INTERNATIONAL JOURNAL of LEGAL POLICY
Vol. I, Issue 2 (2025)
Jun, 2025

Administrative Deference in International Courts

Loper Bright Echoes at IMCO, WHO, and ILO

- **Daniel Stein**[1]

Abstract

As the International Court of Justice (ICJ) considers an Advisory Opinion on whether or not the Right to Strike is implied in the 'Right to organize' contained in Convention 87 (C87) of the International Labor Organization (ILO), America's Administrative Law was thrown into disarray when its Supreme Court decided Loper Bright Enterprises v. Raimondo, which overruled the Chevron doctrine that required courts to defer to Executive Agency constructions of their own statutes. Since there is no international equivalent to America's Administrative Procedure Act, this article examines the scope of administrative deference in ICJ Advisory Opinions. This is the third time that the ICJ will act in this interpretive role, and by comparing those previous cases within the Inter-Governmental Maritime Consultative Organization (IMCO) and the World Health Organization (WHO), this article examines how deferential those Advisory Opinions were to agency interpretations of their own Conventions and Constitutions, and what that could mean for the ICJ deferring to ILO's leading interpretation of C87. Part one navigates the judgments of these two Advisory Opinions, while Part two examines the history of administrative deference in the United States. Part three considers how deferential the court could be to ILO's interpretation of C87 considering these different theories and approaches. Part four presents a conclusion with some analysis and recommendations.

Keywords

administrative deference, chevron doctrine, loper bright case, ICJ, advisory opinion

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* The author would like to thank Annika Muddappa Bollera (JGLS, BBA LLB, 2021)

ICJ ADVISORY OPINIONS on INTERNATIONAL AGENCIES

Constitution of the Maritime Safety Committee of Inter-Governmental Maritime Consultative Organization (1960)

History of the Dispute

Today's International Maritime Organization (IMO) was created by a 1948 Convention in Geneva which formed, in 1958 in London, as the Inter-Governmental Maritime Consultative Organization.[2] It's constituent organizational structure contained a Maritime Safety Committee (MSC), which was defined in Article 28(a) as -

> "*consist[ing] of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas.*"[3]

When the election for the MSC occurred, two of the top eight ship-owning nations were not elected: Liberia and Panama, and both advocated at to the IMO to bring a case to the ICJ, arguing the statute required selecting the top eight ship-owning nations, which included Liberia and Panama, and provided for elections of only the remaining seats.[4] Liberia alleged that the countries which did not vote for them or Panama voted

[2] IMO: Brief History of IMO, at: https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx.

[3] *Convention on the International Maritime Organization* (IMO) adopted 6 March 1948, Art. 28(a), 289 U.N.T.S. 3 (IMO Convention).

[4] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion), Judgment, 1960 I.C.J. Rep. 150 (June 8). (IMCO Advisory Opinion)

against the evidence that these two countries were truly in the top eight and thus violated their duty under the IMCO Convention's Article 28(a).[5]

Liberia approached the question of administrative deference by asking for a general rule of international law which stated that when reviewing an election at an International Organization, the Court should be "*bound to approach the problem in much the same way as would a municipal tribunal invited to take under judicial review the exercise by any authority of the powers with which it may be vested*".[6] Liberia also argues that the standard of review should include asking whether "*the majority act[ed] in a manner that can objectively be regarded as reasonable and not arbitrary*".[7]

Essentially, those fourteen countries who did not vote for Panama and Liberia argued that the constitution allowed them to vote for eight of the largest ship-owning nations or could allow them to not vote for countries that did not have an "important interest in maritime safety".[8] The reason a state may not have such an interest was because that era was plagued by so-called 'flags of convenience' where ships could sever their national link by registering in foreign jurisdictions to avoid local regulations.[9] These private registries, often founded by American and British companies, promised easy revenue and few problems for the governments of states like Liberia, Panama, the Marshall Islands, Comoros, St. Kitts and Nevis.[10] Panama's exclusion was also possibly based on countries'

