

# The Virtuous Cycle: A New Paradigm for Democratizing Global Governance through Deliberation

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## I. Introduction

Globalization has placed significant strains on the myriad institutions of global governance, giving rise to several new debates in legal scholarship.<sup>1</sup> One such debate centers on the need for increased representation of diverse and specialized interests in global governance organizations. Profound changes in political and economic constellations during the last half-century have generated serious debate on the structure of international organizations, and, in particular, as to whether such organizations should open decision-making processes to civil society.<sup>2</sup> Two phenomena in particular underpin the demands for rethinking inclusion in global governance: the first is the increasing prominence of democratic norms at the international level, and the second is the “rise of civil society” and its enhanced role in the international realm. While the need for restructuring is evident, the more controversial issue concerns institutional design: *how*, in terms of institutional design, to diversify the interests represented in international organizations.

While this theme has received considerable attention in academic and practical literature, academics seemed to have generally overlooked the experience of the sole organization that has formally incorporated civil society in its structure, the International Labor Organization (ILO).<sup>3</sup> This article seeks to fill this gap by learning from the close to 90 years of ILO practical experience in engaging civil society. In what follows I describe and analyze this experience. I conclude that the ILO has introduced an innovative model in the international institution landscape, one that re-emphasizes themes such as accountability, deliberation and the significance of the internal structure of civil society groups. These main features of the model, which I term the Internal Functioning Approach, could inspire international institutions struggling with similar concerns and significantly contribute to enriching the current debate. The Internal Functioning Approach presents a perspective on representation that is underdeveloped in current literature.

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<sup>1</sup> The term ‘global governance’ has emerged along with the transformations in world politics at the turn of the century. The concept of global governance, like that of regimes, encompasses both governmental and non-governmental actors. However, while regimes are issue-oriented, global governance is not confined to a single sphere of endeavor. It is thus a more encompassing concept than regime. See James N. Rosenau, *Governance, Order and Change in World Politics*, in *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* 1, 8-9 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992). Other definitions of global governance emphasize different aspects of this term. For an example of a definition of global governance that emphasizes the common global issues to be addressed, see the definition of Gordenker and Weiss: “[E]fforts to bring more orderly and reliable responses to social and political issues that go beyond capacities of states to address individually, implying the need for cooperation in addressing global issues as no central authority is present.” See Leon Gordenker & Thomas G. Weiss, *Pluralizing Global Governance: Analytical Approaches and Dimensions*, in *NGOS, THE UN, AND GLOBAL GOVERNANCE* 17, 17 (Leon Gordenker & Thomas G. Weiss, eds., 1996).

<sup>2</sup> The main premise to be reconsidered is the most common premise, the dominance of the existing state-based representation method. The UN is the most salient example of such representation.

<sup>3</sup> For exceptions, see *e.g.*, Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 *MICH. J. INT’L L.* 183, 286 (1997) (“the thesis of this article is that useful lessons can be learned from the practices of the early public international unions, the ILO, and the League of Nations.”)

Following the Introduction, Part II of this article summarizes the current debate regarding the direct participation of international civil society in the global arena. In particular, it emphasizes the interplay between democratic norms and accountability, two themes that become increasingly significant over the course of the article. Part III depicts two ILO institutions that seem relevant to the representation dilemma in the ILO: the tripartite structure and the Credentials Committee. This Part focuses in particular on recent developments that seem to indicate that the ILO will soon strengthen its scrutiny of the internal functioning of the workers' and employers' organizations that participate in its governance. Part IV then seeks to evaluate the reforms of the Credentials Committee and their relation to the problem of interest representation. It draws on the core value promoted by the ILO – freedom of association – in building a normative foundation for the re-imagining of representation, the Internal Functioning Approach. This approach, focusing on making groups more accountable as a means for encompassing a broader array of interests, is contrasted with the notion that simply “adding more groups” will help democratize international organizations. Part V presents several advantages of the Internal Functioning Approach, while Parts VI and VII assess the lessons and the limitations of the ILO's experience, and their implication for new governance theories.

## **II. International Civil Society, NGOs and the Diversification of Interests Represented in Global Governance**

### **A. Democracy as an Emerging Fundamental Norm in Global Governance**

In the post-Cold War era, democratic norms gained new importance both national and international levels.<sup>4</sup> On the international front, skeptics have asserted that all that democracy has achieved is new rhetorical power in international discourse, while others have proclaimed an emerging new “right to democracy” in international law.<sup>5</sup> Although the meaning of democracy within institutions of global governance and in international law is the subject of considerable debate, it is generally understood to mean that democratic norms have become increasingly

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<sup>4</sup> See Sakamoto Yoshikazu, *A perspective on the changing world order: A conceptual prelude*, in GLOBAL TRANSFORMATIONS: CHALLENGES TO THE STATE SYSTEM (Sakamoto Yoshikazu ed., 1994) (the two strands of post-Cold War changes are internationalism and democratization); see DEACON BOB, MICHELLE HULSE & PAUL STUBBS, GLOBAL SOCIAL POLICY: INTERNATIONAL ORGANIZATIONS AND THE FUTURE OF WELFARE, § 157 (1997) (the growth of NGOs in Central and Eastern Europe increased as the Cold War came to an end in Central and Eastern Europe).

<sup>5</sup> In recent years, international organizations have shown greater concern for compliance with democratic norms at the national level, some suggesting that international law and treaties do not sufficiently mandate democracy in individual states. See Gregory H. Fox & Brad R. Roth, *Introduction: The Spread Of Liberal Democracy And Its Implications For International Law* in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth, eds., 2000)

prominent.<sup>6</sup> The last few decades have given new meaning to the notion that democracy is the most potent political idea in contemporary times.<sup>7</sup>

As the interactions among state, market, and civil society undergo turbulent transitions, the debate has shifted focus from state actors to the governance structures of international organizations, which have come under increasing scrutiny in the name of democratization. Political activists now vigorously advocate the democratization of international organizations.<sup>8</sup> Many social movements, mostly originating in the developed world, have likewise stepped up requirements for more democratic global governance.<sup>9</sup> Indeed, these demands are not without merit. The structures and constitutions of most international government organizations (IGOs) are rooted in the immediate post-World War II period, reflecting the political, social and economic balance of power that prevailed at that time. They also embody particular philosophies as to their legitimate role in the international system – philosophies that have since come under question.<sup>10</sup> The well-documented “democratic deficit” of international institutions underscores the need for reconsidering the structure of international organizations,<sup>11</sup> through, among other means, the diversification of representation in intergovernmental organizations.<sup>12</sup>

Indeed, theorists and practitioners alike have identified one of the main deficiencies of the Westphalia global order in its representation scheme. While conceptualizing a comprehensive

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<sup>6</sup> See, e.g., Gregory H. Fox, *International Law and the Entitlement to Democracy After War*, 9 GLOBAL GOVERNANCE 179 (2003) (concluding that an emerging body of international law strongly supports the requirement that international officials should promote democratic institutions in peace-building missions). For an examination of the democratic principles in the FTAA, for example, see, e.g., Eric Dannenmaier, *Inter-American Perspective: Trade, Democracy and the FTAA: Public Access to the Process of Constructing a Free Trade Area of the Americas*, 27 FORDHAM INT’L L. J. 1066 (2004).

<sup>7</sup> See DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER § 16-18 (1995).

<sup>8</sup> See Diana Tussie & Maria Pia Riggiozzi, *Pressing Ahead with New Procedures For Old Machinery: Global Governance and Civil Society*, in GLOBAL GOVERNANCE AND THE UNITED NATIONS SYSTEM, 158, 159 (2001).

<sup>9</sup> See, e.g., Deacon, Hulse & Stubbs, *supra* note 4, at 205-207, 210 (Describing the need for reform within Breton Woods institutions, and the greater role argued for NGOs within the context of Breton Woods institutions and/or UN agencies, with the goal of increasing the accountability of such institutions). See also Tussie & Pia Riggiozzi, *supra* note 8, at 160; Chadwick F. Alger, *Transnational Social Movements, World Politics, and Global Governance*, in TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS 260, 263 (Jackie Smith, Charles Chatfield & Ron Pagnucco, eds., 1997) (Alger points out that transnational social movements have tended to push for the expansion of their roles in the political processes of International Governmental Organizations).

<sup>10</sup> See VEIJO HEISKANEN in, JEAN-MARC COICAUD, THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS § 1 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001)

<sup>11</sup> *Id.*, at 48-51 (the concept of ‘democratic deficit’ at the international level may mean that international organizations are not run democratically *vis-à-vis* the public.) Obviously, civil society cannot completely fill the democratic deficit of international institutions, but the hope is that civil society could perhaps supplement democracy in some cases. See William D. Coleman & Tony Potter, *International Institutions, Globalization and Democracy: Assessing the Challenges*, 14 GLOBAL SOCIETY 377, 386 (2000) (stating “it is unrealistic to expect to compensate for this lack of formal procedures by romanticizing the potential of non-governmental organizations. At a minimum, not all issues for which democracy is relevant capture the attention of NGOs.”)

<sup>12</sup> See Louis Kriesberg, *Social Movements and Global Transformations*, in TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS 3, 4-7 (Jackie Smith, Charles Chatfield & Ron Pagnucco, eds.1997).

democratic theory for the international realm remains a weighty task,<sup>13</sup> one of the popular demands for robust global representation is to incorporate functional interests (labor, health, education etc.) into international institutions. The clear division of international institutions into realms of human interaction (for example: trade, labor, culture, health, etc.) as formulated in the Breton Woods design, has come increasingly under attack. The constant “spillover” across spheres of human activity in the age of globalization constitutes in part the background for demands to expand the representation of functional interests in international organizations. The movement to incorporate representation of labor and environmental interests in the WTO, which came to public attention in the Seattle demonstrations of 1999, is merely the most salient example of these developments.<sup>14</sup> Beyond popular demands, academics, including prominent economist Joseph Stiglitz, advocate incorporating labor representation into other international economic institutions, such as the IMF and the World Bank.<sup>15</sup>

## **B. The Rise of International Civil Society**

While scholars have agonized over the meaning of democracy on the international level, in practice most international organizations have responded to the pressure for more representative global governance by “scaling down,” that is, instituting new procedures and mechanisms to help open up a dialogue with civil society.<sup>16</sup> At the same time as democratic

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<sup>13</sup> For a recent overview, see Joshua Cohen & Charles F. Sabel, *Global Democracy?* 37 NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS 763 (2005).

<sup>14</sup> See MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE § 395-463 (1999). See also Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INTL. L. J. 303, 305; Stephen J. Powell, *The Place of Human Rights Law, in World Trade Organization Rules*, 16 FIA. J. INT’L L. 219 (2004). On the regional level we can mention the debate over inclusion of labor and environment in NAFTA and the FTAA. See Eric Dannenmair, *Trade, Democracy And The FTAA: Public Access To The Process Of Constructing A Free Trade Area Of The Americas*, 27 FORDHAM INTL L. J. 1066; James Mercury & Bryan Schwartz, *Creating the Free Trade Area of the Americas: Linking Labour, the Environment and Human Rights to the FTAA*, 1 ASPER REV. INT’L BUS. & TRADE L. 37; Thomas J. Manley & Amb. Luis Laurodo, *International Labor Standards in Free Trade Agreements of the Americas*, 18 EMORY INT’L L. REV. 85 (2004); Marie-Claire C. Segger, *Sustainable Development in the Negotiation of the FTAA*, 27 FORDHAM INT’L L.J. 1118, (2004).

