the original text; however, would this necessarily be the case?

Convention 87 guarantees the right to freedom of association, which is also recognised by the main section of Article 8 of the Constitution. Subparagraph II of Article 8 is a constitutional rule limiting the exercise of the freedom of association, but it is not a fundamental right – there is no fundamental right to *unicity*! *Unicity* is rather a restriction of the fundamental right to freedom

²⁵⁰ The right to freedom of association is acknowledged in the Universal Declaration of Human Rights: "every person is entitled to form and to join trade unions for the protection of his/her rights" (Article 23, n.4). This is reaffirmed both by the International Covenant on Civil and Political Rights (“every person shall be entitled to freely associate to others, including the right to constitute trade unions and to affiliate to them, for the protection of their rights”) (Article 22, Paragraph 1) and the International Covenant on Social, Cultural and Economic Rights (“the right of everyone to form trade unions and join the trade union of his/her choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests”) (Article 8, Paragraph 1). In an express reference to Convention No. 87, the two Covenants set out, with the same text, that no provision “shall allow the States Parties to the International Labour Organization Convention of 1948 concerning freedom of association and protection of the right to organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention”, granting recognition to the ILO Convention which expresses the fundamental right of freedom of trade union organization. It is worth stressing that both treaties have been ratified by Brazil on January 24, 1992 and enacted by Presidential Decree 592 of July 06, 1992. At the regional level, the American Convention on Human Rights of 1969, (Pact of San José, Costa Rica), also ratified by Brazil on September 25, 1992, guarantees the right to freedom of association in Article 16, as does Article 8 of the Additional Protocol to the Inter-American Convention on Human Rights in the Area of Economical, Social and Cultural Rights, "Protocol of San Salvador" (ratified by Brazil). Finally, the right to freedom of association is further enshrined in the 1998 ILO Declaration.

of association. Consequently, the constitutional *unicity* rule cannot be considered an immutable clause and could be changed through constitutional amendment. The internalization of Convention 87 in the Brazilian legal system with status of Constitutional Amendment would have then, authority to revoke Subparagraph II of Article 8 of the Constitution.²⁵¹

Thus, the ratification of Convention 87 can be approved through this special procedure, allowing it to reach the status of a constitutional rule. However, it would also be possible to revoke the rule of unicity of trade unions and then approve the Convention through the ordinary process. Thus, there are plenty of legal ways to change the Constitution, allowing the ratification of Convention 87. Therefore, the unconstitutionality of the Convention is not the reason why Brazil does not ratify this treaty.

Analyzing these “windows of opportunities”²⁵² that did not result in any change and the formal unconstitutionality excuse, it becomes clear that a legal reform has the potential to create such substantial changes to the current system that those who have vested interests in the maintenance of the corporatist system have prevented any change to date. Attempts to reform labour law have failed, because they depend on actors who are part of the corporatist system that protects the interests of these actors: trade unions, employers and government. The interests protected are the same since the New State: the state’s interests in controlling social actors, the employers’ interests in not having to effectively negotiate with independent and representative

²⁵¹ For the purpose of normative clarity and legal security, however, it would be preferable to introduce a Constitutional Amendment to expressly change the wording of Subparagraph II, Article 8. Otherwise, the Supreme Federal Court would have to make a ruling on this constitutional conflict, following the publication of a Presidential Decree enacting the internalization. It must be stressed once again, however, that the unicity rule is a restriction of a fundamental freedom, and therefore may be changed by constitutional amendment or, in this case, through international treaty internalized with the same status as an amendment.

²⁵² Roland, G. “The Political Economy of Transition” (2002) 16 *The Journal of Economic Perspectives* 29 at 29.

trade unions, and the trade unions' interests in maintaining legal representation and mandatory dues. To overcome this inertia, any successful reform must take account of the fact that the labour law regime is strongly coherent with these interests.²⁵³

An observation made in the 2008 Annual Review of the 1998 Declaration may reveal how this correspondence of interests between the social actors to maintain the corporatist structure works. According to this Review, the CUT, the major Brazilian trade union central, "indicated that it did not support the ratification of C.87 as it favors the creation of a single Syndicate".²⁵⁴ Likewise, the 2008 Review of the annual reports concludes that "the Single Central Organization of Workers (CUT) supports maintaining the single trade union system and therefore does not favour ratification of Convention No. 87".²⁵⁵

CUT was created as a result of the new syndicalism movement that, as described above, defended the reform of the corporatist system and the freedom of association. The Central has always been one of the most active defender of trade union reform. However, now, although the Central still maintains in the domestic debate a position favourable to the ratification of Convention 87,²⁵⁶ at the international level, it has changed its position. On the one hand, we

²⁵³ Freitas and Rodriguez argue: "Brazilian labour legislation is not a mixture of corporative and democratic laws. It is oneness that is coherent with the unionist practice and the history of the relations between capital and labour in Brazil. The text of the Brazilian Constitution reproduces the inconsistencies of actual interests of the actors in our labour world. Any reformation in the Brazilian legislation must take this fact into consideration". Freitas Jr., Antônio Rodrigues & Rodriguez, José Rodrigo, "Origin and contents of legislative policies striving to introduce flexibility" (2002) 3 *Revista Direito Mackenzie* 197 at 214.

²⁵⁴ Country Baselines under the 1998 ILO Declaration Annual Review (2000-2008)1: Brazil, on line: ILO <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_facb_bra.pdf>.

²⁵⁵ Paragraph 25 of the ILO, *Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, March 2007), on line: ILO <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_298_3_en.pdf>.

²⁵⁶ See "CUT defende reestruturação do movimento sindical no Brasil", on line: Agência Brasil 26 de Junho de 2008 <http://www.agenciabrasil.gov.br/noticias/2008/06/26/materia.2008-06-26.4402513090/view>.

cannot simply conclude that CUT changed its position because of the approval of the 2008 law #11.648, recognizing the central as trade union associations and their right to receive part of the trade union mandatory dues. On the other hand, however, we can suggest that, as a result of the new law, the central unions have become part of the corporativist structure, benefiting from it, and now have an interest in retaining the system. In the analysis of the effects of the 1998 Declaration, this is the context we must consider, not the one that hinders the real reasons for non-compliance through formal excuses.

Chapter 3

The 1988 Declaration and the promotion of freedom of association in Brazil

Having analyzed the central characteristics of the corporatist system and the major obstacles to the guarantee of the principle of freedom of association in Brazil, the next questions are whether the ILO can effectively help Brazil move from this paralysis that keeps the country from transforming its trade union system and whether the 1998 Declaration is an effective instrument in this case.

In order to develop this analysis, this dissertation describes four ILO programs to promote freedom of association: two in cooperation with Latin-American countries, including Brazil, and two ILO programs in cooperation only with Brazil. In this section, the analysis focuses on one of programs, the National Labour Forum, since this program has as its major goal to reform trade union law in Brazil.

Section III.2 examines ILO-Brazil cooperation programs concerning the other three fundamental rights. This analysis is not developed to compare the freedom of association programs and the programs involving the other three fundamental rights. The goal here is to delineate Brazil's profile as a country that cooperates with the ILO in a number of fields and is open to change, but is also a country confronted by a deep difficulty in changing its trade unions' institutions.

Section III.3 connects the Brazilian case to the peculiarities of freedom of association. This connection provides a picture of a major difficulty faced by the Declaration to promote freedom of association rights: the lack of countries political will. This dissertation suggests that it is in

this context that the 1998 Declaration's effects concerning freedom of association must be analyzed.

Section III.4 returns to the central question asked in Section I: how the ILO can change states' behaviour. Starting from the analysis of Brazil and the freedom of association, this study delineates some conclusions concerning the ILO and the 1998 Declaration.

1 ILO technical cooperation projects with Brazil on freedom of association

Technical cooperation is the 1998 Declaration's main means of action. Technical cooperation is defined by Article 10.2 (b) of the ILO Constitution as one of the activities of the Office, which shall "accord to governments at their request all appropriate assistance within its power in connection with the framing of laws and regulations on the basis of the decisions of the Conference and the improvement of administrative practices and systems of inspection". In fact, according to the 1998 Declaration, the ILO is obliged to assist member States²⁵⁷ to promote the ratification of the fundamental conventions, to promote the respect of the principles expressed by these conventions and to "create a climate for economic and social development".²⁵⁸ Thus, the Declaration provides the ILO with broad and flexible mechanisms to assist its member States, since these mechanisms can have different configurations, depending on the case of the stated

²⁵⁷ Maupain indicates this aspect of the 1998 Declaration as one of its innovations. Maupain, Francis, "Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights" (2005) 16 n.3 EJIL 439 at 446.

²⁵⁸ Article 3, (c), of the 1998 Declaration.

being assisted, and can be used in different situations, that is, not only in the context of a ratification and a complaint.²⁵⁹ Finally, as an ILO expert explains, if the organization's approach to a member State is conducted through the supervisory mechanisms, in some cases the only results are negative reactions from the country; while in the case of the Declaration, "the ILO comes with a positive agenda, it gives a smoother point".²⁶⁰

In this context, the projects and activities developed by the ILO in Brazil concerning freedom of association will be analyzed next. This study covers cooperation projects specifically designed to promote freedom of association; cooperation projects that do not deal exclusively with freedom of association; technical assistance and advice; and research and training.²⁶¹ The analysis also considers the six areas of action elected by the ILO to promote the principles of freedom of association and collective bargaining: advice on labour law reform; capacity building of labour administration; strengthening employers' and workers' organizations; developing tripartism and institution building; preventing and settling disputes; advocacy and information.

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²⁵⁹ Maupain indicates this aspect of the 1998 Declaration as one of its innovations. Maupain, Francis, "Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights" (2005) 16 n.3 EJIL 439 at 445-446.

²⁶⁰ Interview with Horacio Guido, Executive Director of the Standards and Fundamental Principles and Rights at Work Sector (ED/NORM), Geneva, February 2009.

²⁶¹ ILO – Committee on Technical Cooperation, *Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: Technical cooperation priorities and action plans regarding freedom of association and effective recognition of the right to collective bargaining* (Geneva: ILO, 2008), on line: ILO <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_099009.pdf>.

²⁶² "ILO assistance is provided in the form of advocacy, awareness raising, training, advisory services and technical cooperation for capacity building and development of institutions." ILO – Committee on Technical Cooperation, *Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: Technical cooperation priorities and action plans regarding freedom of association and effective recognition of the right to collective bargaining* (Geneva: ILO, 2008) at 1, on line: ILO <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_099009.pdf>. ILO Report of the Director-General, *Freedom of*

The first two projects to be analyzed are the “Trade Union and Decent Work in the globalization era in Latin America” and “Strengthening Trade Unions facing the new goals of integration in Latin America” projects. They were supported by the Ministry of Labour of Spain and promoted by the Oficina Regional de la OIT para América Latina y el Caribe. These projects involve other Latin American countries besides Brazil and aim to strength trade union organizations through training and capacity building.