[5] IMO Convention, n 3.
[6] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (request for Advisory Opinion), Written Statement of the Government of Liberia, 17 Nov. 1959 <https://www.icj-cij.org/sites/default/files/case-related/43/9241.pdf>, p.72.
[7] Ibid, p. 73.
[8] IMO Convention, n 3.
[9] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion), Dissenting Opinion of J. Moreno Quintana, 1960 I.C.J. Rep. 150 (June 8).
[10] Elizabeth R. DeSombre, Flagging Standards: Globalization and Environmental, Safety, and Labor Regulations at Sea (2006).

distinction between flagged ships and owned ships, a desire to examine its registry, and some political disputes over management of its canal, a crucial passage for global shipping.[11] Neither side disputed that the ICJ had jurisdiction to interpret the IMCO Convention.[12]

The Court's Decision

The Court, with a 13-2 majority, decided that because the word 'elected' follows the clause regarding the eight largest, that it is a set category of eight of the fourteen seats, with only the remaining six up to election for the remaining seats.[13] The dissent of President Kjaelstad argues that the inclusion of the phrase "important interest in maritime safety" and because it literally does not say "the top eight largest" implies some role for the members to reject members of the top eight, should they be judged to not have such an interest.[14] For the majority, such an interest is implied in their status as the eight largest, but for President Kjaelstad's dissent, this interpretation negates entirely the first clause, and as such is against the usual canons of construction.[15]

For purposes of administrative deference, President Kjaelstad was prepared to accept this voting power as within "the Agency's" discretion, even if it could "in a hypothetical case, lead to abuse or arbitrariness".[16] Here, 'the Agency' is represented by a majority of its voting members. By extension, such a right exists, and Kjaelstad would only overturn it should the "discretionary

[11] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion), Written Statement of the Government of the Kingdom of Norway; Written Statement of the Netherlands Government, 17 Nov. 1959; https://www.icj-cij.org/sites/default/files/case-related/43/9241.pdf.

[12] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organizatio*n (request for Advisory Opinions), Request for Advisory Opinion, 25 Mar. 1959.

[13] IMO Convention, n.3

[14] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion), Dissenting Opinion of J. Kjaelstad, 1960 I.C.J. Rep. 150 (June 8).

[15] Ibid.

[16] Ibid, p. 3.

power of appraisal [be exercised] in an improper or arbitrary manner".[17] This is consistent with general principles of domestic administrative law, though such a link is not drawn. The other dissent, by Judge Moreno Quintana, follows a different track, focused more on the contrast between flags of convenience and national commercial ship registries.[18]

He writes –

> "*The registration of shipping by an administrative authority is one thing, the ownership of a merchant fleet is another. The latter reflects an international economic reality which can be satisfactorily established only by the existence of a genuine link between the owner of a ship and the flag it flies. This is the doctrine expressed by Article 5 of the Convention on the High Seas which was signed at Geneva on 29 April 1958 by all the eighty-six States represented at the Conference that drew it up. This provision, by which international law establishes an obligation binding in national law, constitutes at the present time the opinio juris gentium on the matter. The flag-that supreme emblem of sovereignty which international law authorizes ships to fly-must represent a country's degree of economic independence, not the interests of third parties or companies. This is a consequence of the very structure of world economy, of which merchant shipping, is one of the principal supports. For all these reasons, which the IMCO Assembly had full authority and opportunity to appreciate, consider that the Maritime Safety Committee of the Organization, which was elected on 15 January 1959, was constituted in accordance with the Convention for the establishment of the Organization.*".[19]

While there is no specific reference to deference or discretion, the separate opinion is clear that it considers the non-election of Panama and Liberia to

[17] Ibid.

[18] Dissenting Opinion of J. Moreno Quintana), n 9.