<sup>15</sup> See Joseph E. Stiglitz, *Globalization and Development*, in TAMING GLOBALIZATION 47, 65 (David Held & Koenig-Archibugi, eds., 2003). A related concern is that in many liberal democracies, as well as at the regional and international level, the current system of interest group representation is skewed to favor business interests. See PHILIPPE C. SCHMITTER, HOW TO DEMOCRATIZE THE EUROPEAN UNION AND WHY BOTHER? § 59 (2000). In the EU, for example, the ETUC, which represents most of unionized labor in Western Europe (and as such has a larger constituency than most member states), has limited influence in clearly demarcated areas of EU policy-making. In contrast, the business and employers lobby is able to influence, if not set, the EU agenda on a range of issues. See James Goodman, *The European Union: Reconstructing Democracy beyond the Nation-State*, in THE TRANSFORMATION OF DEMOCRACY? 171, 193 (Anthony McGrew, ed., 1997).

<sup>16</sup> Peter Uvin defines “scaling down” as processes in which international organizations (IOs) change their structures and modes of functioning to allow meaningful interaction and cooperation with grassroots organizations and NGOs, Peter Uvin, *Scaling Up the Grassroots and Scaling Down the Summit: The Relations Between Third World NGOs and the UN*, in NGOS, THE UN, AND GLOBAL GOVERNANCE 159, 159 (Leon Gordenker & Thomas G Weiss eds., 1996). See also, Ottoway, M., *Corporatism goes global: international organizations, nongovernmental organization networks, and transnational business*, GLOBAL GOVERNANCE 265, 265-292 (2001). (“Even the

norms have become prominent in the global arena, the involvement of civil society in global governance has reached new heights in terms of subject matter, scale of participation and diversity of organizations. As globalization has blurred conceptual distinctions between international and national, and between public and private, civil society has gained new salience in the international arena. The increase in NGO involvement in international policy-making has many root causes,<sup>17</sup> including changes in the functions and attributes of sovereignty and the increasing fluidity of national borders; the increase in governmental negotiations advanced by the end of the Cold War, which also opened new possibilities for communication and cooperation within decision-making processes;<sup>18</sup> the communications revolution, which has provided the infrastructure for transnational NGO operations;<sup>19</sup> and the increasing importance of democratic values at the international level.<sup>20</sup> However, this expanded presence of civil society has not been accompanied by serious efforts to institutionalize its participation. The mode, quality, and degree of participation of civil society groups in IGOs vary considerably across institutional contexts.

It is now generally agreed that international civil society exerts power in global governance, although the degree of its impact and influence is widely contested. Some argue that the activity of international civil society in decision-making by IGOs, for example, has limited impact because of their unofficial and informal status.<sup>21</sup> Others view international civil society as a powerful force for institutional innovation, monitoring and policy change. Among the many examples cited by these observers are the substantial influence of powerful NGOs in such areas as the environment, criminal law, labor and commerce;<sup>22</sup> their expanding role as conduits for

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most reluctant and opaque international organizations such as the International Monetary Fund (IMF) and the World Trade Organization (WTO), are beginning to accept the necessity to establish links to NGOs”). For a more general discussion of the relations between NGOs and the UN system, see, e.g., Chadwick F. Alger, *Strengthening Relations between NGOs and the UN System: Towards a Research Agenda*, 13 GLOBAL SOCIETY, 393, 396-399 (1999). The most well known efforts to structure project relationship with NGOs are by the World Bank, UNHCR and UNDP, see Gordenker & Weiss, *supra* note 1, at 28.

<sup>17</sup> See Ronnie D. Lipschutz, *Reconstructing World Politics: The Emergence of Global Civil Society*, 21 MILLENNIUM 389, 400-418 (1992) (analyzing the emergence of global civil society on the macro-structural, level and on the micro-agency, level).

<sup>18</sup> See Gordenker & Weiss, *supra* note 1, at 24 (pointing to the end of the Cold War as perhaps the most important explanation of NGO expansion).

<sup>19</sup> See Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CAR. L. REV. 957 (1996).

<sup>20</sup> See Kriesberg, *supra* note 12.

<sup>21</sup> See Daniel W. Drezner, *On The Balance Between International Law And Democratic Sovereignty*, 2 CHI. J. INT'L L. 321, 327-329 (2001) (questioning whether the influence of NGOs and other private actors was powerful enough to violate democratic sovereignty, and describing obstacles to such power); Nayef H. Samhat & Rodger A. Payne, *Regimes, Public Spheres and Global Democracy: Towards the Transformation of Political Community*, 17 GLOBAL SOCIETY 273, 385 (2003) (exploring the problems of viewing non-state actors as contributing to global democratization, referring to Christoff Gorg and Joachim Hirsch for the claim that the role of political participation of NGOs in international political process is “soft”).

<sup>22</sup> See Spiro, *supra* note 19, at 166. See also Drezner, *supra* note 21, at 324-326. (describing the influence of NGOs and other private actors, in particularly in the realm of human rights law). For a discussion in the context of environmental issues, see PORTER, GARETH & JANET WELSH BROWN, GLOBAL ENVIRONMENTAL POLITICS § 56-60 (1991). For a discussion of the indigenous movement, see Bice Maiguashca, *The Transnational Indigenous Movement in a Changing World Order*, in GLOBAL TRANSFORMATIONS: CHALLENGES TO THE STATE SYSTEM 356 (Sakamoto Yoshikazu, ed., 1994) (an account of the indigenous movement as a counter-hegemonic struggle at the global level and a powerful weapon that has mounted a defense of indigenous rights). There are differences as to the

developmental aid;<sup>23</sup> and their impact on the commercial activities of corporate giants such as Nike and Shell.<sup>24</sup> In some cases, such as the participation of NGOs in UNESCO, scholars have even identified the existence of “international corporatism.”<sup>25</sup>

### **C. The Debate over International Civil Society: Ensuring Democracy, Accountability and Representation**

The emergence of democratic norms as core principles in global governance and international law, together with the rise of civil society, has led to two contradictory claims. The first is that the participation of functional interests is a vital component of a truly democratic system. The other perceives the very participation of civil society as a source of an illegitimate exertion of power that runs counter to democratic principles.<sup>26</sup> In what follows I briefly summarize both views.

Many view the “appreciable enlargement”<sup>27</sup> of the global public sphere and its democratization as unreservedly linked, arguing that civil society supplements democracy in several ways. The argument hinges on the role of civil groups in strengthening democratic processes and on the reciprocal strengthening of civic equality and participation. Focusing on inclusion, so the argument goes, international NGOs can legitimize decision-making on the

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effectiveness of civil society in different realms. For example, Coleman and Potter point out that the presence of civil society organizations is weaker in finance than in agriculture. *See* Coleman & Potter, *supra* note 11, at 397.

<sup>23</sup> The number of development NGOs registered in the OECD countries grew from 1600 in 1980 to 2970 in 1993. *See* David Hulme & Michael Edwards, *NGOs, States and Donors: An Overview*, in *NGOS, STATES AND DONORS* 3, 4 (David Hulme & Michael Edwards, eds., 1997). *See also* Debora Spar & James Dail, *Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations*, 3 *CHICAGO JOURNAL OF INTERNATIONAL LAW* 171, 172. (“In the United States and European Union, for example, NGOs have become major conduits for development aid, accounting for 67 percent of the EU’s relief aid in 1994 and 5 percent of the OECD’s total aid budget between 1993 and 1994. In Bangladesh, Uganda, and elsewhere, they act in some instances like agents of the state, performing functions that were once reserved solely for local governments, such as education, health and rural banking.”).

<sup>24</sup> *See* Spar & Dail, *supra* note 23, at 172.

<sup>25</sup> *See* Faina Milman-Sivan, *Labor rights and globalization: An institutional analysis of the International Labor Organization (ILO)*, COLUMBIA UNIVERSITY - ELECTRONIC DISSERTATIONS (2006), 9.

<sup>26</sup> On the national level, democratic theorists and practitioners have long debated whether functional groups should play a privileged role in the policy-making process, either as interest groups in pluralist democracies or as social partners in “neo-corporatist” social democracies. While partnership between government and certain groups seems unavoidable in modern liberal democracies, the justification for such a scheme should be further explored. *See* Norman Lewis, *Corporatism and Accountability: The Democratic Dilemma*, in *CORPORATISM AND ACCOUNTABILITY, ORGANIZED INTERESTS IN BRITISH PUBLIC LIFE* 63, 63- 64, 77 (Colin Crouch & Ronald Dore eds., 1990). Lewis defines corporatism as an identified policy style of intervention and representation (as is pluralism). The most crucial determinant in identifying corporatism, in his view, is how interdependent the public and private sectors are, and with what degree of institutionalization.

<sup>27</sup> *See, e.g.*, Benedict Kingsbury, *The Democratic Accountability of Non-Governmental Organizations: First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society*, 3 *CHI. J. INT’L L.* 183, 184 (2002) (an “uneven but appreciable enlargement and democratization of the global public sphere can perhaps be discerned”).

global sphere by voicing the interests of unrepresented and marginalized groups.<sup>28</sup> By acting as “a door through which individual interest may be manifested on the deliberations of the global governance and in particular the actions of IOs,”<sup>29</sup> NGOs potentially increase the legitimacy of global governance.<sup>30</sup> This argument rests on notions of democratic legitimacy, as discussed in the democratic theory on the national level.<sup>31</sup> But arguments for the participation of non-state actors can also be framed in terms of distributive justice and political equality, since these newly represented actors are often the losers of globalization processes.<sup>32</sup>

The opponents of the participation of international civil society in global governance regard its influence as illegitimate and anti-democratic. This view has two prongs. The first is that any deviation from a state-centered international regime is inherently anti-democratic. In its weaker form, this argument maintains that international civil society's involvement in international organizations is unnecessary, as individuals can seek to influence the organizations through their respective governments even in the absence of direct participation.<sup>33</sup> In its stronger form, it alleges that civil society disrupts representative democracy. Allowing labor, for example, to be represented directly in the WTO both through the state and through functional groups can, under this approach, unfairly skew representation in favor of workers. This stronger view maintains that direct participation of civil society would undermine democracy as it would give civil society “two bites at the apple, one at home and one at the WTO.”<sup>34</sup>

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<sup>28</sup> Martens, for example, points out that IOs benefit in terms of legitimacy from the direct participation of NGOs. See Martens Bertin, *Economic Development That Lasts: Labor Intensive Irrigation Projects, in NEPAL AND THE UNITED REPUBLIC OF TANZANIA* 391. NGOs can help IOs fulfill the role of being fiduciaries for future generations. Charnovitz, *supra* note 3, at 274.

