A Legal Perspective on the Role of International Labour Standards in Rebalancing Globalization

Une perspective juridique sur le rôle des normes internationales du travail dans le rééquilibrage de la mondialisation

Eric Gravel, Tomi Kohiyama and Katerina Tsotroudi

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A Legal Perspective on the Role of International Labour Standards in Rebalancing Globalization

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Introduction

- 1 Aims to provide a remedy for (what was to be later labelled) *social dumping* and to find sustainable solutions to poverty and social exclusion through a certain equalization of levels of social protection among countries lie at the origin of the creation of the ILO in 1919 (Maupain, 1997, p. 582). The intention at that time was to achieve these aims through the promotion of social dialogue, in the form of tripartism, and the adoption of international labour standards. The subsequent advent of globalization brought to the centre stage, with unprecedented magnitude, the same concerns that had led to the Organization's establishment, while at the same time calling into question the relevance of its standards-setting action. More recently, the eruption of the financial crisis, its socio-economic costs and new developments in the globalization process have placed international labour standards under further strain.
- 2 The celebration of the ILO's 75th anniversary in 1994 sparked off a series of reforms intended to revitalize international labour standards. A landmark instrument, the ILO Declaration on Fundamental Principles and Rights at Work, 1998 (the "1998 Declaration"), has served to establish a global minimum social floor by promoting respect for the fundamental rights and principles reflected in the ILO's eight fundamental Conventions and boosting their ratification levels. The important role of international labour standards in achieving a fair globalization has received staunch support from the ILO's

constituents, particularly through the Declaration on Social Justice for a Fair Globalization, 2008 (the “Social Justice Declaration”) and the Global Jobs Pact, 2009.

- 3 However, beyond these policy statements, a number of questions have arisen: are ILO member States translating their commitments to the ILO and its standards into concrete actions? Is the ILO sufficiently responsive to its Members’ needs and is it assisting them in taking the measures that are commensurate with the on-going challenges?
- 4 The present paper answers these questions through examination of three topics: the role of international labour standards in the context of crisis as it emerges from the work of the supervisory bodies; current trends as regards the protection of workers in the informal economy; and labour provisions inserted in preferential trade arrangements. These topics are significant as they all highlight what might be described as the parameters of any research on the role of international labour standards in the context of globalization. First, the existing body of standards and the guidance of the supervisory bodies provide a relevant framework within which the issues involved should be analyzed and addressed, thus underlining the emphasis that should be placed on the effective implementation of international labour standards. Second, in addressing the issues in question, the adequate complementarity between international labour standards and national labour legislation, policy and practice should be ensured and adjusted as appropriate. The involvement of social partners in determining such balance is key in this respect. Third, the complexity of the issues in question point out to the necessity of an integrated approach drawing from different expertises, with special emphasis on integrated economic and legal approaches. Finally, these three topics exemplify the voluntary approach to social progress on which the ILO normative action rests, thus pointing out the overriding issue of the effectiveness of international labour standards in the context of globalization.

The role of international labour standards in the context of the crisis as it emerges from the comments of the supervisory bodies

- 5 The present section discusses the extent to which international labour standards can and have served as safeguards in the context of the crisis, paving the way for a sustainable recovery. It illustrates cases of best practices identified by the ILO supervisory bodies and discusses the way in which these bodies have approached cases of possible social regression, related in particular to the austerity measures adopted in Europe during the second stage of the crisis.

There is widespread recognition that the crisis must not be used as an excuse for lowering standards

- 6 Even if international labour standards may appear to be a distant concern in times of crises, the fact that they are actually part of the solution was widely acknowledged by the ILO constituents during the discussions which led to the adoption of the Global Jobs Pact, 2009. The latter includes among the principles for promoting recovery and development the “promot[ion of] core labour standards and other international labour standards that support the economic and jobs recovery and reduce gender inequality” and emphasizes

the essential role of standards in preventing a downward spiral in labour conditions and building the recovery notably by maintaining social cohesion and a global social floor (ILO, 2009c, para. 14). The tripartite Committee on the Application of Standards (CAPP) – one of the cornerstones of the ILO supervisory system that functions as a standing Committee of the International Labour Conference – emphasized in 2009 that the crisis must not be used as an excuse for lowering standards; that there could be no sustainable economic recovery without sustainable and up to date labour standards; that treaty obligations, voluntarily undertaken, were to be fully respected and that ensuring respect for fundamental principles and rights at work results in undeniable benefits to the development of human capital and economic growth in general and, more particularly, to global economic recovery (ILO, 2009, para. 97). This statement was echoed by the G20 leaders in their Pittsburgh Summit Statement.¹ The Global Jobs Pact has listed the comprehensive set of Conventions and Recommendations, which serve as minimum safeguards in the context of the crisis: the fundamental Conventions on freedom of association and collective bargaining, non-discrimination, forced labour and child labour as well as the ILO instruments concerning employment policy, wages, social security, the employment relationship, the termination of employment, labour administration and inspection, migrant workers, labour conditions on public contracts, occupational safety and health, working hours and social dialogue mechanisms (ibid).²

- 7 Against this background, the adoption of a new instrument which would have established guiding principles and policies to deal with preventive crisis action and effective crisis responses was contemplated as a possible standard-setting option in the 2010 General Survey on Employment Instruments by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), i.e., the supervisory body which carries out a legal examination of the extent to which national laws and practices conform to international labour standards and reports thereon to the International Labour Conference (ILO, 2010b, paragraph 806). The CAPP decided not to move forward on such an option. In so doing, the ILO constituents confirmed that the priority should fall on the effective application of the existing standards in these times of crises, in line with the guidance provided in the Global Jobs Pact, rather than move towards the adoption of yet another instrument. The role of the ILO supervisory system is key in this regard.

