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Addendum: Background document

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Introduction

1. This document seeks to inform the discussions of the Governing Body in preparation of the consideration at the next session of the International Labour Conference of an item concerning the inclusion of safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work. It has been prepared in response to the request of the Governing Body at its 343rd Session (November 2021) for a background document addressing the following issues: (i) the terminology to be used in the draft Conference resolution amending the 1998 Declaration on Fundamental Principles and Rights at Work (1998 Declaration); (ii) the occupational safety and health instrument(s) to be recognized as fundamental; and (iii) the possible legal effects, direct and indirect, on existing trade agreements concluded by Member States.

I. Terminology to be used in the draft Conference resolution amending the 1998 Declaration

I.1. Terminology used in the ILO

2. The ILO Constitution sets forth the principle that workers must be protected from "sickness, disease and injury arising out of [their] employment" (Preamble, paragraph 2). The 1944 Declaration of Philadelphia recognizes the solemn obligation of the ILO to further "adequate protection for the life and health of workers in all occupations" (III(g)).

3. Since the establishment of the ILO Constitution in 1919, various formulations have been used by the ILO and its Member States in referencing a right to safe and healthy work and related concepts. [1] These include, among others: (1) the right to safe and healthy working conditions; (2) the right to [a] safe and healthy working environment[s]; (3) the right to safety and health at work; (4) the prevention of occupational accidents and diseases; (5) ensuring safe and healthy working environments; and (6) the promotion of safe and healthy working environments. Of these, the first two are those used most commonly in international, regional and domestic legal instruments. In some instances, these terms are used interchangeably. Different terms are sometimes used to define the same concept. The terms most commonly used by practitioners are "occupational safety and health" or "occupational health and safety"

4. In considering the inclusion of safe and healthy working conditions as an additional fundamental principle and right at work, the Governing Body may wish to consider the importance of ensuring consistency with terminology used in international labour standards and non-binding ILO instruments, and also in other international instruments and national provisions, as reviewed below.

5. While "working conditions" or "working environment" are not defined by ILO Conventions on occupational safety and health (OSH), the terminology they most commonly use is "a safe and healthy working environment" or "occupational safety and health and the working environment". The right to a safe and healthy working environment is referenced in Article 1

[1] See GB.341/INS/6, para. 25.

of the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), and the term "working environment" is used multiple times in the Occupational Safety and Health Convention, 1981 (No. 155). Neither instrument contains a reference to "safe and healthy working conditions". Indeed, since the adoption of Convention No. 155, references to "safe and healthy working conditions" have been rare. [2] The right to a safe and healthy working environment, as used by international labour standards, is a broad concept in accordance with the principles of Conventions Nos 155 and 187, and refers to the content of national OSH policies, the roles of public authorities, employers, workers and others, and the management of OSH in the workplace.

6. In recent years, a few non-binding ILO instruments have more commonly used the expression "safe and healthy working conditions". For example, this is the wording used in Part I of the ILO Declaration on Social Justice for a Fair Globalization (2008) and Part II(D) of the ILO Centenary Declaration for the Future of Work (2019). It would seem that this was for no specific purpose. On the other hand, in other more OSH-focused platforms, on various occasions, such as in the 2008 Seoul Declaration on Safety and Health at Work and the 2011 Istanbul Declaration on Safety and Health at Work, ILO constituents have referred to "a national preventative safety and health culture" and "the rights of workers to a safe and healthy working environment" as a prerequisite for achieving a national preventative culture. These concepts are inextricably linked.