<sup>29</sup> See Charnovitz, *supra* note 3, at 274 (“The dramatic increase in human rights NGOs appears to have been motivated largely by the desire to provide a voice for the interests of individuals in the human rights regime.”) See David H. Moore, *Agency Costs in International Human Rights*, 42 COLUM. J. TRANSNAT’L L. 491, 504 (2004).

<sup>30</sup> See Coleman & Potter, *supra* note 11, at 380 (“The concept of accountability includes the idea that political leaders will explain to citizens how their actions have addressed the articulated wants and preferences of the “people”. The problem of accountability is compounded by the fact that the participants in policy-making frequently do not represent the full range of populations affected by their decisions. Not only do rules for representation tend to be restrictive, but also the proceedings at these sites often lack transparency. Without adequate representation and transparent policy processes, the possibilities for a mismatch between policy outputs and citizens’ preferences widen considerably, a threat to “output-oriented legitimating”.”)

<sup>31</sup> *Id.*

<sup>32</sup> Arguments for participation of civil society in international institutions extend beyond the value of promoting representation. Drawing on neo-functional insights, the participation of civil society groups in IOs can provide a forum for the formation, articulation, and transformation of preferences. Since neo-functionalists interpret the interests of state and non-state actors as a product of cross-border interactions, they see IOs as providing one sphere where such interactions occur, and interests form. If this is true, the importance of including the unheard voices that NGOs purport to represent is even more crucial. See, e.g., Linda Cornett & James A. Caporaso, “*And Still it Moves*” *State Interests and Social Forces in the European Community*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 219, 236-243 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992) (discussing functionalism and neo-functionalism, contrasting these theories with neo-realism, in the context of the EU).

<sup>33</sup> See Charnovitz, *supra* note 3.

<sup>34</sup> See John R. Bolton, *Should We Take Global Governance Seriously?* 1 CHI. J. INT’L L. 205, 217 (2000); Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 FORDHAM INT’L. L. J. 173, 199-200 (2000).

A second and more familiar line of attack views international civil society's alleged lack of accountability as being contrary to democratic values.<sup>35</sup> While proponents of participation of civil society present NGOs and other groups as the answer to the "democratic deficit" in the international sphere,<sup>36</sup> opponents turn international civil society advocacy on its head, attacking civil society groups themselves for being non-democratic, unrepresentative, and therefore unaccountable. Concerns regarding the accountability of civil society underscore the need to further explore the question of the best ways to expand the representativity of interest groups in global governance. A particularly rich and uncharted terrain to commence this exploration is provided by one of the oldest international organizations, the ILO.

The ILO was the first, and remains the only IO to endorse the participation of civil society groups as an integral element of its structure. The tripartite structure of the ILO departs from the conventional state-centered form of representation in a distinct way – by incorporating two particular functional interests, those of workers and those of employers. Some point to the ILO, "the most daring of all international organizations in its approach to NGO participation," as a model for participation in international civil society.<sup>37</sup> Judge Schwebel writes: "How in advance of its time was the tripartite design of the ILO. How much the experience of the ILO has to teach in respect of the influence of the non-governmental organization on governmental policy and on the policy of international institutions."<sup>38</sup> In the following section I analyze the lessons that can be drawn from the experience of the ILO.

### **III. The ILO as a Case Study for Civil Society Participation: Two Initial Approaches**

#### **A. Drawing on the ILO's Experience**

The ILO is the international organization that has the most experienced with participation of non-state organizations that represent particular functional interests. Surprisingly though, legal scholars have made little attempt to learn from the ILO's practical experience in engaging civil society organizations.<sup>39</sup> The remainder of this article will be devoted to a critical examination of

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<sup>35</sup> See Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INTL. L. 91, 112-19 (2000).

<sup>36</sup> See Deacon, Hulse & Stubbs, *supra* note 4, at 202, 211-213 (concluding that one of the strategies for reforming global governance is to empower international civil society).

<sup>37</sup> See, e.g., Charnovitz, *supra* note 3, Williamson refers to Stephen M. Schwebel, *The Prescience and Pertinence of the ILO*, in *VISIONS OF THE FUTURE OF SOCIAL JUSTICE: ESSAYS ON THE OCCASION OF THE ILO'S 75<sup>th</sup> Anniversary* 257 (1994).

<sup>38</sup> See Charnovitz, *supra* note 3, at 216 referring to Stephen M. Schwebel, *The Prescience and Pertinence of the ILO*, in *VISIONS OF THE FUTURE OF SOCIAL JUSTICE: ESSAYS ON THE OCCASION OF THE ILO'S 75<sup>th</sup> ANNIVERSARY* 257 (1994).

<sup>39</sup> For exceptions, see e.g., Charnovitz, *supra* note 3, at 286 ("the thesis of this article is that useful lessons can be learned from the practices of the early public international unions, the ILO, and the League of Nations").

the ILO's experience with representation and the inclusion in its structure of diverse functional interests. In what follows, I draw on the ILO experience to delineate two initial approaches towards representation. I identify two approaches within the ILO: the Multi-Interests Approach and the Credentials Committee Approach.<sup>40</sup> I associate the former approach with the mainstream literature on global governance, i.e., the notion that adding more functional groups will supplement the democratic features of global governance. The most robust support for a framework that advocates broad inclusion of international civil society can be found in new governance theories that advocate a constant reshuffling of the groups that are at the table. The Credentials Committee Approach suggests an alternative path, which I proceed to develop into a fuller framework – the Internal Functioning Approach. I believe this framework could adequately address the following urgent question: How can the ILO encompass a broader array of interests in a way that better reflects current understanding of intersectional identity, and, at the same time, promotes better accountability by accommodating the need for stable structures?

## **B. Between a Tripartite and a Multi-Interest Structure: The Multi-Interests Approach**

### ***a. General***

Like other international organizations, the ILO has encountered mounting criticism regarding the manner in which it structures interest representation. Many consider the tripartite model of representation a valuable counter-model to the state-centered method of representation that persists in other global institutions.<sup>41</sup> However, political, cultural and economic changes in the last three decades have called into question the aptness of the ILO structure. I term the debates relating to the tripartism, which I discuss below, the Multi-Interest Approach.

Two lines of attack, which together comprise the Multi-interest Approach, are particularly relevant. The first is the more familiar critique centering on the West/rest dichotomy. The second, which I develop below, focuses on the unfounded reliance of the tripartite structure on class alone, reflecting an outdated notion of the “typical worker.” While it is clear (as will be shown below) that incorporating additional voices into the ILO structure is appropriate, the approach to

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Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 NO. 3 IX-X VANDERBILT LAW REVIEW 649-726 (2006).

<sup>40</sup> The Multi-Interests Approach is not fully developed in the sense that the ILO rejected it, while the Credentials Committee Approach, as I see it, is also in the early stages of development.

<sup>41</sup> See Virginia A. Leary, *Lessons from the Experience of the International Labour Organization*, in THE UNITED NATIONS AND HUMAN RIGHTS, A CRITICAL APPRAISAL 580 (Philip Alston ed., 1992) (comparing the ILO system with the UN). Indeed, the ILO deems tripartism crucial to the organization's governance. The ILO Conference has repeatedly affirmed the need to maintain the tripartite structure in all channels of ILO activities. The Conference has affirmed tripartite representation not only at the international but also at the national level. In the ILO's view, the success of the ILO system of implementing conventions is partly attributable to this structure. The functional groups help improve ILO efficacy, both by extending the *information base* the organization relies upon, and by *reducing the politicization* of the discussions. Moreover, participation in the ILO standard-setting process fosters the participants' commitment to these standards, and thus contributes to their satisfactory implementation.

doing so remains controversial. In practice, the ILO has hitherto rejected the Multi-Interest Approach, and has resisted altering tripartism by incorporating additional interest groups.

***b. Towards a Multi-Interest Approach: West/Rest Dichotomy***

One basis for criticizing the tripartite structure focuses on the distinction between Western and non-Western states.<sup>42</sup> According to this view, the problem with the ILO structure (tripartism included) lies in its association with Western values. This deficiency, according to the claim, is rooted in the domination of the ILO by European trade unionists that are the driving force behind the proliferation of international standards that match the labor standards of advanced social democracies.<sup>43</sup> Wider inclusion of civil society groups is therefore cast as a means to amplify the voice of workers in developing countries.

While historically the tripartite structure has indeed mirrored Western social organization, this criticism seems limited. It neglects the more problematic aspect of tripartism, namely, that it fails to adequately represent the fragmentation and reshaping of interests in contemporary economic conditions, be they Eastern or Western. The West/rest dichotomy implies that workers in the West are themselves adequately represented through tripartism, which view ignores the ways in which identities and interests in Northern labor markets are undergoing rapid restructuring, with the resultant under-representation of the interests of groups such as migrants, women who have recently entered the workforce, unemployed workers, temporary workers and the large and growing informal sector in the West. The critique I describe and develop below takes this phenomenon into account.

***c. Towards a Multi-Interest Approach: Fragmentation of the Identity of the “Typical Worker”***

The tripartite structure indeed reflects the corporatist and social-democratic aspirations of its founding historical moment. The ideological underpinnings of the tripartite structure are rooted in the corporatist ideal of decision-making through social dialogue, encompassing workers and employers, and reflect in particular the historical arrangements of social democratic regimes.<sup>44</sup> Under most views of corporatism, interest representation is limited to monopolistic

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<sup>42</sup> One such dichotomy, derived in part from the writings of prominent Western ideologues such as Weber, Hegel, and Marx, is the one between the Western tradition and Confucianism. Weber theorized the relationship between Protestantism and Capitalism, while Hegel and Marx attributed the rapid pace of industrialization in the West to Western culture. Oriental cultures and social patterns were viewed as structural barriers to the development of capitalism. Hegel placed China in the infancy of history, and Marx saw the Great Wall of China as a metaphor for the resistance of non-Western societies to change. See Xing Li, *Dichotomies and Paradoxes: The West and Islam*, 16 GLOBAL SOCIETY 407, 406-409 (2002).

<sup>43</sup> See Efred Cordova, *Some Reflections on the Overproduction of International Labor Standards*, 14 COMP. LAB. L. 138, 162 (1993) (“The European trade union delegates, who are both the heirs of the democratic socialists, as well as champions of the *acquis* (that is, the notion that what has been gained is sacred and constitutes a floor from which to demand further advances), have been the most vigorous initiators and supporters of international standards. They would certainly also oppose any diminution in the rhythm of standard setting.”)

<sup>44</sup> See TIKRITI ABD AL KARIM, *TRIPARTISM AND THE INTERNATIONAL LABOR ORGANIZATION: A STUDY OF THE LEGAL CONCEPT: ITS ORIGINS, FUNCTION, AND EVOLUTION IN THE LAW OF NATIONS* § 337 (1982) (the true meaning of the tripartite principle was defined in terms of Western capitalistic societies, where a clear distinction exists between employers, workers and governments).

representation of each functional interest.<sup>45</sup> Naturally, then, as far as labor is concerned, the preferred path would be a high degree of working-class collaboration, rather than the fragmentation of the working class. However, in reality workers' identities are fragmented and are in fact far from uniform or coherent. Only a fraction of the world's workers are organized in some fashion.<sup>46</sup> The identity of the worker is far more complex than the tripartite structure suggests.