... and that the longstanding statements of the ILO supervisory bodies constitute the baseline

- 8 At the outset, it bears noting that this is not the first time that the ILO supervisory bodies have had to pronounce themselves on the application of standards in situations of crisis and austerity. The Committee on Freedom of Association (CFA), a tripartite body entrusted with the examination of complaints alleging infringements of freedom of association principles, has had a long record of decisions on the need to align structural adjustment programmes with respect to collective bargaining structures and agreements. In a longstanding dictum which has been reiterated in a plethora of cases, the CFA has spelled out the fundamental principles which should underlie any austerity package if freedom of association and collective bargaining is to be respected:

“If, as part of its stabilization policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary,

without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards" (ILO, 2006, Para. 1024).

- 9 The CFA has also emphasized that, in any case, a limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement and that consultation should aim at ensuring that the public authorities seek the views, advice and assistance of employers' and workers' organizations, particularly in the preparation and implementation of laws and regulations affecting their interests (ibid, para. 999 and 1068).
- 10 This guidance which emanates from the principles of proportionality and tripartite dialogue should underlie any effort to steer an economy through the crisis while, at the same time, respecting international commitments under the ILO Constitution and ratified Conventions on freedom of association and collective bargaining. It also resonates well with the Global Jobs Pact, which provides that the success of measures to avoid wage deflation crucially depends on ensuring respect for core workers' rights and building the capacity of the social partners for dialogue and agreement-making.

The crisis entails a risk of social regression

- 11 The immediate response by the CEACR to the emergence of the current crisis was to adopt a general observation on the application of the ILO social security standards in the context of the global financial crisis, in which it emphasized the need to avoid the risk of social regression. The CEACR also emphasized that, in the unprecedented conditions of the global financial crisis, governments must manage the skyrocketing levels of budgetary deficit in such a way as not to endanger the social guarantees of the population and that measures taken by governments to salvage private providers could not be taken at the expense of cutting the resources available to public social security schemes (ILO, 2009).
- 12 Two years later, in its 2011 General Survey on Social Security instruments, the CEACR took the opportunity to return to this question in the light of recent developments. The CEACR noted that, in 2010, several European countries took an abrupt turn from stimulus measures, adopted in consultation with the social partners during the early part of the crisis, towards austerity plans aimed at addressing public debt and budget deficits and enhancing fiscal consolidation.³ The CEACR concluded that:

"it appears that in some cases the imperative need to achieve fiscal consolidation has not been balanced with sufficient concern for the social and human costs of such rapid austerity measures. Not only social cohesion will be put at risk, but in such conditions, the economic recovery may be accompanied by a prolonged "human recession". One should also remember that governing only by financially oriented criteria may lead to an undermining of social justice and equity. Public opinion is much less ready to accept drastic austerity measures if it sees that the efforts requested are not equally distributed and shared by everyone." (ILO, 2011 para., 567)
- 13 Even though the comments of the CEACR concern the social security Conventions in particular, the austerity measures may also impact on the application of several other instruments. In the case of **Greece**, for instance, the Greek trade unions submitted to the CEACR urgent observations alleging violations of no less than 12 ratified Conventions. Faced with this challenge, the CEACR had a choice between pursuing its traditional

approach of making comments on the conformity of national law and practice with ratified Conventions, or taking a more innovative path which consisted of, for instance, engaging in a constructive dialogue aimed at assisting the country to honour its international commitments while facing the challenge of fiscal consolidation. In its 2011 report, the CEACR invited the Government to avail itself of ILO technical assistance, in the form of a High Level Mission, so as to facilitate a comprehensive understanding of the issues before examining the impact of the austerity measures on the application of the ratified Conventions. (ILO, 2011, p. 584-85)

- 14 The approach of the CEACR in this case has been in line with the integrated strategy pursued over the last few years on the basis of the decisions taken by the ILO Governing Body (e.g., ILO 2009d). This strategy consists of taking advantage of synergies among all standards-related means of action, including technical cooperation, in order to strengthen the standards system and promote the effective application of international labour standards on the ground.
- 15 For such a strategy to succeed, two conditions must be met. First, it is necessary to draw upon the technical competencies of the Office as a whole with a view to offering cutting-edge technical advice and realistic policy options within the framework of ratified Conventions. Second, the obligations voluntarily undertaken under the ILO Constitution and ratified Conventions, as well as the comments of the supervisory bodies on their application, should provide the necessary legal mandate and framework for the ILO to engage in dialogue with international institutions having a leading role in this domain, notably the International Monetary Fund (IMF) and the European Union (EU).