The project “Trade Union and Decent Work in the globalization era in Latin America”²⁶³ was implemented from 2002 until 2005. The countries participating in the project were Argentina, Brazil, Chile, Colombia, Paraguay, Peru, Venezuela and Uruguay. The project aimed to aid trade unions to “participate in the building of democratic labour relations and to perform an effective role in the protection of workers rights and interests”.²⁶⁴ For this, the program involved “technical advice through research, training and capacity building of trade union leaders and bureaucracy”²⁶⁵ to increase the knowledge of the fundamental conventions. The

Association in Practice: Lessons Learned. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (Geneva: ILO, 2008) at xii.

²⁶³ Oficina Regional de la OIT para América Latina y el Caribe, *Los sindicatos y el trabajo decente en la era de la globalización en América Latina* – Project code: RLA/01/M10/SPA, on line: OIT <<http://white.oit.org.pe/spanish/260ameri/oitreg/activid/proyectos/actrav/proyectos/pdf/tripoit.pdf>>.

²⁶⁴ Free translation: “participe activamente en la construcción democrática de las relaciones laborales, y para que desempeñe un papel eficaz en la protección de los derechos y los intereses de los trabajadores y las trabajadoras”. Oficina Regional de la OIT para América Latina y el Caribe, *Los sindicatos y el trabajo decente en la era de la globalización en América Latina – Resumen de la Memoria 2002/2005*, on line: OIT <http://white.oit.org.pe/spanish/260ameri/oitreg/activid/proyectos/actrav/proyectos/memoria/contenido/introduccion.html>.

²⁶⁵ Free translation: “El Proyecto realizó un proceso de asesoramiento técnico a las organizaciones sindicales, apoyándolas con investigaciones y con formación y capacitación de dirigentes sindicales, cuadros medios y técnicos”. Oficina Regional de la OIT para América Latina y el Caribe, *Los sindicatos y el trabajo decente en la era de la globalización en América Latina – Resumen de la Memoria 2002/2005*, on line: OIT <http://white.oit.org.pe/spanish/260ameri/oitreg/activid/proyectos/actrav/proyectos/memoria/contenido/introduccion.html>.

program trained 496 people and three Brazilian trade union centrals participated in the project: *Central Única dos Trabalhadores – CUT* (Unified Labour Central), *Força Sindical* (Union Strength), and *Confederação Geral dos Trabalhadores – CGT* (Workers’ General Confederation). In Brazil, the project supported a national seminar organized by CUT, which presented as one of its themes the possible ratification of Convention 87.²⁶⁶

The project “Strengthening Trade Unions facing the new goals of integration in Latin America”²⁶⁷ began in August de 2006, and will last until August 2010. The countries participating in the project are the following: Argentina, Brazil, Colombia, Costa Rica, Guatemala, Nicaragua, Paraguay, Peru, Venezuela and Uruguay.

Among other goals, this project aims to “increase trade unions’ technical capacity to elaborate proposals of freedom of association and collective bargain development”.²⁶⁸ The project intends to work through the study and identification of the major obstacles to implement freedom of association, the organization of seminars and elaboration of proposals, dissemination of these proposals and of freedom of association campaigns.²⁶⁹

Among its activities, the project proposed the organization of national seminars “to analyze

²⁶⁶ CUT, Seminário Nacional “Defesa da ação sindical, a negociação coletiva e o diálogo social”, São Paulo, Brasil, 18, 19 y 20 de agosto de 2005, on line OIT
<http://white.oit.org.pe/spanish/260ameri/oitreg/activid/proyectos/actrav/proyectos/memoria/boletin/brasil_b2.html>

²⁶⁷ Oficina Regional de la OIT para América Latina y el Caribe, *Fortalecimiento de los sindicatos ante los nuevos retos de la integración en América Latina – Project code: RLA/06/M03/SPA*, on line: OIT
<<http://www.ilo.org/public/spanish/region/eurpro/madrid/programas/projects/retos.htm>>.

²⁶⁸ Oficina Regional de la OIT para América Latina y el Caribe, *Fortalecimiento de los sindicatos ante los nuevos retos de la integración en América Latina – Project code: RLA/06/M03/SPA*, on line: OIT
<<http://www.ilo.org/public/spanish/region/eurpro/madrid/programas/projects/retos.htm>>.

²⁶⁹ Oficina Regional de la OIT para América Latina y el Caribe, *Fortalecimiento de los sindicatos ante los nuevos retos de la integración en América Latina – Guía del Proyecto*, on line: OIT
<http://white.oit.org.pe/proyectoactrav/pry_rla_06_m03_spa/guia/iv.html>.

and propose the renovation of the freedom of association structures in Latin America”.²⁷⁰ In Brazil, the project involves the following trade union centrals: CUT, Union Strength, CGT, *Central Geral dos Trabalhadores do Brasil* – CGTB (Workers’ General Central of Brazil), *Social Democracia Sindical* – SDS (Social Democracy Syndical) and *Coordenação Autônoma dos Trabalhadores* – CAT (Workers’ Autonomous Coordination).²⁷¹

Both projects dealt specifically with capacity building in trade unions in order to strengthen these institutions to perform their role more effectively. The projects were delineated considering a Latin American context of lack of legal recognition of freedom of association and collective bargaining, of lack of laws or enforcement of laws against anti-trade unions practices and of violence against trade unions. Considering their repercussions in Brazil, the programs present three limitations.

First, it is worth noticing that acting through the central trade unions makes the project more easily implemented, but presents the risk of not reaching institutions that are at the bottom of the trade union structure, which generally are the ones who need training the most. Therefore, it is important for the organization to include in the project an evaluation on how the knowledge provided by the projects to the trade union centrals is disseminated among the trade union structure. Second, because they are regional programs, they do not focus on the peculiarities of the corporatist Brazilian trade unions. The third limitation involves the first two. As the project

²⁷⁰ Oficina Regional de la OIT para América Latina y el Caribe, *Fortalecimiento de los sindicatos ante los nuevos retos de la integración en América Latina – R.1.3 Actividades Modernización de estructuras*, on line: OIT <http://74.125.113.132/search?q=cache:NM32IHADikMJ:white.oit.org.pe/proyectoactrav/pry_rla_06_m03_spa/actividades/documentos/presentacion_fesal.ppt+http://white.oit.org.pe/proyectoactrav/pry_rla_06_m03_spa/actividades/documentos/presentacion_fesal.ppt&cd=1&hl=en&ct=clnk&client=safari>.

²⁷¹ Oficina Regional de la OIT para América Latina y el Caribe, *Fortalecimiento de los sindicatos ante los nuevos retos de la integración en América Latina – Project code: RLA/06/M03/SPA*, on line: OIT <http://white.oit.org.pe/proyectoactrav/pry_rla_06_m03_spa/contactanos/index.html>.

acts through the trade unions centrals and these centrals in the Brazilian context are against the reform of the corporativist system,²⁷² the ILO maybe investing its resources in the wrong actors. Instead of investing in strengthening the actors will to change, the organization is dialoguing only with actors who internally defend the unicity rule and the mandatory representation – both violations of the principle of freedom of association.²⁷³ As we will see bellow, this limitation is present in other ILO activities.

Two projects were developed through the cooperation between Brazil and the ILO: the International Labour Standards for judges and the “National Labour Forum: Labour and Trade Union Reform and Affirmation of Social Dialogue in Brazil”. While the first project is a training program for labour courts’ judges to apply ILO international labour standards, the second is a public policy project that aims to promote the reform of labour law institutions in Brazil, including trade union institutions.

The International Labour Standards for judges and labour courts’ administration is a training program, developed by the ILO Turin International Training Centre and the ILO Freedom of Association Programme in cooperation with the Brazilian Superior Labour Court

²⁷² “Movimento sindical como um todo comemora legalização das centrais” Noticias del Sur (21 March 2008), on line Noticias del Sur <<http://www.noticiasdelsur.com/nota.php?nota=6649>>. See also “Nota da Conlutas sobre o Imposto Sindical” Conlutas (09 April 2008), on line: Conlutas <<http://www.conlutas.org.br/exibedocs.asp?tipodoc=agenda&id=1074>>.

²⁷³ In the case of CUT, although the central affirms as one of its goals the end of mandatory trade union dues, CUT opposed a 2002 law proposal, presented by dep. Augusto Carvalho, to abolish these dues. The Central affirmed that it would be necessary to have a gradual extinction of the mandatory dues and that the centrals would agreed on it. Although in 2008 the Ministry of Labour publicly committed itself to present a law proposal abolishing the mandatory dues, until now there is no sign of a new law proposal. Meanwhile, CUT is receiving its share of the mandatory dues and has announced that it will use the money in a campaign in defence of freedom of association. On the CUT’s position, see CUT, “Contribuição negocial: MTE se compromete a enviar projeto ao Congresso” (25 August 2008), on line: Federação dos Bancários <http://www.fetecsp.org.br/index2.php?option=com_content&do_pdf=1&id=38942>.

(TST).²⁷⁴ According to the terms of the project's agreement, the 23 regional labour courts can join the program, developing with the ILO a regional training seminar.²⁷⁵ The program intends to provide labour judges with the knowledge of the ILO system of international norms and, specially, of the norms related to freedom of association and collective bargaining.²⁷⁶ According to the ILO, "its primary aim is to meet very quickly the pressing training and technical assistance needs expressed by constituents as regards the subjects covered by the first global report, namely those to do with freedom of association".²⁷⁷ Since 2004, every year almost 400 people have participated in the training.²⁷⁸

Increasing the knowledge about international labour rights is an important measure to promote the guarantee of the freedom of association principle.²⁷⁹ Considering the Brazilian context, most faculties of law do not offer international labour law courses and, as a result, most

²⁷⁴ See ILO, ILS for Judges and Lawyers, on line: International Training Centre <http://training.itcilo.org/ils/ils_judges/judges_projects_Brazil.htm>.

²⁷⁵ In addition, the ILO also has a partnership with the BBC, by which it has trained 36 Brazilian journalists on fundamental principles and rights at work. ILO. Report of the Director-General, *Freedom of Association in Practice: Lessons Learned. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2008) at 70. See also ILO, ILS for journalists and media professionals, on line: International Training Centre <http://ilsforjournalists.itcilo.org/index.php?option=com_frontpage&Itemid=1>.

²⁷⁶ Seminário Internacional OIT/EMATRA. Informe Final. Rio de Janeiro, 21 al 23 de agosto de 2006, on line: International Training Centre <http://training.itcilo.org/ils/ils_judges/training_projects/spanish/Brazil/Informe_final_A251204.pdf>.

²⁷⁷ International Training Centre, Freedom of Association Programme, on line: Standards and Fundamental Principles and Rights at Work <http://training.itcilo.org/ils/ils_freedom/freedom_activities.htm>.