7. There are several references in Convention No. 155 to "occupational safety and health and the working environment" in Parts II and III, which address national policy and action at the national level, respectively. Article 4 sets forth the obligation of Member States, in the light of national conditions and practice, and in consultation with the most representative organizations of employers and workers, to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment, with the aim of "prevent[ing] accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment". This policy must encompass all the areas of action identified in Articles 5 and 6. [3] Member States must review at appropriate intervals the situation regarding occupational safety and health and the working environment with a view to "identifying major problems, evolving effective methods for dealing with them and priorities of action, and evaluating results". References to "occupational safety and health and the working environment" are also made in Article 9, on enforcement, and Article 14, which requires measures to include "questions of occupational safety and health and the working environment at all levels of education and training". It is important to mention that Convention No. 155 introduced an integrated approach to OSH that is more comprehensive than that of previous standards addressing specific hazards or industries. Importantly, the Convention

[2] For example, under Article 10 of the Safety and Health in Construction Convention, 1988 (No. 167), "[n]ational laws or regulations shall provide that workers shall have the right and the duty at any workplace to participate in ensuring safe working conditions to the extent of their control over the equipment and methods of work and to express views on the working procedures adopted that may affect safety and health".

[3] Article 5(a) of Convention No. 155 relates to the concept of "safety by design", which consists of applying methods early in the design or planning phase of the life cycle of materials, premises, substances and work processes (material elements of work) to minimize occupational hazards and, if possible, eliminating them. Article 5(b) concerns the safe adaptation and use of material elements of work in the workplace. Under Article 5(c)–(e), the policy should also cover training for the achievement of adequate levels of safety and health; communication and cooperation at all levels; and the protection of workers and their representatives from disciplinary measures. Article 6 requires the policy to indicate the respective functions and responsibilities of public authorities, employers, workers and others, taking into account the complementary character of such responsibilities.

defined health in relation to work as encompassing "the physical and mental elements affecting health which are directly related to safety and hygiene at work" and "not merely the absence of disease or infirmity" (Article 3(e)). This definition includes all the potential causes of harm that may be present in the working environment and that may lead to a negative physical or psychosocial outcome, including loss of life. [4]

8. Convention No. 187 is the only international labour standard to refer to workplace safety and health as a right by using the terminology "the right of workers to a safe and healthy working environment" (Article 3(2)). Article 1(d) provides that a safe and healthy working environment must be secured "through a system of defined rights, responsibilities and duties … where the principle of prevention is accorded the highest priority" and Article 3(2) connects it to the national preventative safety and health culture.

9. Other OSH Conventions containing general provisions also use the term "safe and healthy work environment" with a similar meaning. According to Article 1(a) of the Occupational Health Services Convention, 1985 (No. 161), the primary function of occupational health services is to advise employers, workers and their representatives in workplaces on "the requirements for establishing and maintaining a safe and healthy working environment which will facilitate optimal physical and mental health in relation to work".

10. The terminology "safe and healthy working environment" draws upon the development of a "national safety and health culture" (Article 1(d) of Convention No. 187), and presupposes the shared commitment of governments, employers and workers to support the formulation and implementation of a national occupational safety and health policy (Article 4(1) of Convention No. 155), indicating "the respective functions and responsibilities in respect of occupational safety and health and the working environment of public authorities, employers, workers and others" (Article 6 of Convention No. 155), a national occupational safety and health programme that includes objectives to be achieved in a predetermined time frame, priorities and means of action, and means to assess progress (Article 1(c) of Convention No. 187) and a national system for occupational safety and health or "the infrastructure which provides the main framework for implementing the national policy and national programmes on occupational safety and health" (Article 1(b) of Convention No. 187).

I.2. Terminology used outside the ILO

11. "Just and favourable conditions of work" and "safe and healthy working conditions" is the wording used by the 1949 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights, respectively. Both instruments were adopted by the international community well before the use of the term "safe and healthy working environment" in international labour standards. More recently, however, target 8.8 of the United Nations 2030 Agenda for Sustainable Development refers to "working