... while in certain respects, the crisis has been an opportunity for social progress

- 16 Against this background, it is perhaps unorthodox to present the crisis as an opportunity for social progress. Nevertheless, the supervisory bodies have noted certain significant examples where, in the framework of efforts to overcome the negative effects of the global economic downturn, the crisis has functioned as a catalyst for progress, consolidating certain advances (which had sometimes been initiated prior to the crisis). Many notable examples emanate from developing and emerging countries; some of which have, by the same token, distanced themselves from the structural adjustment policies which they had previously pursued.
- 17 For instance, in the framework of the supervision of the Employment Policy Convention, 1964 (No. 122), the CEACR noted information provided by **Brazil** on the counter-cyclical measures adopted by the Government, including infrastructure projects under the Growth Acceleration Plan, entailing investments of US\$300 billion in 2009, as well as programmes to build houses for the poorest families and an expansion of beneficiaries of the *Bolsa Familia* programme that provides financial assistance to 11.1 million families. The CEACR and the CAPP have taken note of similar measures adopted in **Argentina, China, Mexico, Turkey and India** (notably, the Indian National Rural Employment Guarantee Scheme, which has been noted on various occasions as an important social safety net) (ILO, 2010b, paras 53, 63 and 620; ILO, 2011, pp. 516, 603-606; ILO 2009, p.124)
- 18 The CEACR also took note of stimulus measures and active labour market policies adopted by industrialized countries, especially during the first stage of the crisis (e.g., **Austria**,

France, United States, Germany, Italy, Japan, New Zealand and Canada; ILO, 2010b, paras 560, 582, 584, 589-591).

- 19 In its 2011 General Survey, the CEACR noted that, in several countries (e.g., **Belgium, Chile, Germany, Japan, Netherlands, Nigeria, Singapore, South Africa**), governments involved the social partners in the shaping of stimulus packages meant to mitigate the impact of the global economic downturn on workers and enterprises and to accelerate recovery (CEACR, 2011c para. 553).
- 20 In its 2010 General Survey, the CEACR, while taking note of policies pursued in the framework of Convention No. 122, requested the Members to evaluate their effectiveness and indicate their impact on the promotion of full, productive and freely chosen employment. The CEACR has also emphasized in its comments under Convention No. 122 that social dialogue is essential in normal times and becomes even more so in times of crisis. The employment instruments require member States to promote and engage in genuine tripartite consultations (CEACR 2010, para. 794). An important caveat is to ensure that such measures benefit the more vulnerable and marginalized segments of society in line with both Convention No. 122 and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). This issue is also addressed below in relation to the informal economy.
- 21 The examination by the ILO supervisory system of crisis response measures and their impact is ongoing and is based on a periodic reporting mechanism. In its forthcoming sessions, the CEACR will examine information on the application of Conventions Nos. 94, 95, 131 and 173 on income security by ratifying States, as a follow-up to the general observation it issued in 2010, in order to emphasize the need to ensure that crisis responses be fully consonant with the principles underlying these Conventions (ILO 2010c, pp.32-35). This permanent supervisory mechanism offers an opportunity to develop, in due time, a global assessment of the extent to which the crisis response measures correspond to the international commitments of member States under ratified Conventions.

... this may point towards a gradual convergence in labour regimes

- 22 Whereas there is broad consensus on the relevance of international labour standards in addressing crisis situations and on the need for effective supervision to ensure their sound implementation on the ground, the ILO supervisory mechanisms are confronted with an unprecedented challenge: the European models of industrial relations and social protection – which, since the inception of the ILO and its standard-setting system, were often looked upon and replicated in the developing world -- are now being reconsidered and, in some cases, fundamentally revamped. At the same time, leading countries from the developing world offer new and innovative examples of how the application of international labour standards can be taken forward in the new conditions of a globalized world.
- 23 Faced with this new environment, the ILO supervisory system has been relying increasingly on technical assistance and cooperation as a complement to its traditional function of controlling the application of ratified Conventions in an active effort to make the ILO and its supervisory system part of the solution to, rather than a distant observer of, the challenges raised by the global economic crisis. Within this framework, it is

important to strengthen the voice of the ILO by using international labour standards and the supervisory mechanisms as a platform for promoting policy coherence at all levels.

- 24 The above is particularly important in the cases of countries with above-average sized informal economies which, according to some estimates, are more than three times as likely to incur the adverse effects of the crisis as those with lower rates (ILO and WTO, 2009, p. 10).

The protection of workers in the informal economy: Current trends

The informal economy provides many with job and income generation outlets, but the jobs created often fail to meet the criteria of decent work....

- 25 While obtaining a true picture of the size and dynamics of the informal economy has proven to be a daunting task since definitions, concepts and measurement might differ depending in part on whether precision or country-comparability is sought, a recent ILO/ WTO joint study has estimated that informal employment comprised about 78 per cent of non-agricultural employment in developing Asia and 52 per cent in Latin America and 56 per cent in Africa (with substantial variation between North Africa and Sub-Saharan Africa).⁴ Most people enter the informal economy not by choice, but out of the need to survive. Especially in circumstances of high unemployment, underemployment and poverty, the informal economy provides many with job and income generation outlets because of the relative ease of entry and low requirements for education, skills, technology and capital. However, the jobs thus created often fail to meet the criteria of decent work. Workers in the informal economy have low incomes, low job security, no social protection and fewer possibilities for access to formal education and training.
- 26 From the perspective of unprotected workers, the negative aspects of work in the informal economy far outweigh its positive aspects. Workers in the informal economy are not recognized, registered or protected under labour legislation and are excluded from social protection. They are therefore not able to enjoy, exercise or defend their fundamental rights at work. Since they are normally not organized, they have little or no collective representation vis-à-vis employers or public authorities.
- 27 It should be recalled that informality is principally a governance issue. The growth of the informal economy can sometimes be traced to inappropriate, ineffective, misguided or badly designed or implemented social policies, often developed without tripartite consultations, and lack good governance for proper and effective implementation of policies and laws.