[19] Ibid. p. 178

be reasonable interpretations.[20] The majority decision, however, does not afford the IMCO election any weight and rules with Panama and Liberia. Though a textualist interpretation of the tools of construction used to justify the court's decision can provide insight into the courts reasonings[21], the ruling clearly follows the Loper Bright holding that courts have the final say on matters of interpretation and the 'agency' – here represented by a majority of its members, are not to be afforded any deference for their interpretation of their own instruments.[22]

The Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt Advisory Opinion (1980)

Background

In 1949, the World Health Organization (WHO) opened its Eastern Mediterranean Regional Office (EMRO) in Alexandria, Egypt. In 1978, following the Camp David Accords, Arab states sought to punish Egypt for normalizing relations with Israel by voting within the WHO to move this office to Amman, Jordan.[23] The logistics of such a move included severing the agreement between the WHO And the EMRO in Alexandria, and interpreting Section 37 of the 1951 Rights and Immunities Agreement between the WHO and what was then the Alexandria Health Bureau.[24] Throughout the boycott against Egypt, the WHO's Regional Committee for the Eastern Mediterranean (RCEM) member states met in special session and formed

[20] Ibid.
[21] *The IMCO Opinion: A Study in Treaty Interpretation*, Duke Law Journal 287-301 (1961)
[22] IMCO Advisory Opinion, n 4.

[23] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion), Written Statement of Kuwait, p. 153, (15 July), https://www.icj-cij.org/sites/default/files/case-related/65/9557.pdf.
[24] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion), Written Statement of the Republic of Iraq, p. 148, (15 July) https://www.icj-cij.org/sites/default/files/case-related/65/9557.pdf.

subcommittees to facilitate the move.[25] When such a recommendation came before the general WHO Assembly, the question over whether Section 37 requires that such a recommendation must be followed as a question to be decided by the Regional Committee, or whether the final decision must be made by the Assembly, and whether a two year 'notification period' imposed by Section 37 would apply, were put to the ICJ after a requesting resolution backed by the United States was adopted 53-46 with 20 abstentions.[26]

The Court's Decision

Before getting to the question posted, the ICJ reframed the specific question to be one outside of just Section 37, allowing for answers from general rules of international law. [27]

These rules imposed a clear obligation on the WHO and Egypt to 'cooperate in good faith to promote the objectives and purposes of the Organization as expressed in its Constitution,' meaning that they must in consultation determine a reasonable period of time to enable them to achieve an orderly transfer of the Office from the territory of the host state.[28] Due to the politics of the case as well as this rewording and reframing, the court's lone dissent argued both procedurally that the Court should have declined to hear the case due, and substantively that the Court should not be re-writing the specific questions it is asked.[29] USSR Judge Morozov argued that such a re-writing would "permit the Court, contrary to the Agreement of 1951, to intervene by its advice in the purely administrative activity of the WHO in the event of the Organization deciding to

[25] EB64/INF. DOC/2, page 3, Annex 1.

[26] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion), Request For Advisory Opinion, 1980 (28 May), https://www.icj-cij.org/sites/default/files/case-related/65/9555.pdf.

[27] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion), Judgment, 1980 I.C.J. Rep. 73. (20 Dec.). [WHO Advisory Opinion]

[28] Ibid, 49.

[29] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion), Dissenting Opinion of Judge Morozov, 1980 I.C.J. Rep. 73, 3, 16 (20 Dec.).

transfer its Regional Office from the territory of Egypt.".[30] He goes on to call the Advisory Opinion "a clear and inappropriate intervention in the question of the implementation of any possible decision to make such a transfer, which is incompatible with the fact that all aspects of that question, including the conditions and modalities of a transfer, belong, in accordance with the WHO Constitution, to the exclusive internal competence of the Organization itself".[31] Some of the other separate opinions also hint at how the court reviews agency actions. The separate opinion of French Judge André Gros emphasizes the importance of careful consideration when discussing questions of deference, writing that "an international administrative service is under an obligation to maintain such conditions as ensure the proper functioning of the organisation, which implies a duty to give detailed study and consideration to problems which raise a question of the constitutional and legal propriety".[32] Polish Judge Manfred Lachs would similarly have provided some deference should the Assembly of the WHO have approved the transfer, but without such approval, he concurs in the judgment.[33]

Only Judge Morozov appears to grant any deference to the parts of the organization that made such a recommendation based on the guidelines and procedures of their own charter and treaty.[34] Additionally, interpreting 'deference' must also answer the question of who is the Agency and what action or interpretation is the ICJ expected to be deferential to: the Agency's Subcommittee 1A of the Regional Committee of the Eastern Mediterranean, or the Assembly itself, which only voted for the request for an Advisory Opinion.