[4] As mentioned in paragraphs 42 and 43 of the *Report on ILO Standards-related Activities in the Area of Occupational Safety and Health: An In-depth Study for Discussion with a View to the Elaboration of a Plan of Action for such Activities* (Report VI, International Labour Conference, 91st Session, 2003) the post-war era up to the 1970s was marked by an increasing awareness of the need for a more comprehensive approach to the human environment in general but also to the working environment. International standards adopted since the "Robens Report", published in 1972, have introduced a number of new, more comprehensive approaches and elements. A first ILO effort resulted in the adoption of the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148), which was a more comprehensive standard than any of the previous OSH standards, but nevertheless with a scope limited to physical hazards and hazardous substances and agents to the extent that they fall within the definitions of air pollution, noise and vibration in the Convention. Convention No. 155 marked a new departure, dealing in a comprehensive manner with OSH and the working environment.

environments". In relation to the Covenant, a general comment of the UN Committee on Economic Social and Cultural Rights interprets the right to safe and healthy working conditions of article 7(b) as encompassing working environments, thereby confirming that the two concepts are now interlinked. The Committee recognized that the prevention of occupational accidents and diseases as a fundamental aspect of the right to just and favourable conditions of work requires the adoption of a national policy for the prevention of accidents and work-related health injury, with all the elements identified by ILO Convention No. 155. [5] In defining the scope of corporate responsibility to respect human rights, the UN Guiding Principles on Business and Human Rights refer to the "internationally recognized human rights" as expressed in the Covenant.

12. The term "working conditions" has also been used frequently in regional instruments, such as Part I, article 3, of the 1961 European Social Charter, to refer to a wide set of labour rights, including remuneration, working hours, equal opportunities, and safe and healthy working conditions, without defining this term. However, in the revised Charter of 1996, article 3 of Part II refers to the need to "formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment" with the primary aim "to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimizing the causes of hazards inherent in the working *environment*" [emphasis added]. This wording corresponds to the terminology of Article 4(2) of Convention No. 155. The European Framework Directive on Safety and Health at Work (Directive 89/391/EEC) also uses the term "working environment".

13. Examples from various national legislations show that both "safe and healthy working conditions" [6] and "[a] safe and healthy working environment[s]" [7] are in common use. A review of national legislation in several countries shows that the use of "working environments" has increased, but "working conditions" is also used in many laws relating to occupational safety and health. [8] In some cases, national OSH legislation refers to both "conditions" and "environment", sometimes apparently interchangeably. [9]

[5] According to the Committee, the national policy should address "at least the following areas: design, testing, choice, substitution, installation, arrangement, use and maintenance of the material elements of work (workplaces, working environment, work processes, tools, machinery and equipment, as well as chemical, physical and biological substances and agents); the relationship between the main elements of work and the physical and mental capacities of workers, including their ergonomic requirements; training of relevant personnel; and protection of workers and representative organizations from disciplinary measures when they have acted in conformity with the national policy, such as in response to imminent and serious danger". See General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), para. 27.

[6] Such as Austria, France, Lithuania and Poland.

[7] Such as Australia, Canada, Georgia and Japan.

[8] See, for example, France (Labour Code, article L4121–2); Germany (Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work, section 2.1); India (Occupational Safety, Health and Working Conditions Code, 2020); Russian Federation (Labour Code of 2001); and the United States of America (OSH Act of 1970, section 2).

[9] For instance, in China, article 16 of the Law on Work Safety of 2002 refers to the employers' duty to achieve "conditions for work safety" in line with the statutory provisions. Article 4 of the Law on Prevention and Control of Occupational Diseases, as amended in 2016, refers to "work environment and conditions" when defining the duty of employers to meet national occupational health standards and requirements. In Denmark, although the Working Environment Act has the term "working environment" in its title, the term "working conditions" is used throughout its provisions (for example, articles 15, 20, 21 and 28). In Finland, the Occupational Safety and Health Act refers to "the working environment and working conditions" in section 1 on objectives, but uses "working conditions" when describing the circumstances surrounding the operations at the workplace throughout the instrument, for example, in sections 3(3), 8(1), 9 and 10. Section 8(1) states that "[e]mployers are