...and responses should be devised at national and local levels with the participation of social partners, taking into account international labour standards.

- 28 There is no doubt that tailor-made and effective responses to the incidence and growth of the informal economy after the crisis can only be devised at national and local levels with the full participation of the social partners and with special focus on vulnerable groups

like women, children, migrant workers, indigenous peoples, rural workers, domestic workers, etc. international labour standards can provide the roadmap upon which such responses and appropriate policy mixes might be based. Such a roadmap would place emphasis on reinforcing the application of the eight fundamental Conventions which contain the basic enabling rights instrumental to progressively breaking away from the informal economy and poverty. It would also rely on the four Conventions most important from the view point of governance, which serve to promote active labour market policies, ensure appropriate law enforcement and oversight from the public authorities and encourage the common search for solutions through tripartite dialogue. The effective application of these twelve instruments at national level constitutes, in and of itself, the basic groundwork for a progressive exit from the informal economy.

- 29 In addition to these basic instruments, certain additional standards are particularly relevant to the informal economy. Several of them contain essential policy tools to address the informal economy, others explicitly include within their scope of coverage workers in the informal economy while some others are intimately related to the condition of workers in this economy. Naturally, they overlap with the instruments which are an integral part of the recovery from the financial and economic crisis.
- 30 The belief that workers in the informal economy are outside the scope of application of international labour standards is a common misconception. In fact, most international labour standards are relevant to those in the informal economy. It should be stressed that the fact that international labour instruments may not be widely applied in practice in the informal economy does not mean they are not relevant to it. Several Conventions and Recommendations have provisions referring specifically to the informal economy, while a number of ILO instruments apply explicitly to “workers” rather than the legally narrower term “employees”, or do not contain language limiting their application to the formal economy (Trebilcock, 2004, p. 590). For instance, ILO fundamental Conventions on freedom of association (Nos. 87 and 98) explicitly state that all workers without distinction whatsoever, including workers in the informal economy, enjoy the fundamental rights which flow from freedom of association. Thus, workers in the informal economy have the right to organize and engage in collective bargaining (where there is an employer). They may freely establish and join trade unions of their own choosing for the furtherance of their occupational interests and may carry out their trade union activities (elections, administration, formulation of programmes) without intervention from the public authorities. Most importantly, they have the right to represent their members in various tripartite bodies and social dialogue structures.

The supervisory bodies have addressed issues relevant to the informal economy in a more systematic manner after the adoption by the Conference in 2002 of a conceptual framework ...

- 31 It was during the 2002 International Labour Conference that a conceptual framework of employment in the informal sector was presented in the context of the discussion on decent work and the informal economy.⁵ The ILO’s supervisory bodies thus decided to address issues relevant to the informal economy in a more systematic manner in their comments after the 2002 discussion at the Conference. For instance, the CEACR has formulated comments concerning themes such as freedom of association, discrimination or labour administration, in particular with regard to the scope of application of these

instruments. But, the majority of the Committee's comments relate to the Conventions on child labour and, to a lesser extent, employment policy. In fact, under Conventions Nos.138 and 182, the Committee has systematically pointed out to governments that the situation of children working in the informal economy deserves special attention. The Committee has also regularly pointed out that Convention No.122 provides that measures to be taken in relation to employment policy should take fully into account the experience and views of the social partners with a view to securing their full cooperation in formulating and implementing employment policies, including the opinions of those working in the rural sector and the informal economy. There are also numerous situations identified by the Committee as cases of forced labour that are taking place in the context of the informal economy and for which it has asked governments to take measures. For instance, a number of comments relate to human trafficking for sexual exploitation, cases of bonded labour or forced labour for vulnerable categories of workers such as migrant workers, domestic workers or indigenous workers, which often occur in the context of the informal economy.⁶

...and in particular, in its 2010 General Survey on employment instruments, the Committee of Experts made a comprehensive review of the policies adopted by governments towards the informal economy.