²⁷⁸ ILO, Taller sobre la OIT y las Normas Internacionales del Trabajo. Seguimiento del Protocolo de Intención entre el Tribunal Superior de Trabajo y el Centro internacional de Formación de la

OIT (Turín) y su Programa sobre Libertad Sindical Informe de la actividad preparado por el Dr. Yves Gandra da Silva Martins Filho, on line: International Training Centre <http://training.itcilo.org/ils/ils_judges/training_projects/spanish/Brazil/Informe_final_A200597.pdf>.

²⁷⁹ According to the ILO, "Increased knowledge of fundamental principles and rights by the judiciary is expected to lead to a better application of those rights and principle in their judgments". ILO Report of the Director-General, *Freedom of Association in Practice: Lessons Learned. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2008) at 65.

lawyers, judges, labour law bureaucracy, labour law professors have no exposure to international labour rights. In addition, the ratification of a treaty involves an internalization process²⁸⁰ which begins with the approval of the ratification by the Congress,²⁸¹ but it does not demand the making of a new domestic law, that is, after the treaty is promulgated internally, the courts must apply the own treaty. Thus, the ratified treaty is kept in the form of a treaty, and it is not part of the labour code, which contributes even more to ignorance about the ratified ILO conventions.

Reversing this situation would be an important achievement for the process of reform of corporativist law. Judges can play an important role in this as they have at their disposal effective instruments to question some of the corporativist institutions. For example, the 1988 Constitution recognized another trade union dues besides the mandatory ones guaranteed by law.²⁸² Immediately after the Constitution came into force, trade unions started to charge the new dues, which was created by the trade union general assembly, of all members of the category. As a result, in addition to the mandatory legal dues, workers also had to pay mandatory dues created by the trade union. The labour courts then ruled that the trade union had the right to create trade union dues, but to charge only of members of the category; otherwise it would violate the freedom of association principle guaranteed by the Constitution and expressed by the convention

²⁸⁰ Internalization constitutes a process by which the ratified treaty is promulgated domestically and come in force.

²⁸¹ The internalization of the international acts is initiated with an exposition of the reasons by the Minister of the Foreign Affairs, requesting the President to send a message to the National Congress proposing the ratification. After the approval of the ratification by the Congress, the President is authorized to ratify the international act and to make it valid in Brazil through a Presidential Decree.

²⁸² 1988 Federal Constitution, Article 8th, IV - a assembleia geral fixará a contribuição que, em se tratando de categoria profissional, será descontada em folha, para custeio do sistema confederativo da representação sindical respectiva, independentemente da contribuição prevista em lei”.

87.²⁸³ Even though the convention 87 is not ratified, it was used by the courts to give content to the constitutional principle of freedom of association.

This type of reasoning can be used in other situations, for instance, in the conflict over trade union representation between an old trade union and a new one during the process of trade union registration explained in Chapter II. In this case, instead of considering only the seniority of the trade unions to recognize the representation, the courts could consider their representativeness to decide which one will prevail. On this view, the courts would still respect the unicity rule, but also apply the constitutional principle of freedom of association.

The second ILO–Brazil project is the “National Labour Forum: Labour and Trade Union Reform and Affirmation of Social Dialogue in Brazil”.²⁸⁴ The Forum was created by the Federal Government in 2003 to serve as a space for social dialogue over the trade union and labour law reforms. The Forum was constituted as a tripartite body composed of trade unions, employer associations and the Ministry of Labour and Employment. The idea was to bring together the social partners – government, employers and trade unions – to negotiate a consensual package of changes that would be presented to the Congress. The cooperation with the ILO provided for the organization technical assistance, specifically in the elaboration of the reform constitutional amendment and law proposal.²⁸⁵

²⁸³ The courts ruled that workers had the right to oppose to the charge of this contribution. Because of this, many trade unions made it difficult for workers to express their opposition by fixing strict time limits for the opposition or by minimally announcing the period for that. See TST decision AIRR - 339/2006-036-02-40 9 (04 May 2009).

²⁸⁴ See Ministério do Trabalho e Emprego, on line: Fórum Nacional do Trabalho (FNT) <<http://www.mtb.gov.br/fnt/default.asp>>.

²⁸⁵ Ajuste Complementar entre o Governo da República Federativa do Brasil e a Organização Internacional do Trabalho ao acordo básico de assistência técnica entre o Governo da República Federativa do Brasil e a Organização das Nações Unidas, suas agências especializadas e a AIEDA, de 29 de dezembro de 1964, para a implementação do projeto “Fórum Nacional do Trabalho: Reforma Sindical e Trabalhista e Afirmação do Diálogo Social no Brasil II”, on line: Ministério das Relações Exteriores <http://www2.mre.gov.br/dai/b_oit_9_4201.htm>.

Proposals about the trade union reform (*Reforma Sindical*) were discussed and, at the end, the forum by consensus approved a number of principles adopted. The final result was an agreement on a transitory system between the present corporatist order and a future system based on the principle of freedom of association. As a result of the consensus arising from the Forum, the Federal Government presented to the National Congress in 2005 the proposal for constitutional amendment presented in order to change the trade union system based on the agreements reached by the social partners. As of June 2009, the constitutional amendment proposal is still in Congress, without any sign of the necessary political momentum to move it through to approval. The project was stalled because of insufficient political support, including among the employers' associations and the trade unions who had participated in the Forum.²⁸⁶ This is unfortunately a recurring pattern with respect to trade union reform: passionate debate and agreement about the need for change, unaccompanied by concrete outcomes.

The final analysis of the Forum must contemplate its positive and negative aspects. On the one side, despite the lack of concrete results, some characteristics of the model adopted by the Forum were correct. Among them, first, the project included trade union reform in the government agenda as the crucial condition for the modernization of labour law in the country. Second, the federal government led the project and the ILO had a secondary role in technical assistance. The ILO as an "outsider" should not lead the reform process.²⁸⁷

²⁸⁶ Besides the Constitutional Amendment Proposal, there was also a proposed reform of the Trade Union Law that would establish a transition to a system based on freedom of association. This proposal has never been presented to the Congress. See Ministério do Trabalho e Emprego, on line: Fórum Nacional do Trabalho (FNT) <<http://www.mtb.gov.br/fnt/default.asp>>.

²⁸⁷ According to Trebilcock and Davis, while "outsiders" should perform a secondary role in national institutional reforms, "insiders" must perform the protagonist's role, since these groups have a "detailed local knowledge of both local values and the innumerable factors that determine the consequences of adopting or adapting specific legal institutions". Trebilcock, M. & Davis, K., "The Relationship between Law and Development: Optimists versus Skeptics" (2008) 56 Am. J. Comp. L. 895 at 919.

On the other hand, contributing to the failure of the project, the Forum used social dialogue mechanisms to guarantee the social actors' support for trade union reform. This idea ended up being a naïve strategy. The trade unions in general continued not to support any reform that would question the corporatist structures that benefit them, that is, the mandatory dues and the unicity.²⁸⁸ As was the case in the Latin America ILO projects, the Forum invested its resources in the wrong actors who, at the end of the process, opposed the proposed changes.²⁸⁹

In synthesis, none of the projects analyzed above resulted in any concrete change in the corporatist structure. The Forum constituted the most important failure, because it was a project designed specifically to promote trade union reform. In this context, a conclusion that can be reached is that the Declaration provides the ILO with flexible instruments to work with Member States to promote fundamental rights. However, in the case of in Brazil, these instruments might not be reaching the national challenges concerning the guarantee of freedom of association. This observation can be better developed through an analysis of the ILO's activities in Brazil combating child labour, forced labour and discrimination of work.

2 ILO–Brazil cooperation in the promotion of the other fundamental labour rights

²⁸⁸ According to Horn, analyzing the debates at the provincial level during the Forum, the majority of the trade unions supported the unicity rule. Horn, C. H., “Os debates estaduais do Fórum Nacional do Trabalho: entre a reforma e a continuidade” (2007) [unpublished] at 13.

²⁸⁹ See Almeida, Gelsom Rozentino de, “O governo Lula, o Fórum Nacional do Trabalho e a reforma sindical”. (2007) 10 Rev. Katál. Florianópolis 54 at 54-64.

As highlighted in Section I, Brazil has been an active member of the ILO throughout the organization's ninety years. The country is an original member of the ILO and has built its labour law system, more specifically its employment law,²⁹⁰ using the ILO conventions as models.²⁹¹ Despite the complex problems that mark its labour law, the country has been open to dialogue and cooperation with the ILO. After the 1998 Declaration, this disposition to cooperate has continued. The ILO has technical cooperation programs with Brazil within the scope of the 1998 Declaration combating child labour, forced labour and discrimination at work.

The actions against child labour started in 1992 within the scope of the International Programme on the Elimination of Child Labour – IPEC.²⁹² Brazil is among the first members to take part in this program.²⁹³ In Brazil, the ILO gave technical assistance to the elaboration of the National Program on the Prevention and Eradication of Child Labour and Protection of Teenagers Workers, based on the two ILO fundamental conventions on the prohibition of child labour.²⁹⁴ The Program delineated a series of public policies that came to complement an institutional change that started with the 1988 Federal Constitution, which guarantees the

²⁹⁰ Concerning trade union law, the first corporatist laws used the freedom of association principle guaranteed by the ILO to legitimize its regulation. The irony is that these laws mostly restricted the freedom of association principle. However, the clear understanding of how the corporatist law violates this principle is a result of the 80 years experience of this system in Brazil. See Louzada, Alfredo João. *Legislação social-trabalhista: coletânea de decretos feita por determinação do Ministro do Trabalho, Indústria e Comércio* (Rio de Janeiro: Departamento Nacional do Trabalho/MTIC, 1933) at 415. v.1.

²⁹¹ See Gomes, Ana Virgínia M. “O Brasil e a Organização Internacional do Trabalho”. In: Bertolin, P.; Siqueira, F. *Evolução histórica do Direito do Trabalho*. Saraiva [forthcoming in 2009]. About the influence of ILO conventions on Brazilian labour law, see also Louzada, Alfredo João. *Legislação social-trabalhista: coletânea de decretos feita por determinação do Ministro do Trabalho, Indústria e Comércio* (Rio de Janeiro: Departamento Nacional do Trabalho/MTIC, 1933) at XIV.

²⁹² See ILO – Escritório Brasília, on line: IPEC <<http://www.oitbrasil.org.br/ipec/index2.php>>.

²⁹³ The other five first countries to be part of IPEC were India, Indonesia, Turkey, Thailand and Kenya. OIT, *Boas Práticas de Combate ao Trabalho Infantil: os 10 anos do Ipec no Brasil* (Brasília: OIT, 2003) at 33.