[30] Ibid, 14.
[31] Ibid, 1a.

[32] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion), Separate Opinion of J. Lachs, 1980 I.C.J. Rep. 73, p.105 (20 Dec.).
[33] Ibid.
[34] Morozov Dissent, n. 29.

There can also be the argument that the Court was only asked to decide on the specifics of Article 37 because the Working Group of Executive Board of the WHO could not come to a definitive interpretation and thus no deference should be afforded. "In its resolution WHA 33.16 of 20 May 1980 the World Health Assembly noted that 'the Working Group of the Executive Board has been unable to make a judgment or a recommendation on the applicability of Section 37 of this Agreement' (the Agreement of 1951)," as pointed out by the Egyptian Judge El-Erian's separate opinion.[35] In this case, the WHO's RCEM is situated alongside the IMCO voters as representing 'the Agency' procedures that could be deferred to by the court, even though it is challenged by other members of the agency, rather than affected outside parties.

Interpretation and Context

The Court's decision to provide the additional notification period solved the problem in a different way: the office remained in Alexandria but Israel's connection to the WHO was routed through the WHO regional office in Europe.[36] The finding that International Organizations are bound 'under general rules of international law' is also a reminder that the Organization is not just bound by its positivist obligations in its charter or treaty agreements.[37] As such, the Organization's ability and capacity to interpret their own statutes can only go so far when they have other international law obligations which can only by properly weighed by the ICJ itself.[38] While there may have been some

[35] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) Separate Opinion of J. El-Erian) 1980 I.C.J. Rep. 73, (20 Dec.).

[36] Brolmann, C. M., The Significance of the 1980 ICJ Advisory Opinion Interpretation of the Agreement of 25 March 1951 between the Who and Egypt (May 29, 2015). Forthcoming in a slightly different version, in C Ryngaert (ed-in-chief), I Dekker, R Wessel, J Wouters (eds), Case Law on International Organizations: Text and Commentary, (Oxford University Press 2015), Amsterdam Law School Research Paper No. 2015-17, Amsterdam Center for International Law No. 2015-08, Available at SSRN: https://ssrn.com/abstract=2611976

[37] *WHO Advisory Opinion*, n. 27, 37.

[38] Morozov Dissent, n. 29, 1.

legitimate confusion about the nature of the statutory obligations at the time, the specifics of these positivist obligations were later drafted into the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("the 1986 Vienna Convention"), which, though not ratified, is recognized as customary international law.[39]

AMERICAN ADMINISTRATIVE DEFERENCE

The Makings of Loper Bright

After the Great Depression and the New Deal policies designed to ameliorate their worst effects, as well as the national coordination required during World War II, America's Administrative Agencies grew in number and powers. Early cases focused on questions of whether or not public hearings or individual adjudications were necessary for rule changes[40], but questions about whether the agency was acting within the scope of its authority came to a head in a 1944 case regarding whether firemen's waiting time could be counted as overtime.[41] The case turned on how a Bulletin issued by the Administrator of the Fair Labor Standards Act (FLSA), as well as their amicus brief, should be considered by the courts. The Court held that "the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance".[42] Further. "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those

[39] Vienna Convention on the Law of Treaties art. 32, opened for signature May 23, 1969, 1155 U.N.T.S. 331.

[40] *Londoner v. Denver*, 210 U.S. 373 (1908); *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441 (1915)

[41] *Skidmore v. Swift & Co.*, (1944) 323 U. S. 134.