Trade unions originated in industrial countries, and the perception of what were considered to be typical employment relations and the typical worker has shaped industrial relations. Class was always considered the basis for the worker's identity, and the purportedly objective basis for defining workers' interests as against those of the employers. The ideological boundaries of class were straightforward. As long as mass production was the main production method and men were privileged in gender relations, trade unions in the private sector found their core constituency in full-time male employees with low skills in a relatively stable working environment. Such workers had the capacity to exert greater power over the employer when collectively organized. Since the typical worker was the male breadwinner, the predominant trade union agenda was clear: advancing issues such as the "family wage," defining the work week and constraining the ability of the employer to hire and fire at will.<sup>47</sup>

Increasingly, however, with rapid changes in corporate and workplace organization, transformation of the global labor market and the feminization of the workforce, the reality of working life has fractured the paradigm of full-time, breadwinning, and male production workers.<sup>48</sup> Employment relations increasingly encompass part-time, short-term agency and informal work, as well as unemployment, as the ILO itself has acknowledged.<sup>49</sup> The socioeconomic and cultural bases for feelings of self-identification as working-class have therefore been undermined. Transformative ideals have lost their appeal, and the traditional bases for worker identities have been displaced.

The interests of workers can no longer be described in stark opposition to those of employers. It is becoming more and more apparent that trade unions can no longer simply

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<sup>45</sup> See Stanley A. Gacek, *Revisiting the Corporatist and Contractualist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CAR. L. REV. 21, 50 (1994).

<sup>46</sup> See Dimitris Stevis, *Agents, Subjects, Objects, or Phantoms? Labor, the Environment, and Liberal Institutionalization*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 91, 95 (2002).

<sup>47</sup> See MICHAEL J. PIORE, BEYOND INDIVIDUALISM § 23 (1995) (the New Deal was designed to reserve jobs for full-time adult male workers). See also Richard Hyman, *An Emerging Agenda for Trade Unions?* in CONFERENCE ON ORGANIZED LABOR (International Institute for Labor Studies) available at <http://www.ilo.org/public/english/bureau/inst/project/network/hyman.htm> (reviewing the challenges of current trade unions, including the challenges that stem from the change in the constituencies that trade unions seek to mobilize).

<sup>48</sup> See, for example, Gut Standing, *Global Feminization though Flexible Labor*, in THE POLITICAL ECONOMY OF DEVELOPMENT AND UNDERDEVELOPMENT 405 (1996).

<sup>49</sup> ILO, Report of the Director General to the 87th Session of the ILC: Decent Work (June 1999), available at <http://www.ilo.org/public/english/standards/reim/ilc/ilc87/rep-i.htm>.

aggregate the interests of workers. Moreover, the decline in the appeal of the typical worker identity coincides with the rise of competing bases of identity. Hence, the emergence of international civil society has opened up possibilities for strengthening cross-border solidarity based on such identities, as demonstrated, for example, by the Beijing Women's Conference.<sup>50</sup>

Along with these changes, a large-scale shift in the understanding of social movements also took place in the late 20<sup>th</sup> century. Social movements were no longer perceived as being "pre-political" or "objective" manifestations of fixed, unitary interests of the working class, but, first and foremost, as a political phenomenon rooted in subjectively-formed and transformed identities.<sup>51</sup> A new understanding emerged of identity as "intersectional," highlighting the fact that all individuals stand at the crossroads of multiple, intersecting groups.<sup>52</sup> Indeed, encouraging the simultaneous belonging to overlapping, local and global "communities of interest and affection" is central to the politics of new social movements.<sup>53</sup> Identity, interests and self-understanding are therefore increasingly understood as fluid.<sup>54</sup>

In the context of labor movements, these transformations underscore the need to redefine the bases of labor solidarity, in light of the ever-shifting fluid interests and identities that are relevant to labor regulation in the contemporary era.<sup>55</sup> Class, according to this claim, can no longer be viewed as a privileged identity but as one of many possible identities that workers can have.<sup>56</sup> This understanding could be translated to pressure on the ILO to neglect the limited framework of tripartism, and to move towards a multi-interest structure. The ILO has yet to embrace this shift.

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<sup>50</sup> See, e.g., Donna Dickenson, *Counting Women In: Globalization, Democratization and the Women's Movement*, in *THE TRANSFORMATION OF DEMOCRACY?* 97, 107-108 (Anthony McGrew, ed., 1997). Previous women's conferences were dominated by ideological disagreements: The first conference in Mexico City was dominated by the divide between North and South, East and West. The second conference in Copenhagen was dominated by the Palestinian question. By at the time of the Beijing Conference in 1995, a consensus on the plan of action was reached, and feminists successfully challenged the assumption that national identity was the primary or exclusive political space. This consensus was reached not by an association of individual states but through a global process undertaken by women delegates. This is but one example of an emerging global female solidarity.

<sup>51</sup> See Gary Marks & Doug McAdam, *Social Movements and The Changing Structure Of Political Opportunity In The European Union*, in *GOVERNANCE IN THE EUROPEAN UNION* 95, 96 (Gary Marks et al ed., 1996)

<sup>52</sup> See IRIS MARISOM YOUNG, *INCLUSION AND DEMOCRACY* § 12 (2000). To add yet another complication, group definitions themselves are unstable and incoherent. Group membership for example can be defined differently by the person and by the group, by internal definitions of the group or external assignments, See MARTHA MINOW, *NOT ONLY FOR MYSELF* § 38-41 (1997).

<sup>53</sup> See Anthony McGrew, *Democracy Beyond Borders? Globalization and the Reconstruction of Democratic Theory and Politics*, in *THE TRANSFORMATION OF DEMOCRACY* 231, 249 (Anthony McGrew, ed., 1997).

<sup>54</sup> The uniqueness of the individual subject is further underscored when we understand identity not as an aggregate of the traits or groups that a person belongs to, but as constructed by the interactions and the activities of that person in relation to her position.

<sup>55</sup> See Hyman, *supra* note 47, Tr@nsit-Virtuelles Forum, Nr. 24/2002 at [http://www.iwm.at/index.php?option=com\\_content&task=view&id=266&Itemid=442](http://www.iwm.at/index.php?option=com_content&task=view&id=266&Itemid=442)

<sup>56</sup> See Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 *HASTINGS L.J.* 79, 118 (2002); see Helfer, *supra* note 39, at 719-720.

Whichever version of the multi-interests approach one adopts, it is important to note that this is the mainstream position in the debate on global governance. That is, the notion that interest diversification can be addressed by increasing the number of groups is widespread, as described above. The most radical version of this notion can be seen in new governance theories, which advocate constant reshuffling of group membership and even of the categories of groups (women, labor, etc.) participating. I further address new governance theories below, but first, in what follows, I present the foundations of an alternative approach for reconfiguring representation, the Credentials Committee approach. It is based on a careful analysis of the recent reforms in the structure of the Credentials Committee, the ILO body in charge of examining the credentials of ILO delegates. These reforms, which have not yet received academic attention, further provide the basis for my proposed theoretical framework for the ILO's shift towards a more promising structure, the Internal Functioning Approach. Thinking in these terms will enrich the global governance debate, as it is overly attentive to the mainstream notion of adding more groups as the cure for democratic deficit in global governance.

### **C. The Credentials' Committee Approach**

#### ***a. Recent Changes in the ILO Credentials Committee***

The ILO Credentials Committee (the "Committee") plays the crucial, if academically little examined, role of gatekeeper to participation in the full deliberative processes of the organization. Examining the Committee is key to an overall assessment of the ILO's expectations of its constituent member states and of the functional organizations that serve as part of its tripartite structure. These expectations are currently in flux, as the Committee is undergoing substantial reforms, the scope and impact of which have yet to be felt.

The Committee was established at the First Session of the ILO Conference in 1919,<sup>57</sup> and until recently (in other words, for close to 90 years) its structure, purpose and practices underwent very little change.<sup>58</sup> From its inception and until the end of the Cold War, the ILO was under severe pressure to accommodate the ideological divide between capitalist and communist industrial relations.<sup>59</sup> This pressure was manifested in the Committee's work, as it tried to avoid

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<sup>57</sup> Such committees were subsequently established at regional conferences and meetings convened pursuant to Article 38 of the ILO Constitution *See*, The Role of the Credentials Committee, Governing Body, 286<sup>th</sup> Session, March 2003, GB.286/LILS/3, at paragraph 4.

<sup>58</sup> There were merely two changes to the procedure and mandate of the committee, one in 1932 and another in 1997. In 1932 the Conference introduced the conditions of receivability as described in the Standing Orders of the International Labor Conference, Art. 26 (4) (here in after the "ILC Standing Orders"). In 1997 the mandate of the Committee was extended to include consideration of complaints regarding non-payment of Conference travel expenses. *See* ILO Const. Article 5 (2), and Article 26 (9) - 26(11).

<sup>59</sup> "Universality goes beyond the question of the number of States which are Members of the Organization. Paramount to that concept is the idea that the aims and the purposes of the ILO and the action that it takes must correspond with the needs of all the people throughout the world, whatever social or economic regime exists in their countries. The principle of universality means also that the ILO should not be designed solely to fit any given structure to be uniformly applied; but it must maintain its purpose to help the governments and people of all countries to develop solutions to the labor problems that exist in their own special circumstances." ILC, 37<sup>th</sup> Session (1954), *Record of Proceedings*, p. 436.

the tension between the need to scrupulously define legitimate representation of members and groups, and the organization's ostensible commitments to include all member states and their delegates in the ILO discussions, in other words, its commitment to membership universality.<sup>60</sup>

As a result of these tensions, the Committee feared that higher standards for accepting the credentials of delegates would result in the curtailment by states of their participation in the ILO.<sup>61</sup> In its attempt to accommodate all member states, the Committee preferred the value of universality to a robust conception of representation.<sup>62</sup>

The ILO's commitment to universality was legally rooted in a narrow legal interpretation of Article 3 of the ILO Constitution, which defines the Committee's mandate.<sup>63</sup> The requirements for the nominations of functional groups are established in Article 3(5) of the ILO Constitution. Article 3(5) requires member states to "nominate non-government delegates and advisors chosen in agreement with the industrial organizations, if such organizations exist, which are the most representative of employers or workpeople, as the case may be, in their respective countries." In the past, the Committee repeatedly declined to investigate whether the functional organization

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<sup>60</sup> See, for example, the speeches of the Government delegate of Argentina and the Worker's delegate of India, for example, ILC, 37<sup>th</sup> Session (1954), *Record of Proceedings*, p. 321- 324. Also see the speech of the Government Delegate of Ceylon, ILC, 37<sup>th</sup> Session (1954), *Record of Proceedings*, p. 326; and the speech of the Government delegate of the Philippines, *id.*, at 338. With respect to governmental representatives, the mandate was even narrower. Article 3 (1) of the Constitution merely states that two delegates "shall be Government delegates," and thus the Credentials Committee's examination has been limited to the question of whether it was indeed the government that made the nomination or appointment.