²⁹⁴ Plano de Erradicação e Prevenção, on line: Brasil, Ministério do Trabalho e Emprego <http://www.mte.gov.br/trab_infantil/plan_prevencao_erradicacao.asp>.

integrated protection of children.²⁹⁵

Through the IPEC, the ILO worked with the federal and provincial governments, employers' associations, trade unions and NGOs. The organization supported the creation and function of forums to discuss and inspect the efficacy of policies on the eradication of child labour,²⁹⁶ developed national campaigns against child labour,²⁹⁷ trained leaders combating child labour²⁹⁸ and developed studies on child labour in Brazil.²⁹⁹

Since 2003, the ILO has developed a time-bound program³⁰⁰ integrated to the National Program on the Prevention and Eradication of Child Labour. The time-bound program establishes clear goals that must be reached in a short period of time, concerning the strategies to

²⁹⁵ OIT, *Boas Práticas de Combate ao Trabalho Infantil: os 10 anos do Ipec no Brasil* (Brasília: OIT, 2003) at 44. The integrated protection of child means that the law must protect the right of children in the family, in the labour market, in society. On the evolution of legal policy in Brazil concerning the prohibition of child labour, see Gomes, A. V. M. et al, *Análise e recomendações para a melhor regulamentação e cumprimento da normativa nacional e internacional sobre o trabalho de crianças e adolescentes no Brasil* (Lima : OIT-IPEC/ SIRTICooperación Española, 2003), on line OIT <http://www.oit.org.pe/intranet/index.php?option=com_content&task=view&id=273&Itemid=1153>.

²⁹⁶ As is the case of the *Fórum Nacional de Prevenção e Erradicação do Trabalho Infantil – FNPETI* (National Forum on the Prevention and Eradication of Child Labour), constituted in 1994 with the support of the ILO and UNICEF. OIT, *Boas Práticas de Combate ao Trabalho Infantil: os 10 anos do Ipec no Brasil* (Brasília: OIT, 2003) at 46.

²⁹⁷ For example, the campaign *O Brasil sem trabalho Infantil Doméstico* (Brazil without domestic child labour), part of the project *Plano de Ação em Comunicação para o Enfrentamento do Trabalho Infantil Doméstico* (Plan of Action in Communication for the Combat of Domestic Child Labour), supported by the ILO, UNICEF, Save the Children, Fundação Abrinq, Agência de Notícias dos Direitos da Infância - ANDI. See “O Brasil sem trabalho Infantil Doméstico”, on line: ANDI <<http://www.andi.org.br/tid>>.

²⁹⁸ Between 1994 and 1995, the ILO supported the training of members of the city councils on children's rights (*Conselhos dos Direitos da Criança e do Adolescente*) on the Children Rights Code (*Estatuto da Criança e do Adolescente*). OIT, *Boas Práticas de Combate ao Trabalho Infantil: os 10 anos do Ipec no Brasil* (Brasília: OIT, 2003) at 46.

²⁹⁹ For example, the study *Trajatória de crianças, adolescentese jovens inseridos nas redes do tráfico de drogas no varejo do Rio de Janeiro, 2004-2006* on child labour in the drug traffic in Rio de Janeiro, on line: ILO <<http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=6786>>.

³⁰⁰ Time-bound programmes were created based on the ILO 182 Convention on the worst forms of child labour, according to which member States “shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.” (Article 1). See Time-bound programmes, on line: IPEC <<http://www.ilo.org/ipec/Action/Time-BoundProgrammes/lang--en/index.htm>>.

keep children from the labour market, to rescue the ones who are already working, to re-adapt rescued children to a life without work, and to protect children against the worst forms of child labour.³⁰¹ As a result of these actions, the ILO has become an important partner of the Brazilian government and social actors combating child labour. Even though the problem is still very serious, the improvement is clear: in Brazil the number of children working has decreased from more than 11.8 million workers between five to seventeen years old in the early 1990s³⁰² to 2,5 million workers between five to fifteen years old.³⁰³

The ILO's cooperation with Brazil combating discrimination at work focuses on gender and colour discrimination.³⁰⁴ The government constituted a program "Brazil, Gender and Race – United for Equal Opportunities", with the support of the ILO. Based on this program, provincial units of the Ministry of Labour develop training, mediation of individual and collective conflicts and dissemination of anti-discrimination policies,³⁰⁵ acting in partnership with other governmental and non-governmental organs. The program acts beyond the colour and gender discrimination, including also combating discrimination against native Brazilians, against

³⁰¹ Programa de Duração Determinada, on line IPEC <<http://www.oitbrasil.org.br/ipecc/progr/pdd.php>>. For example, one of these goals is to strengthen the government's capacity to identify the worst forms of child labour. In June of 2008, Decree # 6481 was promulgated, regulating Article 4 of Convention 182, and creating a list of type of the worst forms of child labour (93 forms in the case of Brazil).

³⁰² OIT, *Boas Práticas de Combate ao Trabalho Infantil: os 10 anos do Ipec no Brasil* (Brasília: OIT, 2003) at 39.

³⁰³ Instituto de Pesquisa Econômica Aplicada – IPEA, *Pesquisa Nacional por Amostragem de Domicílios 2007 Primeiras Análises: Mercado de Trabalho, Trabalho Infantil e Previdência* (30 de Setembro de 2008) at 9, on line: IPEA <http://www.ipea.gov.br/sites/000/2/comunicado_presidencia/08_09_30_Pnad_PrimeirasAnalises_N10MT.pdf>.

³⁰⁴ When one calls attention to the inequalities and discrimination by gender and race in the Brazilian labour market, one is not referring to "minorities", but to approximately 60 million people (70.5% of the labour force). "The situation of the Afro-Brazilian women is especially worrying, because they are victims, at the same time, of two forms of discrimination, which are related and reinforce each other". (Free translation). OIT, *Suplemento Nacional do Relatório Global 2007* at 2, on line: CONJUR <<http://s.conjur.com.br/dl/supl.pdf>>.

³⁰⁵ Program Brasil, *Gênero e Raça Orientações Gerais 2006*, on line: Brasil, Ministério do Trabalho e Emprego <<http://www.mte.gov.br/discriminacao/ProgramaBrasiGeneroracatarde.pdf>>.

workers with special needs, and against age and sexual orientation.³⁰⁶

There have been other significant institutional developments. In 2004, the *Comissão Tripartite de Igualdade de Oportunidades e de Tratamento de Gênero e Raça no Trabalho* (Tripartite Commission on Equality of Opportunities on Gender and Race in the labour market)³⁰⁷ was constituted as a Ministry of Labour commission. In 2003, the Special Secretariat for Policies to Promote Racial Equality and the Special Secretariat for Women Policies were created, both as federal ministries with the mission to articulate and coordinate public policies.

The results of these actions can be found in the evolution of the legal institutions for the fight against discrimination³⁰⁸ and the decrease of inequality in the labour market. Even though discrimination still marks the country's labour market,³⁰⁹ there has been a change in the distribution of labour income and, in particular, a decline in the level of labour market discrimination by sector and by geography.³¹⁰

³⁰⁶ In addition, in 2003 the ILO published the ILO code *Managing disability in the workplace: An ILO code of practice*. See OIT, *Gestão das questões relativas à deficiência no local de trabalho: repertório de recomendações práticas da OIT*, 1. ed., rev., (Brasília : OIT, 2004).

³⁰⁷ Ministério do Trabalho e Emprego, Comissão Tripartite de Igualdade de Oportunidades e de Tratamento de Gênero e Raça no Trabalho at 9, on line: Brasil, Ministério do Trabalho e Emprego <http://www.mte.gov.br/comissao_tripartite/default.asp>.

³⁰⁸ On the evolution of the Brazilian legislation against gender discrimination, see Gomes. A.V.M., 2004. “A proteção internacional contra a discriminação da mulher no trabalho e o Direito do Trabalho brasileiro” (2004) 143 *Genesis – Revista de Direito do Trabalho* 647 at 647 - 663.

³⁰⁹ In spite of the growing integration of women and Afro-Brazilians into the labour market, the wage differentiation is still very pronounced. Although the gap has been narrowing, in 2005 white men received 56% higher remuneration than women and 11% higher remuneration than black men. See OIT, *Suplemento Nacional do Relatório Global 2007* at 4, on line: CONJUR <<http://s.conjur.com.br/dl/supl.pdf>>.

³¹⁰ “With the exception of the segmentation between the formal and informal segments, all the other forms of discrimination and segmentation declined during the decade and, in particular, during the last quath. This reduction in the labour market's imperfections, with its growing integration, had a fundamental part to explain the inequality drop of labour remuneration and *per capita* income.” Barros, R. P. de *et al*, *Discriminação e segmentação no Mercado de trabalho e desigualdade de renda no Brasil*. Rio de Janeiro, (Rio de Janeiro: IPEA, julho de 2007) at 1. See Barros, R. P. de. “Uma análise das principais causas da queda recente na desigualdade de renda brasileira”

Concerning forced labour, cooperation between the ILO and Brazil started in 2002 when they established a technical cooperation program, which resulted in the project “Combating forced labour in Brazil”. This project aims to strengthen national institutions to combat forced labour and to rehabilitate rescued workers, preventing these workers from returning to slavery.³¹¹ A significant outcome of the project is the creation of mobile groups constituted by the Labour Ministry Inspection, Labour Public Prosecution Service and Federal Police. These groups go to places where workers are kept and take immediate necessary measures to release workers and punish employers.³¹² Another important initiative established by the project is the list of enterprises where the labour inspection found forced labour (*Lista suja do trabalho escravo*), published on the web by the Ministry of Labour.³¹³ The last list from 5 May 2009 contains 200 enterprises. The project also aims to strengthen the country’s legal institutions and, in 2003, law #10.803 modified article 149 of the Criminal Code, defining slavery as a crime and including in this definition modern forms of slavery.³¹⁴

(2006) 8 *Econômica: revista do Programa de Pós-Graduação em Economia da UFF* at 117-47.

³¹¹ For example, law #10.608, from 2002, Art. 2 guarantees that workers identified as submitted to the regimen of forced labour or reduced the analogous condition of slave, as a result of the action of the Ministry of Work, will have the right to receive three parcels of insurance-unemployment valued at the minimum wage each (Free translation)

³¹² Vilela, Ruth Beatriz Vasconcelos & Cunha, Raquel Maria Andrade. “A experiência do grupo especial de fiscalização móvel no combate ao trabalho escravo” in: Comissão Pastoral da Terra, *Trabalho escravo no Brasil Contemporâneo* (São Paulo: Ed. Loyola, 1999) at 35. See Santos, A., *A Proibição Internacional do Trabalho Escravo e a Cooperação entre OIT e o Brasil* (Santos: Dissertação de Mestrado, Universidade Católica da Santos, 2006).

³¹³ See on line: Brasil, Ministério do Trabalho e Emprego. <http://www.mte.gov.br/trab_escravo/lista_2009_05_14.pdf>.