[42] Ibid at 140.

factors which give it power to persuade, if lacking power to control".[43]

In 1946, Congress passed the Administrative Procedure Act, which codified the scope of review permitted by courts. Courts could, under section §706(2) -

> "*hold unlawful and set aside agency action, findings, and conclusions found to be—*
>
> *(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;*
>
> *(B) contrary to constitutional right, power, privilege, or immunity;*
>
> *(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;*
>
> *(D) without observance of procedure required by law;*
>
> *(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or*
>
> *(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court in making the foregoing determinations,*
>
> *the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.*"[44]

The question of how deferential courts should be to agency interpretations came to a head in 1984 when the Supreme Court decided Chevron U.S.A., Inc. v. NRDC.[45] In this case, Chevron sought approval from the Environmental Protection Agency to define a "stationary source" under the Clean Air Act Amendments of 1977 as one that required a permit only when overall plant emissions went up, rather than any specific source of emissions at the plant itself.[46] In a holding that materially resulted in increased emissions, the Supreme Court propagated a rule requiring courts to ask first, whether the

[43] Ibid.

[44] APA §706(2)

[45] (1984) 467 U.S. 837.

[46] Ibid.

statute spoke clearly on an issue, and then, if not, then to defer to an agency interpretation so long as it is a reasonable reading of the statute.[47] This requirement for courts to leave reasonable agency decisions in place was a principle of American Administrative law for forty years.

Loper Bright

In a challenge to the National Marine Fisheries Service (NMFS) rulemaking regarding the Magnuson-Stevens Fishery Conservation and Management Act (MSA) over who was responsible for paying regulatory observers for Atlantic herring fishery management, the Supreme Court declared that "Chevron cannot be reconciled with the APA," which requires the court to defer to the agency interpretation rather than do its own independent analysis. Thus, now courts have the final say on statutory ambiguity, rather than the agency, even if the latter's analysis is a reasonable interpretation of the statute.[48]

Without Chevron, the court is now to return to the provisions of the APA and the original 1944 factors from Skidmore, which Justice Kagan's dissent reminds as still. recognizing that "agency interpretations 'constitute a body of experience and informed judgment' that may be 'entitled to respect'.[49] The Majority opinion agrees that "[i]n exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes.[50] But, such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA," not full deference.[51] The amount of deference is now only "[c]areful attention to the judgment of the Executive Branch

[47] Ibid.

[48] *Loper-Bright v. Raimondo*, (2024) 603 U.S. 369 (2024).
[49] *Skidmore v. Swift & Co.*, (1944) 323 U. S. 134, 140.
[50] *Loper-Bright* n. 44, at 385.
[51] *Loper-Bright*, quoting Skidmore, 323 U. S., at 140.

may help inform that inquiry".[52] And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it.[53] But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous".[54] This level of deference brings the Supreme Court closer in line with the decisions of the ICJ in the IMCO and WHO cases, and shows the full scope of potential deference to agency decision-making. Requiring deference to reasonable agency interpretation seems to bring the position of Judge Morozov in line with the members of the Chevron majority. Loper Bright thus seems more in line with ICJ jurisprudence that the judges can and must review agency decisions without any mandatory deference to the reasonable decisions of the International Agencies.

ADVISORY OPINION on the RIGHT to STRIKE

Background

Currently, the ICJ is considering an Advisory Opinion on whether or not the various instruments of the International Labor Organization (ILO), specifically, Convention 87 and its interpretation, contains or recognizes a right to strike in International Law.[55] The formation of the question requires understanding the history, structure, and politics of the ILO to conceptualize the context. Constitutionally formed in 1919 out of Part XIII of the Treaty of Versailles, the ILO administers a series of Conventions, including a series formed in 1944 Philadelphia, explicitly relating to a right to organize. ILO Administration consists of a Committee of Experts (CoE) on the Application of Conventions and Recommendation which, since 1927,