- 32 Moreover, the Committee of Experts, in its 2010 General Survey on employment instruments, made a comprehensive review of the policies governments have adopted towards the informal economy. In this study, the Committee noted with interest that most countries stated that they had policies targeted towards the informal economy, women, youth, older workers, people with disabilities, and migrants. For instance, in Asia, the most explicit programmes on the informal economy are to be found in the current or former centrally planned economies. In Mongolia, there is a national programme on the informal economy, a key element of which is its incorporation into the formal economy through a system of registration based on the issuance of identity cards. China also gives priority to the incorporation of the informal economy into the formal, while Viet Nam emphasizes the development of community-based insurance programmes as a means of improving the welfare of workers in the informal economy. In the case of Latin America, the Committee noted that most countries laid strong emphasis on, and had elaborate policies and programmes targeting the informal economy. Argentina has set a well-articulated policy towards the informal economy, and the Government has considered informal employment to be one of the most serious challenges that has emerged in the labour market. It has seen the extension of the informal economy as an erosion of the fundamental rights of workers and their families. Its overriding objective is therefore to end informal employment, but the policy recognizes the importance of taking into account the high level of heterogeneity that characterizes the informal economy in designing specific interventions. The Government of Bolivia has considered for its part the integration of workers in the informal economy as one of its priorities as proposed by a policy document drafted in 2009. Particular initiatives have been proposed by the Ministry of Labour to promote the transition towards the formal economy. Brazil has implemented a wide range of employment and income generation programmes directed at the informal economy, principally through PROGER. Most other countries also have

programmes such as microcredit, training, and small and microenterprise development that covered the informal economy. In the case of Africa, the Committee noted that most countries had policies targeted at the informal economy, youth and women workers. As regards the informal economy, Rwanda has indicated that it prioritizes this sector because “in the years to come in light of the rate of population increase and public sector restructuring, employment creation will depend less on Government than in the past hence the need to refocus development policies and strategies towards the private sector (including the informal economy) as a way to promote employment.” Cameroon has stated that it is implementing a special project, and is promoting the formation of producer groups and the extension of credit to rural producers. Mali has stated that it is also establishing producer groups (*chambres d’artisans*) and has reduced import duties for informal sector producers. Niger has stated that it provides training and has created an apprenticeship scheme for its informal economy while Malawi is in the process of reviewing its Business Licensing Act and is promoting microfinance.

- 33 Through this General Survey, the Committee further noted that the concept of the informal economy and the need to devote special attention to it in developing countries has also been widely assimilated. Most developing countries refer to it in their employment plans or policies and have policies and programmes directed at raising productivity and incomes in this sector. The common elements of these programmes include credit and microfinance programmes, provision of sites where these activities can be carried out, training, encouraging the formation of producer groups and assistance in acquiring inputs and in marketing. Some countries have also introduced measures to extend labour and social protection to workers in this sector.
- 34 Finally, the Committee of Experts acknowledged that a progressive elimination of the informal economy was the ultimate goal, but pointed out that this goal should be achieved through sustained economic development. During much of this long-term process, it is important to include assistance to the informal economy as part of policies to achieve full and productive employment and to reduce poverty. Such action towards the informal economy should include efforts to extend access to justice, property rights, labour rights and business rights to informal economy workers and business.

Other supervisory bodies have addressed workers’ issues in the informal economy...

- 35 The CAPP has for its part emphasized in recent years the importance of a cooperative framework between the ILO and its member States to deal with the informal economy’s lack of labour rights protection. The CAPP has insisted on the need for labour inspectors to be better trained to enhance communication with the informal economy’s actors and has stressed the need to collect better statistical data related to this sector in order to give a clearer definition of the informal economy. Another key element emphasized by the CAPP is the fact that in order to address workers’ issues in the informal economy, governments have to ensure that employment, as a key element for poverty reduction, is at the heart of macroeconomic and social policies.
- 36 Furthermore, those who work in the informal economy may bring a complaint to the CFA if they feel that their freedom of association rights have been infringed by their Government (or by a person and their Government has not taken the necessary measures to ensure the free exercise of freedom of association). Complaints relating to issues linked

to the informal economy have already been submitted to the CFA in recent years, e.g., **Argentina, Guatemala and El Salvador**.

...while several countries have adopted laws and regulations which specifically address the issue of informality for workers.

- 37 In terms of legislation, it bears noting that, in recent years, several countries have adopted laws and regulations which specifically address the issue of informality for workers. For instance, **Burkina Faso** adopted in 2008 a Decree concerning the adoption of particular statutes for the Assistance Fund for the Informal Sector. The Fund was established in order to provide direct loans and guarantees to creators of micro-projects. It is administered by the Ministry of Employment and the Ministry of Economy and Finance and aims to promote employment and combat poverty by creating jobs through micro-projects, and in particular by providing training, follow-up and advisory services for the receivers of micro-credit loans. Another example is Egypt which, already in 2003, adopted a Decree promulgating the regulation on employment in the informal sector. This decree establishes a Commission on employment in the informal sector charged with studying and formulating policy on workers in the informal economy. It provides for the registration of workers in the informal economy and the issuance of registration cards. It also forbids employers to hire workers in the informal economy through non-authorized employment services. For its part, India adopted in 2008 the Unorganized Workers' Social Security Act, which provides for the establishment of social security schemes for workers in the informal or "unorganised" economy and applies to the whole of India. For the purpose of the Act, an unorganised worker is defined as a "home-based worker, self-employed worker or a wage worker in the unorganised sector". The Government may formulate and notify suitable welfare schemes for unorganised workers such as provident fund, employment injury benefit, housing, educational schemes for children, skill upgrading of workers, funeral assistance and old age homes. Another country which has adopted legislation addressing this issue is Papua New Guinea, which adopted in 2004 the Informal Sector Development and Control Act. This Act provides the facilities and encourages the development of informal businesses in urban and rural areas. It regulates and controls the development of informal businesses, including through the establishment of inspection and sets out rules for the protection of public health and safety. Finally, one last example is Portugal, which adopted in 2009 the Law establishing the legal regime for domestic work. This law regulates the creation of an activity, without legal subordination, in the home or residence of the worker. This includes when a finished product, following the purchase of the raw materials, is provided for a specific price to the salesperson.⁷
- 38 To promote decent work, it is necessary to eliminate the negative aspects of informality while at the same time ensuring that opportunities for livelihood and entrepreneurship are not destroyed, and promoting the protection and incorporation of workers and economic units of the informal economy into the mainstream economy. Based on the guidance provided by international labour standards, appropriate responses and policy mixes should be decided upon at national and local levels with the full participation of the social partners and with special focus on vulnerable groups. Addressing the informal economy is thus a central aspect of strategies for an exit from the crisis. It would also seem to be an important component of any action to ensure that trade liberalization