³¹⁴ Articles 149; 203 and 207 of the Criminal Code, dealing with the following conditions respectively: reduction to the analogous condition of slave (confinement: 2-8 years); b) reduction of right assured for working law (penalty: detention 1-2 years, and fines, beyond corresponding penalty to the violence, being increased of one sixth to one third if the victim is less than eighteen years old, is a pregnant woman, a tribal person or has a physical or mental deficiency); c) to enlist workers of a place to another in the domestic territory (penalty: detention 1-3 years, and fines, can be increased of one sixth to one third if the victim is less than eighteen years, is a pregnant woman, a tribal

The fight against forced labour in Brazil is the most successful story among the four rights promoted by the 1998 Declaration, considering that the country recognized for the first time the existence of forced labour only in 1995.³¹⁵ Since then, Brazil has agreed to cooperate with the ILO and now has an institutional system to combat this practice. The collaboration with the ILO has been crucial to place the fight against forced labour in the legal and political agenda, pressuring the government to keep focusing in abolishing forced labour, and to disseminate inside and outside the country advances and obstacles of the Brazilian case.³¹⁶ Although still far from totally eliminating this practice,³¹⁷ the development in combating forced labour is clear: from 150 workers rescued from forced labour in 1995³¹⁸ to six thousand workers rescued in 2007.³¹⁹

These three fundamental labour rights have achieved a different legal and political status in comparison with freedom of association. On the one hand, the prohibition of forced labour,

person or or has physical or mental deficiency). See ILO, *Report of the Director-General The cost of coercion International Labour Conference, 98th Session, Report I (B)* (Geneva: International Labour Office, 2009) at 36.

³¹⁵ República Federativa do Brasil. Combate ao Trabalho Escravo no Brasil. Comissão Interamericana de Direitos Humanos Outubro de 2006, on line: Repórter Brasil

<http://www.reporterbrasil.org.br/documentos/oea_governo.pdf>.

³¹⁶ For an analysis of the Brazilian cooperation with the ILO to combat forced labour, see Fenwick, Colin & Kring, Thomas, *Rights At Work. An Assessment of the Declaration's Technical Cooperation in Select Countries* (Geneva: ILO, August 2007) at 55-60.

³¹⁷ According to the ILO 2009 global report on forced labour, "Despite the significant number of identified cases and releases, there have been almost no forced labour convictions in Brazil under criminal justice". ILO, *Report of the Director-General The cost of coercion International Labour Conference, 98th Session, Report I (B)* (Geneva: International Labour Office, 2009) at 38. A similar observation had already been made by the 2005 global report. See ILO, *Report of the Director-General A global alliance against forced labour. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work International Labour Conference, 93rd Session, Report I (B)* (Geneva: International Labour Office, 2005) at 21.

³¹⁸ Canuto, Antonio & Luz, Cassia Regina da Silva, eds., *Conflitos no campo* (Goiânia: Gráfica Terra, 2004) at 141.

³¹⁹ ILO, *Report of the Director-General The cost of coercion International Labour Conference, 98th Session, Report I (B)* (Geneva: International Labour Office, 2009) at 38.

equality at work and prohibition of child labour are progressing towards greater recognition and institutionalization. Although there is still a long way to go to their full implementation, they constitute the successful examples of the protection of labour fundamental rights in Brazil, since there is a much broader consensus about their status as fundamental rights. In other words, there has been a greater measure of success in these areas, unfortunately not in fully preventing the violation of these rights, but more in terms of the public recognition of their existence and the formulation of strategies to protect them.³²⁰

Although the objective of this dissertation is not to analyze the efficacy of these programs, this analysis reveals the government's willingness to collaborate with the ILO in the promotion of these fundamental rights,³²¹ even though the country still deals with challenges to fully protect these rights. The analysis indicates that many initiatives have been developed to promote the three fundamental rights, and that the country is changing and improving its institutions that fight against forced labour, child labour and discrimination at work. The ILO, among other international and national organizations, has been able to contribute to the change in the country's perception about these rights and to the building of new and creative institutional solutions to the violations. The question is why is it that the same has not happened in the case of

³²⁰ In the case of child labour, the change in the perception of the problem is revealed, for example, by the decrease in the use of children in formal workplaces compared with their prevalence in the eighties. Child labour now is more usual in informal workplace, hidden not only from authorities, but also from consumers. On the public perception of child labour in Brazil, see Ribeiro, Rosa, *A Percepção sobre o Trabalho Infantil na Sociedade Brasileira: primeiros resultados da Pesquisa de Opinião IBOPE 2004/2006*, on line: ILO - ANDI <<http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=6784>>.

³²¹ Another important initiative in the collaboration between the ILO and Brazil was memorandum of understanding for the establishment of a technical cooperation program promoting a decent work agenda in 2003. This program, announced in 2006, establishes three priorities: to produce more and better jobs, with equality of opportunities and treatment; to eradicate forced labour and child labour, in special, the worst forms of child labour; to make the tripartite actors and social dialogue stronger as instruments of democratic governance. Memorando de Entendimento entre a República Federativa do Brasil e a Organização Internacional do Trabalho para o Estabelecimento de um Programa de Cooperação Técnica para a Promoção de uma Agenda de Trabalho Decente, on line: Ministério das Relações Exteriores <http://www2.mre.gov/dai/b_oit_07_5110.htm>. Unfortunately, with respect to the last priority, the program does not foresee the ratification of the ILO Convention 87 on Freedom of Association.

freedom of association?

The difference is that, unlike the three fundamental rights examined in this section, the protection of freedom of association is lost in a permanent debate about the reform of the corporatist trade union structure. Freedom of association is not fully recognized as a fundamental right either politically or legally as demonstrated by Brazil's ongoing failure to ratify ILO Convention 87 and to reform its corporatist trade union structure. As in the case of promoting the other three fundamental rights, the ILO must confront the country's national challenges on freedom of association, explained in section II. However, considering the poor results achieved until now, it is fair to ask whether there is any peculiarity in promoting freedom of association that makes the work of the 1998 Declaration more difficult in this case than in the cases of the other three rights.

3 Peculiarities of compliance with the freedom of association

For the ILO to reach these national challenges, a broader consensus among actors on the need to promote freedom of association may be necessary. Therefore, the degree to which a country's political will is a necessary condition for the 1998 Declaration to produce any effect concerning freedom of association is crucial to understand the efficacy of this international norm.

The importance of a country's political will results from the fact that the ILO can only develop a cooperation program if the country invites the organization to do so.³²² Indeed, the cases where the Declaration is most effective are the ones where there is political will to promote fundamental rights, but there is a lack of capacity, as it is the case of forced labour in Brazil. However, if it is true that for the 1998 Declaration to be effective a country's political will is a necessary pre-condition, the promotion of freedom of association may be threatened, because regarding this right, there is an increasing number of cases in which the country has the capacity, but there is no will of governments or trade unions. For example, in Brazil, where even trade unions themselves do not wish for changes, the 1998 Declaration may not be very effective.

According to an ILO expert,³²³ there are four different situations in the case of compliance or lack of compliance with international labour standards. First, the country has the political will and the capacity. Second, the country has the political will and no capacity to comply with the right. Third, there is capacity and no political will. Fourth, the country has no capacity and no political will. Some observations can be made concerning this division.

The second case is the one in which the Declaration can be more effective, acting through cooperation to build the country's capacity. With the exception of freedom of association, generally if the country has capacity, it also has the political will to comply with the right. In the

³²² According to Paragraph 3 of the 1998 declaration: the ILO has the obligation to help its members, "in response to their established and expressed needs". As explained by Alston, the technical assistance "could be provided by the ILO in situations in which a lack of political will was not the major stumbling block;" Alston, Philip, "Facing Up to the Complexities of the ILO's Core Labour Standards Agenda." (2005) 16 EJIL 467 at 473.

³²³ Interview with Kari Tapiola, Executive Director of the Standards and Fundamental Principles and Rights at Work Sector (ED/NORM), Geneva, February 2009.

case of freedom of association, however, there are a significant number of cases of countries that have the capacity to comply, but no political will.³²⁴

This lack of political will can be explained by the peculiarities of the freedom of association principle. Among these peculiarities, freedom of association's close relationship to democracy³²⁵ is central to the reluctance of governments to support freedom of association rights.³²⁶ This close relationship means that freedom of association goes beyond the workplace, that is, to promote freedom of association rights is to promote more participation, debate and need for dialogue not only in the workplace, but also in the social policy's decision making.³²⁷

Another peculiarity of freedom of association is that, besides been a fundamental right, freedom of association is also a labour right.³²⁸ From the four fundamental rights expressed by the 1998 Declaration, the freedom to create trade unions and for collective bargaining are originally from labour and can only be exercised by workers, while the protection of children, of

³²⁴ According to K. Tapiola, Interview with Kari Tapiola, Executive Director of the Standards and Fundamental Principles and Rights at Work Sector (ED/NORM), Geneva, February 2009. Other examples of countries that, having the capacity, for different internal reasons do not enforce freedom of association are United States, Mexico, Malaysia, India, Argentina, China, etc. For an analysis of the US case, see Compa, Lance, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (Ithaca: Cornell University Press, 2004).

³²⁵ See examples of this relationship described in Curtis, Karen, "Democracy, freedom of association and the ILO" in: Javillier, Jean-Claude & Gernigon Bernard, eds., *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos* (Genève: Bureau international du Travail, 2004).

³²⁶ Interview with Kari Tapiola, Executive Director of the Standards and Fundamental Principles and Rights at Work Sector (ED/NORM), Geneva, February 2009.

³²⁷ An example of the political content of freedom of association rights can be found in the explanation of the Indian government for not ratifying Conventions 87 and 98: "The main reason for our not ratifying these two Conventions is the inability of the Government to promote unionisation of the Government servants in a highly politicised trade union system of the country", on line: Government of India, India and the ILO <<http://labour.nic.in/ilas/indiaandilo.htm>>.

³²⁸ According to Knapp, "freedom of association is perhaps the most essential right given to workers because it allows for the fulfillment and exercise of all others labor rights". Knapp, John C., "The Boundaries of the ILO: A Labor Rights Argument for Institutional Cooperation" (2003) 29 Brooklyn J. Int'l L. 369 at 382.

equality and of freedom can be exercised and protected in different contexts. Therefore, the human rights effect of the 1998 Declaration, explained on Section I.4, may not apply in the freedom of association's case, because the guarantee of this right is mixed in political debates on the guarantee of labour rights much more than in the consensus about the guarantee of fundamental human rights. For example, while no country openly defends child labour, there are far fewer constraints in defending restrictions of freedom of association rights.³²⁹ In synthesis, freedom of association rights are much more seen as labour rights than as fundamental human rights, and changing this view is an important task of the ILO.