[52] *Loper-Bright*, n.44, at 404.
[53] Ibid.
[54] Ibid. p. 412

[55] Right to Strike under ILO Convention No. 87 (Request for Advisory Opinion) 2024 (10 Apr.). [ILO AO Request]

conducts surveys and creates report on treaty compliance.[56] The Governing Body Committee on Freedom of Association (CFA), set up in 1951, hears complaints of breach of the constitutional guarantee of freedom of association.[57] The CFA is a court with ten judges that hears disputes about state compliance with the Conventions: an independent chair and three representatives each from governments, labor organizations, and employers.[58]

The CFA's reporter, the Digest of Decisions, states, in the 6th edition of 2018, in the 'Right to Strike' chapter, several employer-led paragraphs inserted in 2006 with only one note of reference, alongside two heavily reported statements – "the Committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests" and "the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests".[59] But, listed first, is the employer added declaration: "While the Committee has always regarded the right to strike as constituting a fundamental right of workers and of their organizations, it has regarded it as such only in so far as it is utilized as a means of defending their economic interests."[60] The push by the Employers Group against fifty years of interpretation of the right to strike under Convention 87 and the ILO Constitution also challenged the authoritativeness of the CFA to issue an interpretation, leading to the question finally being presented in 2023 for the ICJ: "Is the right to strike of workers and their organizations protected under the

[56] Novitz, T., 2010, In: Canadian Labour and Employment Law Journal. 15(3), p. 465 - 494.
[57] Ibid.
[58] ILO supervisory system: Special procedures, International Labour Organization, https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/committee-freedom-association-cfa

[59] *Committee on Freedom of Association Digest of Decisions*, CFA Digest of Decisions, 6th edition, 2018, p. 143-4.
[60] ibid at 751.

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?"[61]

Administrative Deference in Global Administrative Law

In their paper on the Emergence of Global Administrative Law, Kingsbury and Stewart consider a 'Bottom-Up approach' through extending (and adapting) the tools of domestic administrative law.[62] This raises the concern that such extension would usurp national functions, or could allow national regulators to skirt responsibility.[63] With the possibility that international courts could review domestic actions implementing international laws, or national courts reviewing decisions of international organizations which infringe on individual liberties, there must be "different standards of procedure and review".[64] Kingsbury suggests that greater deference should apply to international courts reviewing domestic actions because of "imperatives of confidentiality, flexibility, and speed in international negotiations," and that alternatively, in when national courts review international actions, "less deference might by applied, on the premise that global administrative policymaking is inherently more opaque and less susceptible to informal mechanisms of participation and review than comparable domestic policy-making, and that it is not embedded in a parliamentary framework that would exercise control".[65] But how do International Courts interpret the administrative actions of International Organizations?

Deference and Statutory Interpretation at the ICJ: WHO/IMCO Lessons

[61] ILO AO Request, n. 55.
[62] Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. and Contemp. Problems 15-62 (2005).
[63] Ibid.
[64] B. Kingsbury & R. Stewart, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1
[65] Ibid at 41.

Under the ICJ statutes, previous decisions are not binding common law, but practice has developed for certainty and continuity in the law that the courts generally follow the procedural and substantive precedents.[66] As the only other cases considering disputes within International Organizations within the United Nations system, questions of deference and interpretation can take several lessons from the WHO and IMCO advisory.

From the WHO case, rewriting of the question to encompass broader international law can allow the Judges to consider the right to strike under general international law rather than only what appears in C87. This would allow the court to consider State Practices and Opinio Juris, the bases of customary international law, which has relied upon the ILO documents to protect strikers in national and regional courts.[67]

Secondly, the rule of Chevron and Morozov would require automatic deference to the CFA interpretation so long as it is reasonable and within their authority to decide.[68] Focusing only on what the agency has interpreted – after determining that C87 was vague enough to not include a right to strike since it is not explicit – would be the second required step of Chevron.

Under Loper Bright, and ICJ jurisprudence in the WHO case to re-write specific treaty questions as ones under general international law, the Court can also consider the widespread adoption in international courts of the right to strike, as it expanded from the ILO to "Article 22 of the International Covenant on Civil and Political Rights 1966 (which relates to freedom of association, including the right to form

[66] ICJ Statute Art. 38, See also J.G. Devaney, *The role of precedent in the jurisprudence of the International Court of Justice: A constructive interpretation*, Leiden J. of Int. L. 2022;35(3):641-659.