benefit to workers of developing countries with large informal economies, all the more so as these countries are increasingly parties to preferential trade arrangements including labour provisions aiming at guaranteeing certain labour rights and conditions.

The nexus of international labour standards and labour provisions in preferential trade arrangements: addressing current knowledge gaps to promote coherence

- 39 This section briefly raises the main issues arising from labour provisions that are included in unilateral, bilateral and regional trade arrangements (the Generalized System of Preferences (GSP) schemes and trade agreements), which refer to the 1998 Declaration and ILO Conventions. The considerations set out below may be relevant to the labour provisions in trade arrangements relating to the enforcement of domestic labour legislation, which necessarily incorporate provisions of any relevant ILO Conventions that the countries concerned have ratified. Further, the distinction between these two types of trade-related labour provisions is tending to diminish in practice, as recent trade agreements refer both to ILO instruments and the enforcement of national labour legislation.
- 40 The proliferation of labour provisions in trade arrangements – involving not only North-South trade agreements but also a growing number of agreements between developing and emerging economies (Ebert and Posthuma, 2010, pp.3 and 19, ILS, 2009, p.77) – could potentially provide important leverage towards the realization of the ILO objectives and the strengthening of its standards system and the related technical assistance (ILO, 2007, pp.31-32). In fact, the ILO was pioneer in responding to the first significant manifestations of the trade and labour link in the context of globalization from 1994 to 1997. This work was conducted within the framework of the Working Party, which was set up by the Governing Body to discuss all relevant aspects of the social dimensions of the liberalization of international trade (ILO, 1994, p.1). However, the ILO's contribution to the very rich analytical work that has been carried out within other fora has been, on the whole, limited.

Three interrelated gaps in terms of knowledge base and research.

- 41 A review of the literature exposes three gaps in terms of information and analytical work. First, while a broad typology of labour provisions has been established (Ebert and Posthuma, 2010, pp.4-5, ILS, 2009, pp.65-66), a full (insofar as it is possible) and up-to-date picture of these labour provisions is lacking. This is mainly due to the decentralized nature and proliferation of trade arrangements, and particularly of trade agreements (ILS, 2009, p.75). Second, there is an absence of any study investigating what might be described as the “horizontal” impact of labour provisions, in other words their compatibility with the ILO standards to which they refer and with the corresponding provisions of the ILO Constitution. Third, although the “vertical” impact of these labour provisions, i.e., their impact on national labour rights and conditions, has been studied, robust analyses of their actual effect would appear to be scant. Most articles and reports take a narrative approach or are based on case studies, rather than attempting to make

international comparisons (Ebert and Posthuma, 2010, pp.22-23, CARIS, 2010, p.153). Existing systematic evaluations of their vertical impact are limited to the GSP schemes adopted by the United States and the European Union.

- 42 These three gaps are inter-related. Until they are filled, it is unlikely that there will be any conclusive evidence of the impact of labour provisions in trade arrangements, including their role in the current globalization process, and in particular, of whether they might contribute to limit the adverse effects of the crisis on workers' rights and conditions, including those in the informal economy (ILO and WTO, 2009, p. 145).

First there is a need for a knowledge base...

- 43 These gaps are undoubtedly due in part to the difficulties inherent in gaining access to the relevant information, stored in various sources, starting with the websites of the relevant national actors and of the international organizations concerned (especially the WTO, UNCTAD and EU), including the ILO, which has recently created a portal on free trade agreements and labour rights. What is needed is a comprehensive, reliable and user-friendly knowledge base into which regular and up-to-date information on these trade-related labour provisions is fed. This knowledge base could serve as a basis for further analytical and research work, in particular, with respect to the reasons why labour provisions are inserted in trade arrangements and the manner in which their contents are devised. This knowledge base could also be used by States in their trade negotiations, thereby ensuring that trading partners have equal access to information. It could also be used by the social partners and other representatives of civil society, who are playing an increasing role in monitoring the implementation of the respective labour provisions.

Second, there is a need for an analysis of the impact of trade-related labour provisions on the ILO standards system...