A concrete peculiarity in the promotion of freedom of association concerns the dialogue with the entities that represent workers. In other words, in order to promote freedom of association the ILO must work together with trade unions that sometimes represent interests different from workers' interests. If the ILO is working with the wrong associations, such as trade unions that want to keep the corporatist system because they benefit from it, this work will not be efficient. The representation problem ("distorted representation", according to Cooney)³³⁰ is not unknown to the organization, since it is part of an ongoing debate concerning

³²⁹ Again the Brazilian case is a good example: a democratic country that has no embarrassment in perpetuating a corporatist trade union system, which violates the freedom of association principle. The reason is not lack of comprehension on how the system conflicts with freedom of association, since many analyzes in the labour law doctrine have been developed on this issue. See Siqueira Neto, José Francisco, *Liberdade Sindical e Representação dos Trabalhadores nos locais de trabalho* (São Paulo: LTr, 2000); Franco Filho, Georgenor de Sousa, "Contribuições sindicais e liberdade sindical" in: Prado, Ney, ed., *Direito Sindical Brasileiro: estudos em homenagem ao prof. Arion Sayão Romita* (São Paulo, LTr, 1998); Nascimento, Amauri Mascaro, "O Direito Coletivo no Atual Momento Brasileiro" (1993) 57 *Revista LTr*; Magano, Octávio Bueno, "Idéias para uma reforma estrutural da organização sindical brasileira" in Romita, Arion Sayão, ed., *Sindicalismo* (São Paulo, LTr, 1986) at chapter XXIII.

³³⁰ Cooney, Sean, "Testing times for the ILO: Institutional reform for the new international political economy" (1999) 20 *Comparative Labor Law and Policy Journal* 365 at session III.A.

the tripartite structure of the ILO, based on the representation of all workers by the most representative trade unions.³³¹ According to Novitz and Syrpis,

there have been accusations that existing worker representation in the ILO protects only the interests of those participating in the formal labour market, leaving the unemployed, children, women, migrant labourers and those working in informal labour markets without representation.³³²

According to Cooney, on the workers' side, the representation problem in Geneva questions the "ILO's legitimacy, fairness, and responsiveness"³³³ and can facilitate associations that do not represent any significant group of workers to propose and approve international labour norms for their own benefit only.³³⁴ On the employers' side, Cooney argues that the distorted representation affects the own elaboration of international labour standards, since groups in practice involved in the matter are not legitimate participants in the debate in Geneva.³³⁵ Another consequence is that the tripartite system does not constitute an efficient

³³¹ According to Standing, "the unions' claim to be representative of workers is increasingly invalid. This may not be their fault, but the reality is that, even though they have tried to speak in favour of others, they represent core employees, that is, those in formal employment". Standing, Guy, "The ILO: an agency for globalization?" (2008) 39 *Development and Change* 355 at 379. On the debate about the linkage between the principle of freedom of association and the ILO tripartism structure, see Milman-Sivan, Faina. "The Virtuous Cycle: a new paradigm for democratizing global governance through deliberation" () [Unpublished manuscript] at 24-27.

³³² Novitz, Tonia & Syrpis, Phil, "Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism" (2006) 35 *Ind Law J.* 367 at 385. In 1977, when the U.S. withdrew from the ILO, one of the reasons given by the country was the "erosion of tripartism", since, according to U.S. the communist countries representation was not legitimate. Van Daele, Jasmien, "The International Labour Organization (ILO) in Past and Present Research" (2008) 53 *Internationaal Instituut voor Sociale Geschiedenis* 485 at 502.

³³³ Cooney, Sean, "Testing times for the ILO: Institutional reform for the new international political economy" (1999) 20 *Comp. Lab. L. & Pol'y J.* 365 at 371.

³³⁴ Cooney, Sean, "Testing times for the ILO: Institutional reform for the new international political economy" (1999) 20 *Comp. Lab. L. & Pol'y J.* 365 at 371.

³³⁵ An example given by Cooney is the debate on the convention on homework, when the General Secretary of the Self-Employed Women's Association of India was not allowed to speak, since the general secretary was not an official delegate. Cooney, Cooney, Sean, "Testing times for the ILO: Institutional reform for the new international political economy" (1999) 20 *Comp. Lab. L. & Pol'y J.* 365 at 371. Another example of an under represented group

channel for some of the worst violations of labour rights, because these violations affect groups not represented in the traditional way.³³⁶

The distorted representation can also affect the activities of the ILO in promoting the fundamental rights and, more specifically, in promoting freedom of association. In this case, the ILO's traditional partners, the trade unions, might not be fully committed to the achievement of this right. In the Brazilian case, this situation becomes clear, since most trade unions, federations, confederations and central trade unions support the two major elements of the corporativist system – the unicity rule and the mandatory dues – even though both violate the freedom of association. As mentioned in Section II, according to the ILO, even CUT, the major central trade union in Brazil, supports the unicity rule, despite the central's domestic discourse in favour of freedom of association.³³⁷

The reason for this incompatibility between trade unions' interests and workers' interests is that the corporativist system was captured by trade unions that hold mandatory representation and received the mandatory dues, and it is then perpetuated so that these organizations can maintain these benefits. In this context, freedom of association is seen by these organizations exclusively from their perspective, ignoring workers' freedom to choose the trade union that will represent them. For instance, in the 2008 law proposal to recognize central trade unions and

in the ILO tripartite system are domestic workers, whose convention or recommendation will be debate on the 2010 International Labour Conference. See Gomes, Ana & Tortell, Lisa, (2009) *Decent work for domestic workers: Towards an international standard* [unpublished].

³³⁶ The author gives as an example workers on the sex industry. Cooney, Cooney, Sean, "Testing times for the ILO: Institutional reform for the new international political economy" (1999) 20 *Comp. Lab. L. & Pol'y J.* 365 at 372-371.

³³⁷ See Section II.4.

extend mandatory dues to central trade unions,³³⁸ the trade unions opposed a disposition that would allow a public organ to supervise the accountability of trade unions. According to the centrals, this disposition would violate freedom of association. Ironically, nothing was said by these trade unions to protect workers' freedom of association against the imposition of mandatory trade union dues paid to trade unions that hold a mandatory representation.

In this context, when the ILO develops cooperation projects to promote freedom of association involving these same trade unions who support the corporativist system, the organization is not effectively identifying subjects with will to change. As a result, resources, which could be used to facilitate reforms, are wasted, because they are spent with the wrong subjects. For example, when the ILO trains judges and the labour bureaucracy, the organization's correctly help to develop a qualified bureaucracy and judiciary that can plan, design and implement a trade union reform in accordance with the principle of freedom of association. On the other hand, when the ILO trains Brazilian central trade unions³³⁹ to promote freedom of association, even though it is known that these centrals trade unions have strong interests in keeping the corporativist system, it can be expected that this type of activity will not reach significant results.

In the Section III.4, some proposals to this situation are discussed, but for now, it is important to emphasize that in the promotion of freedom of association it is crucial to identify the organization's partners in promoting the necessary changes. In the other three fundamental rights' cases, most of the times the violations are committed by governments and employers.

³³⁸ Now law, #11.648, approved in March 2008. See section II.4.

³³⁹ As in the case of the two Latin America cooperation programs described in Section III.1.

Different from them, in the case of freedom of association, a system that violates this principle can generate trade unions that misrepresent workers' interests and that will not effectively work to protect workers' rights. Currently, this is especially true in corporativist systems, such as Brazil and Mexico,³⁴⁰ and authoritarian systems, like China.³⁴¹

As a result of these peculiarities, freedom of association represents a significant challenge to the ILO and to its 1998 Declaration. In fact, the 2008 ILO Global Report on freedom of association remarks that convention 87 has become the less ratified convention³⁴² and that “has been a decline in extra-budgetary funding directly linked to technical cooperation on freedom of association and collective bargaining”.³⁴³ Moreover, despite these peculiarities in the Brazilian case, it seems like the 1998 Declaration has no mechanisms to promote the freedom of association principle if the country has no political will. Is this a failure of the Declaration? Is

³⁴⁰ On Mexico's trade union system, see Partida Raquel, et al, eds., *El sindicalismo en México ante el nuevo milenio : una perspectiva global* (Guadalajara, México : Universidad de Guadalajara ; México, D.F. : Universidad Nacional Autónoma de México, 2002). See a 2009 complaint presented by International Metalworkers' Federation against Mexico to the ILO Committee on Freedom of Association. The complaint argues the creation by employer and public authorities of a parallel trade union. “Complaints against the Government of Mexico presented by the International Metalworkers' Federation (IMF) and the National Union of Miners, Metalworkers and Allied Workers of the Republic of Mexico (SNTMMSRM) Report No. 350, Case(s) No(s). 2478”, on line ILO-ILOLEX < <http://www.ilo.org/ilolex/english/casframeE.htm>>.

³⁴¹ On Chinese trade union system, see Verma, Anil *et al*, “A Many-Headed Dragon: Growing Pluralism in Labour Policy and Regulation in China” (2008)14 Cdn. Labour & Employment Law Journal 243; Betcherman, Gordon *et al*, “The Transition from a Managed Employment System toward a Modern Labor Market” in A. Sweetman and J. Zhang, eds., *Crossing the River by Grasping the Stones: Thirty Years of Economic Reforms*. Kingston: McGill-Queens University Press, 2008) at 13-14; Cooke, Fang Lee *HRM, Work and Employment in China* (London and New York: Routledge, 2005) at 35-38.

³⁴² ILO. Report of the Director-General, *Freedom of Association in Practice: Lessons Learned. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2008) at xx.

³⁴³ ILO. Report of the Director-General, *Freedom of Association in Practice: Lessons Learned. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2008) at xii. “It should also be kept in mind that the impact of the follow-up to the Declaration is obviously dependent on the resources that are available to carry out the technical assistance programme, and in particular, extra-budgetary resources. While such resources have been fairly abundant for the eradication of child labour, which appeals to popular feelings, this is much less the case for issues like freedom of association and collective bargaining, however instrumental they may be in the positive evolution of other rights”. ILO. Report of the Director-General, *Freedom of Association in Practice: Lessons Learned. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2008) at 457.

this incapacity to generate effects when a country lacks political will a disability of the 1998 Declaration that compromises its efficacy as an international labour norm or, has the 1998 Declaration some resources that can be used in such situations?

4 The promotion of freedom of association: proposals from the Brazilian case

Section I of this dissertation concludes that the analysis of the 1998 Declaration's effects should focus on how this norm can change states' behaviour. While the enforcement view about the ILO mechanisms does not correspond to the promotional role effectively played by the ILO's mechanisms, a more accurate approach should abdicate this enforcement view and focus on how the organization can influence conduct through its promotional mechanisms. The 1998 Declaration seems to provide a framework by which the ILO can work more effectively influencing and pressuring member States. However, at least in the Brazilian case, it appears that in the case of freedom of association these mechanisms are not able to produce significant effects.