<sup>61</sup> For credentialing procedures in international organization as an indirect means of excluding member states, see generally KONSTANTINOS D. MAGLIVERAS, *EXCLUSION FROM PARTICIPATION IN INTERNATIONAL ORGANIZATIONS* § 264 (1999).

<sup>62</sup> An historical example may demonstrate the tendency to limit the mandate of the Credentials Committee. Due to the complexity of the Credential Committee's task, the Council of the League of Nations requested an advisory opinion from the Permanent Court of International Justice, in order to clarify the content of Article 3(5). This opinion, issued in 1922, established the foundation for interpreting this constitutional provision and the basis for subsequent precedents. "Organizations" in this context was construed by the Permanent Court of International Justice to permit the inclusion of multiple organizations. The Court rejected the contention of the Netherlands Confederation of Trade Unions that it was the most representative trade union organization in the country, and did not give its consent to the nomination of the non-governmental delegates. The Government of the Netherlands preferred to consult three other trade organizations that *together* constituted the most representative organizations. See EBERE OSIEKE, *CONSTITUTIONAL LAW AND PRACTICE IN THE INTERNATIONAL LABOR ORGANIZATION* § 53, 65 (1985). OSIEKE refers to *ILO, official Bulliton*, 5 P.C.I.J. Series B, No. 1 9, 9-14 (1922).

<sup>63</sup> ILO Const., Article 3 (9) states that the Conference, by two-thirds of the votes cast by the delegates present, [will/should/may/must] refuse to admit any delegate or advisor whom it deems not to have been nominated in accordance with the Constitution. ILO Const. Article 5 (2), Article 26, paragraphs 3-8. Credentials are inspected only with regard to delegates of the ILO Conference. The Credentials Committee does not subject members of the Governing Body, the executive organ of the ILO, to scrutiny with respect to their credentials. See Osieke, *supra* note 62, at 55. ILC Standing Orders, Article 26(7). Under Article 4 (3) of the ILO Constitution, in the event of the invalidation of the credentials of one of the non-governmental delegates, the other non-governmental delegate also loses the right to vote in the Conference and in its committees. The purpose of this mechanism is to guarantee that the absence of one of the non-governmental delegates does not jeopardize the balance of interests that each national delegation must be able to maintain.

adhered to principles of free association.<sup>64</sup> Furthermore, under the traditional approach, the Committee lacked the competence to examine objections based on the absence of representative employer or worker organizations in a given country.<sup>65</sup> This limited mandate was particularly disturbing in cases where it was clear that a government deliberately refrained from nominating employer or worker delegates in order to deliberately prevent their participation.<sup>66</sup> In addition, the Committee had no mandate to initiate investigations, and limited itself to investigating the few objections that were formally raised by member states. Submitting such objections tends to be politically motivated, as states were usually reluctant to disrupt “friendly relations”. Moreover, the Committee consistently shied away from recommending the invalidation of credentials,<sup>67</sup> and the adoption of such a recommendation depended more on political considerations, than on the merits of the case.<sup>68</sup> This state of affairs resulted in a perception of the weakness of both the Credentials Committee and on the ILO as a whole.

### ***b. Current Reforms of the Committee***

In the last five years, the Committee has challenged the traditional view of its function, described above, by establishing a link between its work and the norm of freedom of association. In the case of Myanmar, the Committee for the first time evoked Article 3(1) as supplemental legal grounds to define its scope of operations, endowing the term “representing” therein with more robust normative meaning. The Committee held that the government “has an obligation under paragraph 1 of article 3 to ‘nominate delegates representing respectively the employers and the work people of each of the members’.”<sup>69</sup> The Credentials Committee stated that a “link between freedom of association and the nomination of the workers’ delegate”<sup>70</sup> was “in keeping with the spirit of the ILO Constitution and the fundamental principle of tripartism.” This novel reading of Article 3(1) interprets the term “representing” in absolute terms, setting the stage for an elaboration of the content of representation.<sup>71</sup>

Following the Myanmar precedent, the Credentials Committee has invoked Article 3(1) in at least four other complaints.<sup>72</sup> The Myanmar case in effect opened the door for the Committee’s

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<sup>64</sup> See, for example, Credential Procedure at the International Labor Conference, Governing Body, 205<sup>th</sup> Session, Feb-March 1978, GB.205/SC/5/3, at paragraph 5.

<sup>65</sup> Articles 5 and 26 of the ILC Standing Orders limited the Committee’s mandate to delegates or advisors whose names and functions are contained in the credentials of the member state concerned.

<sup>66</sup> See The Role of the Credentials Committee, 286<sup>th</sup> Session, *supra* note 57, at paragraph 35.

Since 1997, the Committee has mandate to examine the non-payment of expenses for participating in the Conference. This is aimed to prevent situations where governments could avoid the participation of the employers’ or workers’ nominated delegates, by refusing to pay their travel expenses.

<sup>67</sup> From the 1970s until 2003, no invalidation was accepted by the Conference. See The Role of the Credentials Committee, 286<sup>th</sup> Session, *supra* note 57, at paragraph 13.

<sup>68</sup> Committee on legal Issues and International Labour Standards, Governing Body, 286<sup>th</sup> session, March 2003, Office Report GB.286/LILS/3 International Labor Office, Geneva, at paragraph 13.

<sup>69</sup> ILC, Third Report of the Credentials Committee, *Provisional Record No. 26*, 87<sup>th</sup> Session, 1999, at paragraph 26.

<sup>70</sup> ILC, Third Report of the Credentials Committee, *Provisional Record No. 26*, ILC, 87<sup>th</sup> Session, 1999, at paragraph 26.

<sup>71</sup> See The Role of the Credentials Committee, 286<sup>th</sup> Session, *supra* note 57, at paragraph 14.

<sup>72</sup> ILC, Third report of the Credentials Committee, *Provisional Record 5D*, 91<sup>st</sup> Session, 2003, at paragraph 10 (objection to the nomination of the Workers’ delegate of Saudi Arabia); ILC, Second report of the Credentials

subsequent request in 2002 for a fundamental reconsideration by the Governing Body of its powers.<sup>73</sup>

In June 2005, during the 93<sup>rd</sup> Session of the ILO Conference, interim provisions reforming the Committee's authority to verify credentials came into effect on a trial basis.<sup>74</sup> The Governing Body was scheduled to evaluate these provisions at the 96<sup>th</sup> Session (June 2007).<sup>75</sup> The ILO now openly recognizes the linkage between the norm of freedom of association and the tripartite structure, as manifested in the interim reforms.

The reform is aimed at strengthening the Committee's function. It grants the Committee the power to refer complaints concerning violations of freedom of association to the Committee on Freedom of Association.<sup>76</sup> Further, the Committee was granted follow-up authority, that is, in severe cases of repeated violations of freedom of association, it can now require that governments file a follow-up report on such matters.<sup>77</sup> Moreover, the Committee may now unanimously propose the monitoring of any situation concerning appropriate nomination procedures.<sup>78</sup> The new provisions further extend the mandate of the Credentials Committee to situations where

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Committee, *Provisional Record 17*, 89<sup>th</sup> Session, 2001 at paragraph 20 (objection to the nomination of the Workers' delegate of the United Arab Emirates); ILC, Second Report of the Credentials Committee, *Provisional Record 22*, 88<sup>th</sup> Session, 2000, at paragraph 41 (objection to the nomination of the Workers' delegate of Oman); ILC, Second report of the Credentials Committee, *Provisional Record 22*, 88<sup>th</sup> Session, 2000, at paragraph 7 (objection to the nomination of the Workers' delegate of Saudi Arabia).

<sup>73</sup> ILC, Third Report of the Credential Committee, *Provisional Record 5D*, 90<sup>th</sup> Session, 2002, at paragraph 54.

<sup>74</sup> ILC, Report of the Standing Orders Committee, *Provisional Record No. 16*, 92<sup>nd</sup> Session, 2004.

<sup>75</sup> The Governing Body has recently proposed to extend this period until June 2008: "The record of discussion at the 2004 Conference reflects a conclusion that the Governing Body would need to evaluate the system established by the *Interim provisions* following the end of the 96th Session (2007) of the Conference, with a view to reporting to the Conference in June 2008. This evaluation will be for the Governing Body to discuss between the 2007 and 2008 sessions of the Conference. Since the *Interim provisions* would lapse automatically at the end of the period of their validity (2007) unless the Conference takes a decision to renew them, it is necessary to determine which rules will govern the verification of credentials during the 97th Session (2008) of the Conference, pending possible discussion of the evaluation by the Governing Body." See *Provisional Records No 2-1*, 96nd Session of the International Labor Conference, 2007, at paragraph.6, at <http://www.ilo.org/public/english/standards/reim/ilc/ilc96/pdf/pr-2-1.pdf>.

<sup>76</sup> The Committee on Freedom of Association (CFA) is the tripartite committee of the ILO Governing Body, responsible for the examination of complaints alleging violations of freedom of association. This measure is presently embodied in Article 26 (6) of the interim provisions. Members of the LILS Committee noted that this could involve extra work for the Committee of Freedom of Association, which is already overloaded. A more detailed analysis reveals that, in reality, a large majority of situations submitted to the Credentials Committee for examination are simultaneously the object of procedures before the Committee on Freedom of Association. Likewise, it is not unusual for the Committee on Freedom of Association to receive complaints following the examination of cases by the Credentials Committee, particularly when it concludes that the problems fall principally within the competence of that Committee. The Role of the Credentials Committee, 286<sup>th</sup> Session, *supra* note 57, at paragraph 18.

<sup>77</sup> This measure is now embodied in Article 26 (7) of the interim provisions.

<sup>78</sup> Article 26quater provides that the Committee may unanimously propose the monitoring of any situation relating to the provisions of Article 3 (nomination of Conference delegates and advisors) or Article 13 (payment of travel subsistence expenses by member states) of the ILO Constitution.

states deliberately avoid credentialing delegates of functional groups.<sup>79</sup> This extension explicitly recognizes that the absence of representation of workers' or employers' organizations is inherently inadequate. This recognition embodies a shift towards a deeper understanding of the meaning of representation. In states where employers or workers' organizations are non-existent, the Committee may assist in implementing alternative mechanisms to ensure that functional delegates are as representative as possible.<sup>80</sup>

#### **IV. Rethinking Interest Representation: Towards an Internal Functioning Approach**

##### **A. General**

Part II of this paper was a summary and analysis of a line of criticism advocating a modification of the tripartite structure. While I join the voices promoting broader representation of interests in the ILO, I reject the idea that such a critique necessitates the substitution of a multi-interest partnership for the traditional tripartite structure. Instead, I suggest that the latest reforms provide the Committee with a basis for an alternative path for enhanced representation in international organizations – the Internal Functioning Approach.