- 44 While it has been broached (Ebert and Posthuma, 2010, pp.28-29, ILO, 2007, p. 34-35), the topic of the "horizontal" impact of trade-related labour provisions has not so far been analysed. Any determination of compatibility would require an examination of the terms of trade-related labour provisions (and their relationship with other provisions in the trade arrangement) in light of the ILO Constitution and the provisions of the Conventions ratified by the member States concerned. Importantly, such determination must take into account that in a number of trade agreements, the parties have explicitly reaffirmed their obligations as ILO members. This analysis could contribute to addressing the issue of coordination between diverse (and perhaps diverging) labour provisions to which one country may be subject, depending on the preferential trade arrangement it has accepted (IILS, 2009, p.78).
- 45 In the case of trade agreements that envisage a dispute settlement mechanism for labour matters, there might be a conflict between two compliance systems (Kuijper, 2010, p.13). Which forum should be seized with the alleged violations of the ILO Conventions set out in the agreement: the ILO constitutional supervisory system or the trade dispute settlement mechanism? Four considerations appear relevant in this respect. First, as a matter of principle, it would not be acceptable for a trade advantage enjoyed by an ILO Member to be withdrawn for alleged failure to observe its obligations under ratified

Conventions without the ILO having had the opportunity to express its views on the matter (ILO, 2007, p. 34). Second, under the ILO Constitution, a member State may be obliged to have recourse in the first place to the ILO supervisory system to determine whether another Member has failed to observe a Convention that they have both ratified, regardless of the context in which the allegations of non-observance have arisen. Third, because the implementation of ILO Conventions gives rise to problems of almost unlimited diversity and complexity, time and expertise are required. ILO Members would need to consider whether it would be more cost-effective to have recourse to the well established procedures and expert bodies of the ILO, rather than to an ad hoc body. Indeed in most cases, before being raised under trade arrangements, the issues arising from the non-observance of ILO Conventions will already have been brought to the attention of the ILO supervisory bodies and closely analysed by them. Fourth, there is the important issue of transparency: while the analysis of the supervisory bodies ultimately becomes public, it is not clear whether the various formulas used in the trade arrangements would provide the same.

...and third, there is a need to devise the appropriate tools and methodology for an evaluation of the impact of trade-related labour provisions on national labour rights and conditions

- 46 Turning now to the thorny question of impact in practice, the “vertical” impact, the appropriate tools and methodology still need to be devised for its systematic and general evaluation. To that end, appropriate recourse to the findings of the ILO supervisory bodies should be considered where the relevant Conventions have been ratified. In addition, the methodology to measure progress towards the full application of fundamental rights at work, currently developed in the ILO, could also become a relevant tool for the purpose of this evaluation. It would also seem important to integrate the economic analysis to any legal evaluation to achieve a meaningful assessment. In general, if this meaningful evaluation is to be achieved, careful consideration will also have to be given to the important constraints highlighted by the studies on the topic (e.g., CARIS, 2010, p. 151-188; Orbie and Tortell, 2009, pp. 672- 681; EU, 2008, pp. 59-73; Witte, 2008, pp. 43-51; Doumbia-Henry and Gravel, 2006, pp. 197 and 203; Polaski and Vyborny, 2006, p. 109 ; Elliott and Freeman, 2003, pp.75-80). For instance, assessing the impact of labour provisions is more difficult in the case of trade agreements than in GSP schemes (CARIS, 2010, p.153, Witte, 2008, p.43). This is due to the heterogeneity of labour provisions in trade agreements. A partial remedy to this problem can be found in the establishment of a reliable knowledge base, as proposed above. Moreover, dispute settlement mechanisms in trade agreements, which could shed some light on the impact of labour provisions, have rarely been used. Although the first labour rights related dispute under a regional trade agreement has been launched (the US-Guatemala labour rights dispute under the CAFTA-DR in July 2010), as already underlined, it remains to be seen if and to what extent the related information will be made available to the public. There are other common issues relating to the labour provisions of trade arrangements. Timing is one. A number of trade arrangements are quite recent. In contrast, the achievement of progress in labour legislation and practice takes time. It will therefore be necessary to wait for a reasonable period before being able to assess the impact of the respective labour provisions. Another issue relates to the difficulty of isolating the impact of labour

provisions from other important factors, such as foreign policy considerations and domestic politics, including domestic labour institutions and actors. These issues are well known in the field of labour legislation. They constitute the parameters within which the ILO, and particularly its supervisory bodies, have worked for years in assessing and monitoring progress (or the lack thereof) in the full implementation of international labour standards.

The ILO has the legitimacy and the authority to fill these gaps

- 47 The above considerations highlight the action needed to obtain credible and useful information on labour provisions in preferential trade arrangements. As these labour provisions are increasingly anchored in ILO standards, the Organization has the legitimacy and authority to take the lead in this respect. Further, some trade-related labour provisions envisage a contribution from the Organization to their implementation. The issue of the ILO's role was raised during the preparatory work for the adoption of the Social Justice Declaration (ILO, 2007, pp.33-35). However, there has not as yet been any institutional follow-up. It is therefore high time that the ILO take action, particularly by examining the most appropriate process, including the designation of the competent body/ies to undertake an impact evaluation. Such initiative would be undertaken in the perspective of assisting Members which are entering into trade arrangements or seeking advice on the implementation of the international labour standards contained in these arrangements. Indeed, under the Social Justice Declaration, the provision of such assistance is envisaged "subject to [the] compatibility [of the trade agreements] with ILO obligations". By following-up on the development of labour provisions in trade arrangements and promoting appropriate coordination mechanisms between such provisions and the ILO standards system, the ILO would help to preserve the integrity of its standards and enhance their impact. In so doing, it would be acting to avert the risk of the fragmentation of its body of standards through a sort of "law shopping" (Supiot, 2009, pp. 155-158). It would also bring much needed transparency to the expansion of labour provisions in trade arrangements and lend credibility to the efforts made by its Members to promote the Organization's principles and objectives.