The 1998 Declaration may have resources to deal with countries where there is a lack of political will to comply with the principle of freedom of association. This can be deduced from the structure of the 1998 Declaration itself. According to this structure, countries that have not ratified the fundamental conventions are in the focus of the 1998 Declaration. Since countries with no political will are just the ones most likely to not ratify the conventions, it does not make

sense that the Declaration would not have the resources to deal with situations involving such countries.

Analyzing then how the ILO can change states' behaviour, the 1998 Declaration's promotion of freedom of association faces a dilemma well represented by the Brazilian example. On the one hand, the country has the capacity to comply with the principle, but no political will; on the other hand, the ILO can only act if the country requires the organization's aid, that is, without the country's consent there is not a lot to do. However, in my view this is a false dilemma. I suggest that the flexible 1998 Declaration's mechanisms are well fitted to situations in which there is low political will. Even facing a country's low political will, the 1998 Declaration provides instruments through which the organization can act: disseminating information, improving the qualifications of the bureaucracy and obtaining support of independent actors. All these mechanisms can be used simultaneously, even without a formal cooperation program between the Brazilian government and the ILO, to reform the trade union system. They can be use to prepare the ground for a change in the country.

The National Labour Forum provides an example of how these activities can be developed. Unfortunately, the Forum was an opportunity wasted and its crucial mistake was to give the power to decide about the reform to trade unions and employers' associations who do not want to change. However, despite this structural problem, the ILO could have done much more.

On the one hand, there was a window of opportunity for the ILO to disseminate the concept of freedom of association as workers' fundamental right, since the government was leading the proposal of a reform process of the corporatist system based on the ideal that Brazil should guarantee plenty freedom of association. On the other hand, the organization could have taken the opportunity to explain what freedom of association means and how it is violated by the

Brazilian system. The lack of information on this last point creates a lot of confusion that is used by those who are opposed to any reform. For instance, trade unions suggest that the unicity rule guarantees freedom of association, because, as it imposes the representation by one trade union, it protects the right to be represented by a trade union.³⁴⁴ In synthesis, while in an academic paper the incompatibilities of the Brazilian corporatist system with the freedom of association principle are clear, in the real world of politics, information can be manipulated in accordance with group's interests. As a legitimate actor in the defense of workers' fundamental rights, the ILO has the authority to clarify this debate, just as it has done in the case of forced labour in Brazil.³⁴⁵

All the ILO technical cooperation programs analyzed in section III.1 promoted the strength of trade unions and dialogue with trade unions. As essential as these activities are, I suggest that the ILO should focus also on the activities that could lead to the institutional reform necessary to the guarantee of freedom of association. In this context, more than training trade union centrals that were lobbying to receive part of the mandatory dues charged to all workers, the ILO must focus on agents who have some will to change. If the organization keeps talking with the wrong people, with trade unions who are interested in keeping the system, the programs developed will not achieve any concrete results in promoting changes.

In the process of identification of the subjects with will to change, it is important to

³⁴⁴ Consultor Jurídico, "Sistema de unicidade sindical tem de ser mantido em projeto", on line: (7 May 2003) Consultor Jurídico <http://www.conjur.com.br/2003-mai-07/sistema_unicidade_sindical_mantido_1>; Borges, Altamiro, *O viés liberal da reforma sindical*, on line: Resistir informação <http://resistir.info/brasil/reforma_sindical.htm>.

³⁴⁵ ILO, *Project Document Combating Forced labour in Brazil. BRA/01/50/USA*, on line: OIT-Brasil <http://www.oitbrasil.org.br/tbesc_english/brasil/projetos/documento.php>.

emphasize that a lack of political will in a country hardly means that there is absolutely no desire for change. Thus, in Brazil, even though there is not enough political will to require a technical cooperation program with the ILO, this does not mean that there are no groups in the country who want to comply with freedom of association. ILO's first action then is to identify these agents of change – groups who want changes. In the Brazilian case, even though government, employers and trade unions have interests in maintaining the corporatist structure, the organization can still identify some agents of change among them. For example, when President Lula's government proposed the National Labour Forum to reform the trade union system, it showed some political will to change the system. It is certain that different governments will have different perspectives concerning the reform of the trade union system. If one government tries to reform the system, maybe the next government will hold a different position. There is nothing the organization can do in relation to normal political changes in the country. However, the ILO can promote this will for change even in the government by helping to build a qualified labour bureaucracy.

A more independent and qualified labour administration can assume the role of guiding the country through the reform of the trade union system, proposing the necessary reforms, and delineating a proposal that would comply with the freedom of association principles and with the specificities of the Brazilian reality. The qualification of the labour administration is then an important action that can be developed by the ILO, as has been done in the case of the program to train judges.

Even among trade unions and employers' associations, the ILO must identify groups that are truly involved with the promotion of freedom of association and ready to support changes in the trade union system. For instance, since CUT is the major central trade union and

domestically has freedom of association as one of its flags, the ILO must explore more deeply the reasons why the central has opposed trade union reform in its comments to the Brazilian individual report on freedom of association.³⁴⁶ The dialogue between the ILO and the central is crucial to clarify CUT's position concerning the reform of the corporatist system in Brazil and establish CUT as a partner in a reform process. Since CUT has always tried to differentiate itself by the defense of freedom of association in Brazil, there are some reputation losses to the central in confirming and keeping the position described by the ILO in the Brazilian report.

Concerning employers' associations, in Brazil these associations are considered trade unions by law.³⁴⁷ Therefore, enterprises also pay mandatory dues and are represented by only one trade union. As a result, the employers' representation structure suffers from problems similar to that of the workers' representation structure. Recently, a series of articles in one of the major newspapers in Brazil described some of these problems: employers trade unions with the membership in only two enterprises, one lawyer managing seven trade unions that share the same office, and trade unions that do not even have a head office.³⁴⁸ The main reason for their existence is the same as in the case of workers' trade unions: to receive the mandatory dues. According to the articles, some enterprises have already created their own associations, for example the shoe industries in Sao Paulo.³⁴⁹ Even though these associations have no legal existence in the trade union system, since they can not replace the one trade union that already

³⁴⁶ See Section II.4.

³⁴⁷ See Section II.3.

³⁴⁸ "Sindicatos de fachada" *Folha de São Paulo. Opinião. Editoriais* (19 May 2009), on line: Folha de São Paulo <<http://www1.folha.uol.com.br/fsp/opiniao/fz1905200901.htm>>. See also "Patronato vive crise de representatividade" *Folha de São Paulo. Dinheiro* (18 May 2009), on line: Folha de São Paulo <<http://www1.folha.uol.com.br/fsp/dinheiro/fi1805200902.htm>>.

³⁴⁹ "Patronato vive crise de representatividade" *Folha de São Paulo. Dinheiro* (18 May 2009), on line: Folha de São Paulo <<http://www1.folha.uol.com.br/fsp/dinheiro/fi1805200902.htm>>.

represents employers in the economic category, these enterprises believe that these alternative associations can represent their interests more effectively. These enterprises are in favour of trade union reform concerning workers' and employers' associations, and they constitute an example of a group through which the ILO can promote change.

Moreover, the ILO must focus on workers to help to build the idea of freedom of association as their fundamental right. In order to achieve this, the organization must use resources to disseminate among workers information about the meaning of freedom of association, its benefits, how the Brazilian system restricts this right. Instead of concentrating its resources on central trade unions without any guarantee that the idea of plenty freedom of association as a fundamental right will effectively reach workers, the organization must try to reach workers directly through information campaigns.

The activities developed by the organization when there is no cooperation program specifically delineated to a reform are then different from the activities developed within the scope of a cooperation program specifically designed to reform the law. In the latter, the organization acts together with the government, trade unions, and employers focusing on the measures that will effectively guarantee freedom of association. In the former, the organization works to prepare the ground for future changes, that is, the organization is acting in a previous stage, helping to strengthen actors who will pressure, propose and elaborate reforms, and finally build a consensus in the country concerning the protection of a fundamental labour right. The 1998 Declaration can be an important instrument to the organization to perform such activities.

In order for the 1998 Declaration to provide the framework for the ILO to promote changes

even in an environment of low political will,³⁵⁰ the ILO should not be totally limited in its actions by state's acceptance of cooperation and assistance to reform the trade union structure, as in the case of Brazil. According to the 1998 Declaration, member States have the "an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights".³⁵¹ The consensus in promoting these rights in respect of the ratification of the conventions is the logic of a human rights declaration, such as the 1998 Declaration. If the organization's action now is in the field of human rights, the ILO can then take a more proactive approach without violating states's sovereignty. Therefore, the ILO can act at a stage previous to when the country is ready to start the changes, developing projects to train labour bureaucracy, to promote debates on freedom of association, to disseminate information on freedom of association – that is to prepare the ground for changes among the right actors.

³⁵⁰ This analysis does not apply in certain situations, as in Myanmar, for example, in which the government shows absolutely no political will and no intent to cooperate with the ILO. The reason for this is that the lack of political will is not the only element in this context; usually these are countries that violate other international rights and are isolated internationally. Since these are more complex situations, they deserve a specific analysis. I agree with Langille that "pathological cases" like Myanmar are the exceptions, since most countries cooperate to a certain degree with the ILO, even when violating fundamental labour rights. Langille, Brian. *What Is International Labour Law For?* (Geneva: International Institute for Labour Studies, 2005) at 23, on line: International Institute for Labour Studies <<http://www.ilo.org/public/english/bureau/inst/download/langille.pdf>>.

³⁵¹ Article 2 of the 1998 Declaration.

Conclusion

The main objective of this dissertation is to analyze the effects of the 1998 Declaration, taking as a case of study the activities of the ILO in Brazil in the promotion of freedom of association.

This analysis involves initially the study of the meaning of the 1998 Declaration to the ILO. The declaration is generally described as an ILO reaction within a specific context: the arrival of the economic globalization and the rise of labour problems produced by this process, challenging the traditional ILO mechanisms of international regulation of labour. Even though this description is accurate, in order to fully comprehend the meaning of the 1998 Declaration, a wider context is needed.

This context is given in section I of this dissertation by the study of the most important stages in the ILO history –its creation in 1919, the 1944 Declaration of Philadelphia, and the 1998 Declaration. These different stages indicate the organization’s need to accommodate the changes that happen with labour as part of the dynamic of the organization itself. As a result, the 1998 Declaration does not constitute an unique initiative, but it is part of a constant process of changing that is adequate to keep the organization in touch with problems that affect labour.

A second element of this initial analysis is whether the decisions taken concerning the adoption of the 1998 Declaration were correct. Section I analyzes first, why the ILO adopted a fundamental rights declaration – an international norm with no enforcement effects – given that one of the critiques towards the ILO was exactly its lack of enforcement; and second, why the ILO adopt the concept of fundamental rights.