In the following pages I make several claims. First, I claim that the reforms of the Committee embody an alternative avenue for broadening representation of interests in the ILO.<sup>81</sup> Second, I argue that the ILO, by reforming the Committee while avoiding modifications to its traditional tripartite structure, has chosen to reject the Multi-interests approach. The Committee's reforms serve as the basis for further theoretical development of the Internal Functioning Approach. Third, I claim that not only does the Internal Functioning Approach capture more accurately the spirit of the ILO's own approach, but it is also normatively preferable. This is because the Internal Functioning Approach will eventually result in the adoption of a more democratic internal functioning of the ILO civil society groups (through the implementation of the norm of freedom of association), which, in turn, can be expected to enhance representation. Other advantages associated with this approach are further described in this Part, following an analysis of the Committee's reforms.

##### **B. Analysis of the Credentials Committee Reforms**

###### ***a. Formalistic vs. Substantive Concept of Representation***

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<sup>79</sup> ILO, Report of the Committee on Legal Issues and International Labor Standards, Governing Body, 289<sup>th</sup> Session, March 2004, 286<sup>th</sup> Session, *supra* note 57, at paragraph 13; Article 5 (2), 26 of the Standing Orders.

<sup>80</sup> See The Role of the Credentials Committee, 286<sup>th</sup> Session, *supra* note 57, at paragraph 26.

<sup>81</sup> However, as mentioned above, these paths are not necessarily mutually exclusive.

I believe the Committee's reforms manifest a shift from what could be termed a formalistic model of representation to a more substantive one. The Committee itself, of course, does not articulate its actions in these terms, nor does it present the theory underlying the reform in terms of "a conception of representation". The ILO would benefit from developing a clear understanding of the theory behind these reforms, including its own conception of representation. Tikriti, one of the few scholars to have dedicated an entire study to the tripartite structure of the ILO, formulated the following question: "would it be in the spirit of this provision [Article 3(5) of the ILO Constitution] if consultation for the purpose of nominating non-governmental delegates to the ILO conference take place with the existent organizations, whatever those organizations were, or should it take place with *truly* representative organizations of employers and workers?"<sup>82</sup> Answering this question requires an understanding of what constitutes a truly representative organization, which in turn requires a better comprehension of the complex concept of representation, and, in particular, its connection to the norm of freedom of association.

The traditional approach to delegates' credentials, centering on an examination of the extent to which their nomination procedures conform to the ILO Constitution, embodies a narrow understanding of representation. Here, representation most closely resembles what Pitkin terms the "authorization view" of representation, under which representation is defined in terms of having formal authority to act.<sup>83</sup> As Pitkin herself notes, this is a formalistic view of representation, as it is defined as "a transaction that takes place at the outset, before the actual representing begins."<sup>84</sup>

Clearly, the ILO abandoned this formalistic view by adopting the linkage with freedom of association. However, as I demonstrate below, thus far the ILO has merely taken the first step towards a fully substantive view of representation, which is the foundation of the Internal Functioning Approach. This approach compels a deeper examination of whether the representatives of the three groups that constitute the tripartite structure are genuinely representative of their *constituents* (workers, employers and citizens).<sup>85</sup> It further perceives the mechanism for ensuring this goal in deliberative terms. In what follows I elaborate on both these elements and show how they draw on, and are congruent with, the key norm of freedom of association.

### ***b. Representation and Freedom of Association***

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<sup>82</sup> See ABD AL KARIM, *supra* note 44, at 213 (emphasis added). The Committee may indirectly touch upon this by resorting to an ostensibly factual question: is the organization indeed the "most representative organization" in the country.

<sup>83</sup> See HANNAFENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* § 38 (1972).

<sup>84</sup> See *id.*, at 39.

<sup>85</sup> While the Credentials Committee may explore the first question as to governmental and non-governmental delegates alike, only where non-governmental representatives are concerned can the Credentials Committee explore the second question. This creates an interesting dichotomy in the ILO's approach to representation, one that cannot be addressed here.

The Internal Functioning Approach suggests a framework for the re-conceptualization of representation, by deepening the implications of tying representation to the norm of freedom of association. It goes beyond current reforms: while the reforms paved the way, they fail to fully realize the goal of interests' representation.

An understanding of representation that is based on freedom of association emphasizes two elements: 1. Representation depends on appropriate internal functioning of the represented organizations (workers or employers). 2. These mechanism should be understood in a deliberative manner. In what follows I elaborate on these two elements.

The question of the internal functioning of workers' organizations is an essential element of freedom of association. It is easy to see that a distorted internal functioning of a workers' organization would impede its ability to advance the true interests of its members, an essential goal of the functional organization. The ILO, as described in Conventions Nos. 87 and 98,<sup>86</sup> protects the organization from any interference in its internal functioning. It also allows supporting legislative regulation of internal functioning of workers' organizations when it is "necessary" to advance freedom of association itself.<sup>87</sup>

Convention No. 98 addresses collective bargaining, and calls for its promotion in national legislation. It is aimed at protecting workers and workers' organizations from anti-union discriminatory policies, and seeks to guard against other forms of interference in the functioning and administration of workers' organizations. ILO Convention No. 87 also provides for certain functional and organizational freedoms, which workers' chosen organizations must enjoy. These include the right to draw up their own rules and constitutions, elect their representatives, organize their administration and activities and formulate their programs.<sup>88</sup>

Thus, the ILO, in its interpretation of freedom of association, recognizes the importance of furthering democratic internal functioning under various circumstances. For example, one

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<sup>86</sup> The most significant and detailed substantive standard for freedom of association was elaborated in two ILO Conventions, Freedom of Association and the Right to Organize Convention 1948 (No. 87) (hereinafter Convention No. 87) and the Right to Organize and Collective Bargaining Convention 1949 (No. 98) (hereinafter Convention No. 98). The vast jurisprudence of the Governing Body's Committee on Freedom of Association and the reports of the Committee of Experts on the Application of Conventions and Recommendations elaborate this standard.

<sup>87</sup> One context in which the ILO allows state regulation is that of voting procedures within worker associations in the context of constitution drafting. The imposition by law of secret ballot, direct voting, and majority votes on issues that touch upon constitutive practices of the organization, are deemed as not interfering with the norm of freedom of association if such regulations are aimed at the sole objective of "guaranteeing democracy." See 197<sup>th</sup> Report, Case No. 823, at paragraph 382; 294<sup>th</sup> Report, Case No. 1704, at paragraph 156.

<sup>88</sup> Convention No. 87, Article 3. Convention No. 87 also affirms the right of all workers and employers to establish and join an organization of their own choosing, without prior authorization by the state, and provides for the right of workers' organizations to establish and join federations and confederations, and to affiliate with other international workers' and employers' organizations. It further provides that administrative authority shall not weaken these guarantees.

context in which the ILO allows state regulation is that of voting procedures within workers' associations in the context of constitution drafting within such organizations. Therefore, the imposition by law of secret ballot, direct voting<sup>89</sup> and majority votes on issues that touch upon constitutive practices of the organization<sup>90</sup> have been deemed appropriate to the extent that they are aimed at “guaranteeing democracy.”<sup>91</sup> Government-mandated term limits for union executives are also permissible.<sup>92</sup> Such regulation is deemed to affirmatively enable freedom of association, rather than inhibiting it, by guaranteeing the rights of workers to freely participate in matters affecting the very existence and structure of their organizations.<sup>93</sup> My point here is that appropriate internal functioning of functional organizations in the ILO is an essential component of this norm.<sup>94</sup>

The Internal Functioning Approach is based on an expansive understanding of representation. If representation means “acting in the interest of the represented in a manner that is responsive to them,”<sup>95</sup> then freedom of association should emphasize the responsiveness of representatives. Mechanisms of accountability to their constituents, which are already incorporated into the norm of freedom of association, would be one way to ensure that such representation remains responsive, and thus genuine or real. Ideally, retroactive accountability measures should be supplemented by mechanisms of ongoing deliberations between the representatives and their constituents. Such a framework would ensure that representatives are not merely numerically representative (measured by the number of constituents represented in the group), but also embrace “effective representation,” i.e., incorporate certain mechanisms to ensure that members can influence their leaders.<sup>96</sup>

What might a credentialing criterion look like under a perception of representation that is based on freedom of association? Since democratic procedural norms are the basis for effective representation, some form of periodic internal election should be required from organizations seeking credentialing. Furthermore, workers must be free to organize in some meaningful sense, even if domestic labor law starts from a baseline that is not fully democratic. In order to maximize ILO legitimacy, and in accordance with a dissenting view in the ILO’s understanding of the norm of freedom of association,<sup>97</sup> such organizations must also adhere to the broad principle of inclusiveness, and therefore not exclude minority (or, for that matter, majority)

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<sup>89</sup> ILO Committee of Freedom of Association, *Digest of Decisions*, 1996, at paragraph 339.

<sup>90</sup> 197<sup>th</sup> Report, Case No. 823, at paragraph 382. This case involves a complaint against the Government of Chile, which required such a majority in Article 18 of its trade law legislation.

<sup>91</sup> 294<sup>th</sup> Report, Case No. 1704, at paragraph 156.

<sup>92</sup> See ILO Committee of Freedom of Association, at paragraph 358.

<sup>93</sup> See *id.*, at paragraph 343.

<sup>94</sup> These doctrines rest on unarticulated notions of democracy. Nevertheless, regardless of the particular model of democracy one may adopt, appropriate internal functioning of functional organizations in the ILO is an essential component of this norm. For an analysis of the appropriateness of ILO norms as to the doctrine of interference in internal elections, see Milman-Sivan, *supra* note 25, at 58.

<sup>95</sup> See Pitkin, *supra* note 83, at 209.

<sup>96</sup> See Daniela Obradovic, *Accountability of interest groups in the Union lawmaking process*, in *LAWMAKING IN THE EUROPEAN UNION* 354 (1998).

<sup>97</sup> See Milman-Sivan, *supra* note 25, at 58.

groups based on gender, race, religion, etc. The ILO already implicitly requires some degree of inclusiveness, as the case of Myanmar suggests,<sup>98</sup> and therefore this principle would not be foreign to the ILO internal norms and practices. In addition, as I have argued extensively elsewhere,<sup>99</sup> in order to fully implement this proposed conception of representation, the ILO should, I believe, adopt an understanding of freedom of association in deliberative theory terms.<sup>100</sup> Such an interpretation is in line with a general emphasis of the ILO on deliberation and dialogue.<sup>101</sup> In what follows I present the idea that such an understanding would promote interest diversification.

Any step towards enhancing deeper democratic internal functioning within a group, and in particular the encouragement of broad and inclusive deliberations, prescribed by a deliberative understanding of the norm of freedom of association, would promote the inclusion of a broader array of interests in several ways. First, a deliberative model generally associates democracy with open deliberation among participants, leading to agreed-upon policies and ideas.<sup>102</sup> If deliberation is understood not as striving towards consensus but as a process for “the discussion and elaboration of difference,”<sup>103</sup> such deliberations would lead to a more diverse and complex understanding of the groups’ own interests. It is easy to see how a broad commitment to inclusion, coupled with a requirement for discussions based on persuasion, reasoning, and appeals for the common understanding of justice as principles of the resolution of problems, would encourage better articulation and comprehension of more relevant interests and points of view within workers’ organizations. Deepening democratic deliberation mechanisms within unions may illuminate the heterogeneous nature of the group’s interests, by highlighting the divergent interests of its sub-groups. As groups participate in discussions and decide according to the reasons and arguments presented to them, and not merely on the basis of aggregating pre-determined preferences, such groups would have a meaningful opportunity to explore and reconsider their own preferences and interests (which can include the interests of women, migrants, atypical workers, farmers, etc).