[67] J. Vogt, et. al. The Right to Strike in International Law, Hart Publishing, Oxford (2020), p. 87-90, 122-27, 136-38.

[68] *Chevron U.S.A., Inc. v. NRDC*, (1984) 467 U.S. 837; Morozov Dissent, n 9.

and join trade unions) and Article 8 of the International Covenant on Economic, Social and Cultural Rights 1966 (which relates to all aspects of trade union activity, including the right to strike)," which "state expressly that nothing in those provisions authorizes a state to prejudice its obligations under Convention 87".[69]

As seen in the IMCO case, the Court is free to reframe the specific legal question, replacing a strict interpretation of C87 and the ILO Constitution with one of general international law, and thus not even need to not even consider the amount of deference provided to the specific interpretation of C87. President Kjaelstad's dissent in the IMCO case is mainly focused on the tools of construction, and both dissents recognize the importance of leaving in place the decisions of the elected members, which did not happen in the WHO case, but is present with the majority of the ILO repeatedly recognizing a right to strike in a variety of contexts.

CONCLUSION

Nothing in international law requires ICJ judges to consider that a source of international law can be recognizing that agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," as seen in the current state of American Administrative Law in America.[70] The closest such administrative decisions would come to being a source of International Law which could be considered by the court under Article 38 of the ICJ Statute, would be "treaties establishing rules expressly recognized by the contesting states".[71] This would put the question as one of state acceptance of ILO interpretations as well as the other conventions (ICCPR and ICESCR) which recognize the right to strike, rather than looking at the

[69] Novitz n. 56 at 9, Vogt, n.67 at 75-82, 84-87.

[70] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[71] ICJ Statute, Art. 38(1).

interpretation of agency itself. This is possible given the ICJ's willingness in the WHO case to expand the specific question. However, if only the ILO interpretations are considered, they are voluminous and span decades, making deference to such an interpretation less arbitrary than the questions presented in the IMCO and WHO cases, which only featured an election and meetings of a subcommittee, respectively.

Without this reading of Article 38, guidelines on International Agency deference would perhaps require an International Administrative Procedures Act that would set out the rights and obligations regarding how International Courts review agency actions. Additionally, should one of the ICJ judges consider the question of deference when writing about the ILO case, it would provide similar direction for future cases of administrative review.

Questions as to whether the right to strike are protected under general international law also raises questions as to how much weight the ICJ gives to regional courts in the Americas and Europe. These courts have considered whether or not there is a right to strike in the ILO Convention, local instruments, and international law, and provided affirmation of this right under these different contexts.[72]

Implications of a recognized right to strike in an Advisory Opinion would have relatively little impact on the regional and national courts that have already recognized such a right. If that right is recognized by the ICJ, how it is interpreted by courts in ILO member

[72] ECtHR cases: Enerji Yapi-Yol Sen v Turkey App No 68959/01 (21 April 2009); Danilenkov v Russia App No 67336/01 (30 July 2009); Trofimchuk v Ukraine App No 4241/03 (28 January 2011); IACtHR cases: Case of Baena-Ricardo et al v Panama, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgment of 2 February 2001, Series C No 72; Case of Huilca-Tecse v Peru, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgment of 3 March 2005; Case of Cantoral Huamaní and García Santa Cruz v Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of July 10, 2007, Series C No 167; Case of Acevedo-Jaramillo et al v Peru, Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations and Costs, Judgment of 7 February 2006, Series C, No 144; Caso Lagos del Campo v Peru, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 31 de Agosto 2017, Serie C No 340.

countries seeking to restrict the rights of workers to strike will be interesting to watch and likely include questions as to whether or not advisory opinions are binding. Regardless of those future issues, an International Court more deferential to an International Agency's interpretation of its own instruments and to national and regional courts would make finding the right to strike, both in C87 and an general international law, more likely.