Concerning the first question, two reasons were identified. First, the use of a declaration indicates the importance of the decision taken in 1998, because declarations are used to express fundamental goals or principles of an organization. Second, even though a declaration has no enforcement effects, its option effectively increases the means of action available to the ILO. While to strengthen the current supervisory mechanisms would affect only countries that ratified the conventions, the 1998 Declaration mechanisms involve countries that have not ratified conventions.

Concerning the second question, the use of the concept of fundamental rights is a way to focus the ILO activities. The scope of the 1998 Declaration is well designed, since violations of these rights constitute the most serious problems affecting workers. These are such structural problems that, for instance, in Brazil, years of constant growth and political stability were not enough to resolve them. In such a context, government's commitment in prioritize the guarantee of these rights is crucial, and the 1998 Declaration's approach aims to help countries in promoting these rights. Moreover, the fundamental rights concept label is a way to strengthen the organization's regulation in face of all the economic and political questions that affected labour rights brought by the globalization process.

A third element of the analysis developed in Section I is a review of academic debate on the 1998 Declaration involving Alston, Langille and Maupain. The two main critiques developed by Alston concerns the choice of the four fundamental rights and the Declaration's promotional character. Even though this study focuses on the second critique, a brief analysis was developed focusing on the choice of rights protected by the Declaration. Concerning this last issue, the critique against the election of four rights as fundamental labour rights argues that all other rights protected by the 188 ILO conventions would have their importance minimized as the

fundamental rights would benefit from extra resources and promotional activities.³⁵² Maupain answers to this critique arguing first, that to emphasize fundamental goals does not mean to undermine the system, as the example of the Declaration of Philadelphia shows; and second, the rights protected by the 1998 Declaration have the effect of empowering workers to reach the conditions guaranteed by the other rights.³⁵³ More than ten years after its adoption, the election of fundamental labour rights did not challenge all the other rights. As a matter of fact, the number of ratifications of ILO conventions has even increased. Moreover, the major virtue of the 1998 Declaration list of rights is that it makes the Declaration a simple and direct international norm; qualities that facilitates and disseminates its use not only by the ILO.

The second critique argues that the promotional character of the Declaration jeopardizes the traditional ILO system. This critique involves two related issues: the relationship between ILO promotional and supervisory mechanisms and the enforcements perspective about the ILO, and it poses a crucial question to the organization: what effectively moves ILO members to change their behavior.

Concerning the relationship between promotional and supervisory mechanisms, a preliminary observation is that both have the same goal: to reach countries' compliance with international labour rights. While the supervisory mechanisms focuses on the compatibility of domestic systems with the conventions and in the case of the Committee of Freedom of Association, with the principle of freedom of association, the 1998 Declaration focuses on the promotion of fundamental rights and principles, using technical cooperation. The traditional

³⁵² Wet, Erika de, "Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work". (November 2008) 09 n. 11 German Law Journal 1429 at 1449.

³⁵³ Maupain, Francis. "Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights." (2005)16 EJIL 439 at 448.

supervisory mechanisms involve moral coercion, that is, shame mechanisms in order to pressure the country towards the ratification. The ILO Declaration mechanisms, instead, offers more flexibility both in relation to the moment of the ratification and to the possible means of action that the ILO can develop with the countries. The two systems act in different situations. The difference between the two approaches is that while the supervisory mechanisms points out the countries failures to comply with the international standards, the promotion mechanisms aims to assist members that did not ratify the conventions to promote the ILO principles and to facilitate the necessary changes in the countries. In other words, the 1998 Declaration provides instruments for the ILO to help to promote the national changes necessary for compliance.

The separation between these two systems in the organization's everyday life raises questions about the compatibility of the two models. For the supporters of the supervisory mechanisms, the promotional approach is not based on the standard; therefore it has no content and it constitutes a mere way to increase resources and publicity. For the supporters of the promotional mechanisms, these mechanisms are more effective in reach countries compliance due to the problems faced by the supervisory system. This incompatibility, however, is due to a view that these mechanisms are part of totally different perspectives on the ILO: in one case, the organization enforces standards; in the other case, the organization promotes principles. This analysis suggests that this difference is not real, because both these mechanisms are not enforcement mechanisms.

The enforcement view of the ILO activities is due to a perspective about the international labour regulation that this regulation must prevail social dumping. In order combat social dumping, the ILO must enforce its standards in a way that Member States would comply with the standards even at the risk of being less competitive in the global market. However, section I.

7 indicates that first, the ILO has no enforcement mechanisms to impose standards, and second, the social dumping argument is not consistent with findings in the literature.

The critique of the 1998 Declaration is based then in a strategy that enforcement is the only way to the ILO change states behavior. This dissertation suggests that this strategy erroneously pretends that the ILO counts with effective enforcement mechanisms and that the ILO must impose its standards. The promotional perspective may offer a more effective strategy to reach compliance, since it is founded on a more coherent idea of international standards related to development and not to social dumping, and it may offer to member states what they need to realize the changes.

Section II describes the trade union system in Brazil, identifies the system's incompatibilities with the principle of freedom of association, and analyzed the reasons for the country's non-compliance with the principle of freedom of association. The trade union system is based on corporatist ideals that deny labour conflicts and view trade unions as organs of collaboration with the state. The main elements of the Brazilian corporatist trade union system are the mandatory representation by the single legally recognized union; prohibition of the creation of any other union that might supplant the single established union; the imposition of only one way to organize, by occupational category (for employees) and economic sector (for employers); and compulsory trade union dues. The corporatist structure of labour law in Brazil have been carried over from the 1930s into the present day and represent the biggest obstacle to democratization and modernization of labour relations. This structure violates the principle of freedom of association, because the imposition of the representation by one trade union does not guarantee the freedom to create trade unions.

The permanence of a corporatist order stopped serving the rationale for corporatism a long time ago and is maintained only by virtue of the interests of those participating in the system in limiting freedom of association. The adoption of legislation to allocate a percentage of mandatory trade union dues to the central trade unions without accompanying requirements for accountability is the most recent example of how this system is sustained. The central trade unions had historically supported greater freedom of association, in opposition to the unicity rule, but now they seem content to be part of this system. The modernization and democratization of Brazil's labour relations system depends on the end of the corporatist system and the recognition and application of the freedom of association as a worker's fundamental right. However, there is not enough consensus among the social partners to promote the necessary reforms.

The full acknowledgment of freedom of association as a fundamental right can only take place within a democratic labour legal order, free from corporatist confines. Only then may workers - the beneficiaries of this right - fully exercise this fundamental freedom and only then will there be significant change to social dialogue in Brazil, through greater democratization, worker participation, union representativeness and engagement with workers.

Section III focuses on the ILO activities with Brazil in order to promote the principle of freedom of association. The aim is to analyze whether the ILO can help the country to promote reforms in its trade union structure through the instruments provided by the 1998 Declaration. Section III.1 describes the cooperation programs between the ILO and Brazil that include the promotion of freedom of association. Among the programs, the most important for this study is the National Labour Forum, since this program had as its main goal the reform of the trade union structure.

The Forum was an opportunity wasted. For the first time since the creation of the corporatist labour structure, the trade union reform was elected as a political priority and as a condition to the modernization of employment law. The results did not produce any development; on the contrary, in the only result achieved, central unions were recognized (an old demand of the labour movement), but were also included in the corporatist structure as they start to receive the compulsory trade union dues. The poor results of the Forum can be explained by its own structure: a tripartite structure according to which the actors who benefit from the system would be the ones responsible to reform the system and eliminate their benefits.

The role of the ILO was restricted to provide technical assistance to the elaboration of a constitutional amendment and a law proposal that, at the end, were not even appreciated by the National Parliament. There was no dissemination among workers of information about freedom of association and its incompatibilities with the Brazilian system or campaigns about what constitute freedom of association.

The contrast of the role performed by the ILO in the case of the Forum is more evident when it is compared with its activities in the scope of cooperation programs of the other three fundamental rights, as described in Section III.2. Concerning these three fundamental rights, the ILO has been involved in technical cooperation to strengthen national and local institutions, modernize the law, train the bureaucracy, develop programs to combat violations, organize national campaigns, etc. The results are evident in the three cases. Even though the three rights are still violated, they have enjoyed greater social and political recognition as fundamental rights. If the ILO has been able to contribute through the 1998 Declaration to the development in the promotion of these right, why all this does not happen in the case of freedom of association?

Section III.3 focuses on this question, considering whether there is any peculiarity concerning freedom of association that complicates the work of the ILO. Comparing the examples mentioned in section III.2 with the case of freedom of association in Brazil, the main difference is that in the case of freedom of association the country shows low political will to realize the necessary changes. If a country's political will in collaborating with the ILO is then a necessary condition for the 1998 Declaration's efficacy, the promotion of freedom of association by the 1998 Declaration is jeopardized. The reason for this is that, due to freedom of association's peculiarities, in many cases of violation of freedom of association the country has the capacity to comply with the principle, but has low political will. The close relationship between freedom of association and democracy, the strong labour right character of freedom of association that can minimize its fundamental right character, and the representation problem are identified as peculiarities that contribute to countries' low political will in complying with freedom of association.

The Brazilian case constitutes an example of the representation problem affecting the promotion of freedom of association, since the ILO's traditional partners, the trade unions, do not contribute to this fully promotion of this right. Most trade unions support the central elements of the corporatist structure – the unicity rule and the mandatory representation – , which benefit these trade unions, as it guarantees mandatory representation and economic resources in respect of legitimate membership or support by workers. In this context, when the ILO cooperates with these actors in the promotion of freedom of association, it is unlikely that any substantial reform will be achieved. The organization invests its resources in wrong actors who in the end will oppose any change in the corporatist system. The analysis of the Brazilian case leads to the question whether the 1998 Declaration's efficacy is compromised when a country

lacks political will to promote a fundamental right. Section III.4 examines whether the 1998 Declaration has any resources to overcome this disability.

One of the most important innovations of the 1998 Declaration is that it involves in the ILO system countries that did not ratify the fundamental conventions. These countries are mostly the ones where there is a lack of political will to comply with fundamental labour rights. Therefore, it is incoherent that the Declaration would have no resources to affect these countries. Taking the Brazilian case as an example, this dissertation proposes that the 1998 Declaration provides mechanisms that can be used in these situations (information, qualification of the bureaucracy and support of independent actors) even outside the scope of a cooperation program to reform the law.

For example, the ILO should centralize its efforts to build the idea of freedom of association as workers' fundamental right, disseminating information about what is freedom of association and how it relates with the features of the Brazilian system. Moreover, the ILO must identify the subjects with will to change the system. Even in Brazil, they can be found: in the government and among trade unions and employers' associations that are left outside the benefits of the corporatist system. Different from a cooperation program specifically design to reform trade union law, in these activities the organization will be acting to prepare the ground for future changes. Even though there is low political will in the country, these types of actions are legitimized by the human rights character of the 1998 Declaration.