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<sup>98</sup> See above at Part III, chapter c, section b.

<sup>99</sup> See Faina Milman-Sivan, *supra* note 94.

<sup>100</sup> *Id.*

<sup>101</sup> A full exploration of the tension within the norm of freedom of association and the contrast between “thin” and “thick” views of freedom of association is beyond the scope of this article. I have discussed elsewhere an interpretation of freedom of association that is based on a commitment to freedom, equality and inclusion. See Faina Milman-Sivan, *supra* note 25, at 248. My understanding of deliberation starts with Iris Young’s definition of deliberative democracy: “Democratic process is primarily a discussion of problems, conflicts, claims of need or interest. Through dialogue others test and challenge these proposals and arguments. Because they have not stood up to dialogic examination, the deliberating public rejects or refines some proposals. Participants arrive at a decision not by determining what preferences have greatest numerical support, but by determining which proposals the collective agrees are supported by the best reasons.”

See Young, *supra* note 52, at 10.

<sup>102</sup> This understanding of democracy is inspired from the Greek *polis* or the tradition of civil republicanism, both of which see politics as a process of deliberation between free and equal citizens. In its pure form, these traditions were averse to practicalities and economic day-to-day considerations. See Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 275 (1998).

<sup>103</sup> Charels F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union* 4 (2006), on Sabel's site at <http://www2.law.columbia.edu/sabel/egp-connex-C-07-02.pdf>

Second, as Guthman and Thompson poignantly point out, deliberation encourages a deliberant to, in John Stuart Mill's phrase, "weigh interests not his own".<sup>104</sup> This is another reason why increasing deliberations would result in broader inclusion of interests. Guthmann and Thompson's claim that participants in deliberations "are more likely to take a broader view of issues, and to consider the claims of more of their fellows citizens, in a process in which moral arguments are taken seriously" appears convincing. Thus, a process based on increasing one's sympathy to others and on understanding the other is more likely to produce outcomes that reflect the interests of varied segments of the working class.

Third, a more nuanced understanding of diverse interests within a group, coupled with a tendency to take additional interests into account, may open the door to broader, more comprehensive cooperation between trade unions and other segments of the working class. That is, an understanding of a groups' own interests as consisting of multiple divergent interests may enhance the ability for cooperation with other segments of society on particular issues, where the interests of both groups are aligned. This may pave the way to Naidoo and Fryett's vision of an enhanced power of representation:

The ILO needs to support the strengthening of trade unions, community-based organizations, NGOs, and institutions of social dialogue. This relates to the building of "alliances" between certain NGOs and the traditional social dialogue partners recognized by the ILO. This does not require the modification of social dialogue that weakens tripartism. However trade unions could be encouraged by the ILO to develop alliances with community organizations that represent other segments of the working class, including, the unemployed and workers in the informal economy- and bring this increased "power of representation" to the negotiation table.<sup>105</sup>

The notion of trade unions reaching out and promoting the interests of other sectors of the economy is not unrealistic. Some trade unions have indeed come to understand their role as encompassing the promotion of, for example, the informal sector or the unemployed. Naidoo and Fryet provide us with one such example: "the National Congress of South African Trade Unions (COSATU) in 2000 identified the recruitment and organizing of informal sector and atypical workers as "a major and necessary challenge".<sup>106</sup> COSATU has also forged an alliance between trade unions and community organizations and other civil society formations to lobby for policies that benefit both workers and the poor, creating the "People's Budget Coalition" to develop

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<sup>104</sup> AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* § 42 (1996).

<sup>105</sup> See Ravi Naidoo & Isobel Frye, *The Role of Workers' Organizations in the Extension of Social Security to Informal Workers*, 27 *COMPARATIVE LABOR LAW & POLICY JOURNAL* 187, 193 (2006).

<sup>106</sup> See *id.*, at 197.

common policy positions.<sup>107</sup> It is plausible that with appropriate institutional mechanism, trade unions could serve as a vehicle for the representation of the interests of non-traditional types of workers.<sup>108</sup>

## V. Advantages of the Internal Functioning Approach

In this section, I contrast the understanding of representation promoted in this article with the one adopted by new governance theories. I do not purport to depict or discuss new governance theories in a comprehensive way, but merely to address one particular feature of these theories that is relevant in the present context. As new governance theories recognize the desirability of the participation of NGOs in global governance, and as NGOs tend to have an agenda that is limited in scope, these theories suggest that different NGOs should be brought to the table for each question under deliberation. The institutional structure envisioned here is the inclusion of all the relevant bodies, interests, and stakeholders for each decision or process.<sup>109</sup> The result would be a constant reshuffling of the groups participating in a debate.

The new governance theories, at least as Zeitlin describes them, enumerate three reasons for the importance of all-inclusive participation: first, to enhance local knowledge; second, to ensure the representation of diverse perspectives, and third, to hold public officials accountable.<sup>110</sup> As NGOs tend to have a narrow subject-matter focus, it is likely that advocating the widest range of NGOs possible would result in a loose and fluid participation of groups. Such an unstable vision of global governance could indeed advance local knowledge. However, there is reason to doubt whether it is the best method for promoting accountability.

Further, this fluid understanding of participation is at odds with the Internal Functioning Approach to interest inclusion. Despite its appealing premise, I believe that the new governance approach has substantial disadvantages, which have yet to be sufficiently fleshed out in academic discussions.

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<sup>107</sup> See *id.*, at 199.

<sup>108</sup> For a different view, see Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Political Economy*, 20 COMP. LAB. L. & POL'Y J. 365, 370-374 (1999).

<sup>109</sup> See Charels F. Sabel & Jonathan Zeitlin, *The Modernization of the European Social Model and EU Policies and Instruments* 21 (2003), on Sabel's site at <http://www2.law.columbia.edu/sabel/egp-connex-C-07-02.pdf>. (In the context of the OMC process).

<sup>110</sup> Zeitlin, one of the prominent advocates of new governance theories, summarizes this view with respect to the OMC process in the EU: "Not only the legitimacy but also the effectiveness of OMC processes, on this view, depend on the participation of the widest possible range of stakeholders in policy formulation, implementation, monitoring, and evaluation at all levels (EU, national, sub national) in order to ensure the representation of diverse perspectives, tap the benefits of local knowledge, and hold public officials accountable for carrying out mutually agreed commitments." Working Paper Series La Follette School Working Paper No. 2005-001. <http://www.lafollette.wisc.edu/publications/workingpapers>

I first demonstrate the advantages of a stable governance structure, inferring that an inherently unstable governance structure (as participants under the new governance institutional structure are substituted according to the question at hand) is gravely flawed. I further show that, perhaps counter-intuitively, it is the Internal Functioning Approach that is compatible with the fluid and transformative understanding of interests and identity that I have described above.<sup>111</sup>

### **A. Stability**

The stability of the groups participating in norm-setting institutions is valuable for several reasons. The first reason turns on the contention that some degree of stability enables groups to develop two pre-conditions for deep deliberations: trust and a common vocabulary required for communication. In general, it is trust that enables mutually beneficial cooperative endeavors,<sup>112</sup> deliberations being merely one of them. In the realm of politics, informal norms that are related to trust limit the behavior of elected representatives and discourage the type of policy-making that aggressively promotes the self-interest of one's own constituency. Thus, Kahan concludes, reciprocity dynamics, i.e. where trust between groups is established, make at least some contribution to containing special-interest politics.<sup>113</sup> Sustaining such informal norms and organizational cultures is easier when the groups participating in the deliberations remain stable to some extent. This is necessary in order to establish the notion of multi-round deliberations (if I agree to X in this round, you are likely to reciprocate in the next round of discussions).<sup>114</sup> Moreover, deliberation, including deliberation between representatives of interest groups (as is the case in global governance), is considered to be dependent on their socialization into epistemic communities.<sup>115</sup> Deliberation requires the establishment of common vocabulary, norms of civility, protocols, without which deliberation cannot take place. These informal mechanisms develop over time, and some degree of continuity among the members (or groups) taking part in the deliberations is desirable. This may explain the tendency of comitology to “de facto limit participation to a small club of adepts.”<sup>116</sup> A certain stability resulting in familiarity and in the forging of a “normative community” may enhance the ability of groups to deliberate.

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<sup>111</sup> See above in part V

<sup>112</sup> See generally, Russell Hardin, *Symposium Trust Relationships Part 2 of 2: Distrust*, 81 B.U. L.Rev. 495 (2001).

<sup>113</sup> In contrast to the conventional theory of collective action, which suggests that incentives are necessary in order to encourage wealth maximizers to contribute to public goods, the reciprocity theory suggests an alternative policy, namely, the promotion of trust. That is, a belief that others are inclined to contribute to public goods (in this case, deliberative communication) could in turn induce a contribution (to deliberate in good faith) even without recourse to incentives. As Dan Kahan points out, this process of trust-building was tested in multi-round public good experiments, and, indeed, although unenforceable, face-to-face assurances prompt subjects to make larger contributions, which they quickly increase toward the social optimum. See Dan M. Kahan, *The Logic Of Reciprocity: Trust, Collective Action, And Law*, 102 MICHIGAN LAW REVIEW 71 (2003).

<sup>114</sup> See *id.*, at 8.

<sup>115</sup> Sabel & Zeitlin, *supra* note 103, at 6.

<sup>116</sup> See Sabel & Zeitlin, *supra* note 109, at 21.

The second and more important reason is that stability is needed in order to monitor the internal functioning of the civil society groups participating in the decision-making process. As a practical matter, the standard for accepting an organization's credentials would initially represent a threshold of accountability. Then, a dynamic process could occur whereby groups gradually increase their accountability levels and deepen their commitment to democratic internal functioning. This process of gradually increasing membership accountability can only take place in a stable environment over a period of time, resulting in enhanced accountability and legitimacy for the ILO (or other international organizations). A stable environment that enabled monitoring of the internal functioning of groups would increase accountability, and, as a result, would enhance "input legitimacy". In other words, the accountability of the functional groups participating in any governance structure bears directly on the accountability of this governance structure.

Any discussion of a "democratic deficit" of transnational governance systems should address the accountability of the groups participating in them as an integral component of the political accountability of its structure. It is in this context that we should understand Obradovic's contention, relating to the formalized participation of the social partners at the European Union, that "accountability of the European corporatist groups is every bit as essential to a democracy as political accountability".<sup>117</sup> Indeed, democratic internal functioning of trade unions and employers' organizations that participate in the EU legislation process is a significant component of the EU's accountability. Accepting the participation of undemocratic and unaccountable groups undermines the "input legitimacy" of international institutions, and thus of global governance. This, arguably, would be the consequence of the new governance approach. The Internal Functioning Approach, conversely, maintains that stable organizations could attend to diverse interests without forfeiting accountability.