Concluding remarks: possible implications for standards -setting action

- 48 In considering the issue of the effectiveness of international labour standards, one should recall that ILO normative action rests on the voluntary acceptance of international labour standards, which in turn creates binding obligations on States. This approach was preferred to the approach originally envisaged by the founders of the ILO that would have entrusted the International Labour Conference with the power to directly adopt binding international labour legislation, subject to a right to "opt out" that could be exercised within specific time-limits (Maupain, 2005 p. 93). The solution which was eventually retained is a realistic approach in the field of labour legislation, but means that ILO standards-related action depends largely on the will and capacity of member States to meet their standards-related commitments. The effective implementation of international labour standards can be affected when member States suffer economic crises. In general, globalization has had an impact on the ability of States, under the

pressure of international competition, to take up their role under the ILO Constitution (ILO, 1997, p.3).

- 49 In such circumstances, a priority for the ILO is to ensure that it has the necessary institutional capacity to: develop meaningful standards; keep them up-to-date, including, where appropriate, adapt them to changing needs, conceptions, practices and technological conditions; use all the diverse and complementary mechanisms available under its Constitution geared at their effectiveness; and provide adequate assistance to its members. The Governing Body is currently examining, within the framework of the Social Justice Declaration, a standards review mechanism to reinvigorate and reinforce the ILO body of standards by ensuring that they effectively provide strong protection for all workers in the workplace of today, which also implies their effective implementation. This mechanism, if adopted, would provide an ongoing programme of work in relation to standards, including for the Office as a whole. A set of general principles that would guide this work has been identified. Two of these principles relate to the necessity of ensuring that decisions should, on the one hand, be responsive and relevant to the needs of the world of work and, on the other hand, be based on in-depth analyses. The review process under discussion could thus open a new vista for research on international labour standards which would be indispensable in assessing their relevance and effectiveness, and would therefore require the mobilization of all the Office's areas of expertise, in particular in the economic and legal fields. Such research, making full use of the information arising from the work of the ILO supervisory bodies, could contribute in establishing a valid and balanced overview of the global effectiveness of international labour standards. In addition to providing a basis for the review process, this research-based overview could offer a strong means of publicizing important information on the impact of international labour standards. The availability of information of this nature could ultimately prove to be a key factor in inducing progress, not only in implementation, but also in the coherence of the positions adopted by ILO Members in respect of international labour standards.

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NOTES

1. “We agree that the current challenges do not provide an excuse to disregard or weaken internationally recognized labor standards. To assure that global growth is broadly beneficial, we should implement policies consistent with ILO fundamental principles and rights at work.” (G20, 2009, paragraph 43).
2. These instruments include notably:
 - the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
 - the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
 - the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105);
 - the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182);
 - the Employment Policy Convention, 1964 (No. 122); the Protection of Wages Convention, 1949 (No. 95), the Minimum Wage Fixing Convention, 1970 (No. 131) and the Protection of Workers’ Claims (Employer’s Insolvency) Convention, 1992 (No. 173);
 - the Social Security (Minimum Standards) Convention, 1952 (No. 102);
 - the Employment Relationship Recommendation No.198 (2006);
 - the Termination of Employment Convention, 1982 (No. 158);
 - the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129) and the Labour Administration Convention, 1978 (No. 150);
 - the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143);
 - the Labour Clauses (Public Contracts) Convention, 1949 (No. 94);
 - the Occupational Safety and Health Convention, 1981 (No. 155), its Protocol of 2002 and the Promotional Framework for Occupational Safety and Health Convention, No. 187 (2006);
 - the Hours of Work (Industry) Convention, 1919 (No. 1) and the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30); and
 - the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).
3. The CEACR referred, for instance, to measures taken in Iceland, Ireland, Greece, Germany, Latvia and the United Kingdom.
4. See *Globalization and informal jobs in developing countries*, A joint study of the International Labour Office and the Secretariat of the World Trade Organization, Geneva, 2009, p. 25-33.
5. See Conclusions concerning decent work and the informal economy, International Labour Conference, 90th Session, 2002, *Record of Proceedings*, vol. II, p.25/53, para.2.
6. See *Digest of comments of the ILO’s supervisory bodies related to the informal economy – Extending the scope of application of labour laws to the informal economy*, ILO, Geneva, 2010.
7. All these laws and regulations are available on the NATLEX database at the following address: http://www.ilo.org/dyn/natlex/natlex_browse.home?p_lang=en

AUTHORS

ERIC GRAVEL

The author is Senior Legal Officers at the International Labour Standards Department of the ILO, Geneva.

TOMI KOHIYAMA

The author is Senior Legal Officer in the International Labour Standards Department of the ILO, Geneva.

KATERINA TSOTROUDI

The author is Senior Legal Officer in the International Labour Standards Department of the ILO, Geneva.