## **B. Identity**

Another advantage of the Internal Functioning Approach is that it coincides with an understanding of the self as intersectional and fluid, as explained above.<sup>118</sup> The notion of intersectionality moves away from the idea of identity groups. According to the traditional notion of identity, each one of the identity groups understand itself as representing the "whole person,"<sup>119</sup> by representing a large number of particular interests of the people that comprise this group. Conversely, the notion of intersectionality views identity as constituted of partial affiliation with a number of groups. Intersectionality avoids the essentialist understandings of human interests and personality, that is, the reduction of a complex person to one trait, and the idea that individuals of similar gender or race share some essential traits, which has raised fierce criticism of identity politics.<sup>120</sup>

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<sup>117</sup> See Obradovic, *supra* note 96, at 357.

<sup>118</sup> See Chapter B, Section C and accompanying text.

<sup>119</sup> See Piore, *supra* note 47, at 21.

<sup>120</sup> See Garcia, *supra* note 56, at 119.

Some believe that accepting an understanding of the self that is intersectional and fluid points to the improbability of normative support for neo-corporatist institutional design schemes, as the very understanding of identity and solidarity have been transformed. I believe that the opposite is true. The recognition that workers can move between identities depending on the circumstances<sup>121</sup> does not require the dismantling of neo-corporatist schemes, nor does it require governance systems that allow for constant reshuffling of groups. To the contrary, insisting on the constant reshuffling of groups is more consistent with the notion that one can only belong to one group, with one interest. If we recognize that we can shift within identities, we should not object to having the same individuals attend to different interests within groups.

## **VI. The Internal Functioning Approach: Critique and Implications for New Governance Theories**

The Internal Functioning Approach may be critiqued on various grounds. One relates to the types of interests represented by groups. Initial political configurations tend to “freeze” subsequent identities and behaviors, even where the founding interests and passions decline in salience.<sup>122</sup> Indeed, if initial organization of group interests becomes quasi-permanent, the danger of sclerosis arises. Nevertheless, the ILO experience shows that the formal or semi-formal incorporation of a few, but substantial, civil society groups in international institutions leads to the transfer of real power from the states, while avoiding the pitfalls of establishing an ineffective governance structure. One of the most prominent processes that attempted to be broadly participatory, the OMC process, was criticized for its ineffectiveness,<sup>123</sup> demonstrating perhaps the pragmatic difficulties of such an alternative.

Another source of criticism of the Internal Functioning Approach is that strengthening scrutiny over functional groups may be mistakenly interpreted as restricting the participation of civil society groups, instead of as allowing for greater inclusiveness. However, in its recent attempts to strengthen the monitoring function and the mandate of its Credentials Committee, the ILO has aligned itself with the democratization movement in two complementary ways, one direct and one indirect. First, as I showed above, laying out stringent standards for participation of civil groups puts pressure on the member states to appoint genuine representatives to the ILO, and thus directly influences the democratic nature of the deliberations in the ILO. Second, when

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<sup>121</sup> See, for example, MARI J. MATSUDA, *WHERE IS YOUR BODY?* § 3-13 (1996) (describing how persons move in and out of identities).

<sup>122</sup> I borrow here from Schmitter’s analysis of representation in the EU. He claims that Stein Rokkan’s hypothesis may be true in the EU context: “once national party systems had emerged around a pattern of initial societal cleavages and geopolitical locations, they tend to “freeze” the subsequent identities and behaviors of citizens, even when the founding interests and passions declined in salience and other conflicts became stronger”. See Schmitter, *supra* note 15, at 33.

<sup>123</sup> Zeitlin, *supra* note 103, at 17-18. (One of the harshest criticisms of the OMC process is that it is not effective and has no “teeth”).

governments adhere to stringent standards for promoting domestic freedom of association, this could also promote democracy at the national level. That is, there is a circular relation between promoting democracy on the national and international levels, as has been recognized in the literature on democratic governance.<sup>124</sup> The role of civil organizations in promoting and strengthening democracy on the national level has long been recognized.<sup>125</sup> Promoting democracy on the national level would, in turn, promote it on the international plane, and vice versa. The Internal Functioning Approach, then, provides a compelling framework for diversifying interests and enhancing democracy in global governance.

Accepting the view of representation promoted in this article implies that some features of new governance theories should be re-evaluated. In particular, it suggests that these theories have overemphasized the need for broad inclusion through constant exchange and “reshuffling” of groups that participate in the decision-making process, while undervaluing stability of organizational structures. While the benefits that may be derived from including the “widest possible range of shareholders” are clear, current literature tends to underplay the advantages of some degree of stability in global governance, and in particular its contribution to enhancing legitimacy.

The European Union is the arena where new governance theories have been implemented to the greatest extent. As the tendency of the European Union for broad inclusion of many shareholders is still in preliminary stages, and as these shareholders have yet to receive significant power in standard-setting processes, it is easy to overlook the disadvantages of constant reshuffling of participants. Nevertheless, as the European Union processes, including the OMC process, to name one example, continue to evolve, the drawbacks of involving changing participants with each new question that is discussed, will surface. Therefore, the balance among the three reasons that Zeitlin pointed to<sup>126</sup> would have to be reconsidered. While tailored solutions and local knowledge are crucial to the emerging new forms of governance,<sup>127</sup> this article has shown that the Internal Functioning Approach is an alternative that offers considerable advantages, while minimizing the drawbacks associated with new governance theories. At a minimum, such an approach should be considered alongside the mainstream approach whose

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<sup>124</sup> Susan Marks, *Democracy and International Governance*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 47, 66 (Coicaud & Heiskanen eds., 2001).

<sup>125</sup> See, e.g., Harry Blair, *Donors, Democratization and Civil Society: Relating Theory to Practice*, in *NGOS, STATES AND DONORS: TOO CLOSE FOR COMFORT?* 23, 28 (David Hulme & Michael Edwards, eds., 1997) (“A strong civil society directly supports democracy by widening participation in several ways.”); Hulme & Edwards, *An Overview*, *supra* note 23, at 6 (“NGOs and GROs are seen as vehicles for ‘democratization’ ...by opening up channels of communication and participation, providing training grounds for activities promoting pluralism and by protecting human rights”); David Hulme & Michael Edwards, *NGOs, States and Donors: An Overview*, in *NGOS, STATES AND DONORS* 3, 4 (David Hulme & Michael Edwards, eds., 1997).

<sup>126</sup> See above at part V, and accompanying text.

<sup>127</sup> See Mamadou Diawara, *Mobilizing Local Knowledge*, 27 *COMPARATIVE LABOR LAW & POLICY JOURNAL* 225, 225- 236 (2006).

response to the “democratic deficit” in governance systems is merely to advocate the inclusion of additional interests.

## **VII. Instead of a Summary: Moving beyond the Internal Functioning Approach**

In a recent conference devoted to civil society groups and NGOs, and in light of civil society's accountability deficit, Prof. Richard Higgot, a prominent political scientist, voiced the concern that expectations that civil society could democratize global governance might stem from sheer desperation. As scholars are unable to envision feasible alternatives to the current system of global governance, he suggested, they are left with no alternative other than to believe in civil society as a key to promote democracy on the global level.<sup>128</sup> This article seeks to fill in this void and to offer an alternative avenue for action, one that, while drawn from the ILO experience, could be applicable to other domains in the international sphere.

However, the application of the Internal Functioning Approach to contexts other than labor relations may turn out to be limited. First, beyond the realm of labor relations, the issue of accountability to democratic substantive norms may be more problematic. There is a linkage, as this article has established, between the internal rationale of the ILO and its institutional design. The ILO recognizes, applies and elaborates fundamental democratic rights as substantive norms, and I have argued that these norms – a deliberative interpretation of freedom of association – should govern the relations between the ILO and the functional organizations within its structure through application of the Internal Functioning Approach. One of the advantages of this approach is that by doing so the ILO merely imposes standards that are derived from an internal norm, one that the functional organizations have agreed to. Thus, within the ILO the problem of interference in the organization and independence of the civil sphere is by and large non-existent. However, any attempt to apply the experience of the ILO more generally should perhaps commence with an examination of whether similar democratic norms can (and should) govern international organizations in the relevant sphere. Naturally, some areas of international concern lend themselves more easily than others to analogies from the ILO. Where freedom of association and democratic values are embedded to a great degree in the internal rationale of a particular setting, accepting the lessons above may be more natural. One could argue that a "thick" and deliberative interpretation of freedom of association is embedded explicitly or implicitly in certain spheres of global governance, such as women's rights and the rights of indigenous peoples, and perhaps even with respect to global governance as a whole.<sup>129</sup> A second limitation has to do with the unique nature of workers' and employers' organizations. There are profound differences between, on the one hand, national workers' and employers' organizations and, on the other, international NGOs, both in terms of accountability and representativity and in terms of the type of interests

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<sup>128</sup> Richard Higgot in CEU Summer University conference named Non-Governmental Public Action (20.07.2007).

<sup>129</sup> See Faina Milman-Sivan, *supra* note 25, at 232-234

they represent. For one thing, the constituencies of national employers' and workers' organizations are clearly defined groups. This is a very different situation from, say, environmental concerns, where issues are often quite distinct from human interests, thus giving reason to doubt whether an anthropocentric democratic organization would adequately address such issues. In addition, the geographical loci of environmental problems cover a wide spectrum from highly localized to regional and global; many problems adversely affect some peoples more than others. This state of affairs raises difficult questions about which peoples should be given primary status in deciding particular issues.

Although these challenges are significant, they do not negate the thrust of my argument. Internationally, the trend toward democratization of global governance, discussed above, may have several ramifications that may be summarized as translating into a legal standard of regime legitimacy.<sup>130</sup> That is, it is plausible to maintain that the emerging standards of democratic norms should be utilized as criteria to examine the international governance system itself,<sup>131</sup> including the internal structure of the civil society organizations that participate in it. At the same time that the international community is asking itself whether it is “ready to assume systematic responsibility for a new task of ...the validation of governance in member states,”<sup>132</sup> it should also ask whether it is ready to validate global governance by means of the democratization of international institutions. The international framework for including civil society groups in global governance should stop relying on ad hoc responses to political pressure. Instead, global governance theory should establish normative principles and correlating practical procedures for legitimating such inclusion. This is a crucial challenge, in light of the increasing importance of international governance in the era of globalization. The ILO experience indicates both the feasibility and the challenges in encouraging other international organizations to impose a representative structure on civil society groups. The application of these lessons to different spheres of global governance would require further creative and critical research projects.

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<sup>130</sup> Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and Its Implications for International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 1, 19 (Gregory H. Fox & Brad R. Roth, eds., 2000).

<sup>131</sup> The democratization of international institutions is one of the questions to be addressed in the future, according to, for example, James Crawford, see James Crawford, *Democracy and the Body of International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 91, 112 (Gregory H. Fox & Brad R. Roth, eds., 2000).

<sup>132</sup> Thomas M. Franck, *Legitimacy and the Democratic Entitlement*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 25, 28 (Gregory H. Fox & Brad R. Roth, eds., 2000).