I.3. Other considerations

14. The term "safe and healthy working environments" originated in the 1970s, when it was used as a concept to define workplace equipment, organization and relations as a whole. It has been used to describe everything that exists in the social and physical environment of business operations that is to be regulated internally by management and human resources staff. [10] Scholars and public policy experts have characterized "safe and healthy working conditions" as a widely accepted standard of worker protection [11] including all technical issues relating to equipment, materials and facilities, [12] inspection and training surrounding the conditions, as well as social relations that organize the tasks and operations; [13] this seems to correspond to the term "working environment" as used in international labour standards. In parallel to the increasing interest in occupational health in medical sciences, the concept of ″working environment" expanded to include the actual impacts of working conditions on the health of workers, [14] including discrimination, diversity and mental health. [15]

15. As a descriptive and open-ended concept that does not have a legal origin, [16] the term "safe and healthy working environment" can adapt to the changing focus of workplace organization. Accordingly, it has currently been adopted into legal policy, without necessitating a list of all aspects of workplace operations that would be protected. It can thus correspond to issues concerning psychosocial health, diversity and workplace violence and harassment, and can include all instances of occupational safety and health. [17] As such, the right to a safe and healthy working environment would provide adequate protection for the life and health of workers in all occupations. The realization of this right requires the formulation, implementation and periodic review of national occupational safety and health policies which aim to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimizing, so far as is reasonably practicable, the causes of hazards inherent in the working environment, and which take into account basic principles such as

required to take care of the safety and health of their employees while at work by taking the necessary measures. For this purpose, employers shall consider the circumstances related to the work, working conditions and other aspects of the working environment as well as the employees' personal capacities". In Japan, article 3 of the Industrial Safety and Health Act (Act No. 57 of 1972) defines the employers' responsibility to achieve legal standards of safety and health of workers in workplaces by "creating a comfortable working environment and improving working conditions", thus using both terms.

[10] One example of such use in an early scholarly article is Allan H Graham, "The People Aspect in Developing Management Criteria" in *Business Quarterly* No. 46(2) (1981), 44.

[11] Karin Lukas, "Article 3: The right to safe and healthy working conditions" in *The Revised European Social Charter: An Article by Article Commentary* (Edward Elgar, 2021), 60–74.

[12] Jeffrey Hilgert, "The Future of Workplace Health and Safety as a Fundamental Human Right", *Comparative Labor Law and Policy Journal* No. 34 (2013): 728.

[13] Lukas, 2021.

[14] P. L. Polakoff, "Looking ahead in occupational health and safety", *Occupational Health & Safety*, No. 52(10) (1983), 44–48. See also Timothy Liveright and Marthe Stanbury, "An historical perspective study of mortality within a cohort of distribution workers", *American Journal of Industrial Medicine* No. 4(5) (1983), 146, one of many mortality studies popularized in the 1980s and 90s focusing on the impact of the working environment on the health of workers.

[15] For example, Maureen F. Dollard and Daniel Y. Neser, ″Worker health is good for the economy: Union density and psychosocial safety climate as determinants of country differences in worker health and productivity in 31 European countries", *Social Science and Medicine* No. 92 (2013), 114–123; Paul M. Muchinsky, *Psychology Applied to Work: An Introduction to Industrial and Organizational Psychology* (3rd ed.), (Brooks/Cole: Pacific Grove, CA, 1990).

[16] However, it is worth noting that "*hostile* work environment" is a legal term under the labour laws of various jurisdictions, for example under United States labour law.

[17] R. Rugulies, ″What is a psychosocial work environment?", *Scandinavian Journal of Work, Environment and Health*, No. 45(1) (2019), 1–6.

assessing occupational risks, [18] combating occupational risks at source, and developing a national preventative culture that includes information, consultation and training (Article 4 of Convention No. 155); the definition of the functions and responsibilities of public authorities, employers, workers and others, taking account of the complementary character of such responsibilities and of national conditions and practice (Article 6 of Convention No. 155); an established system of defined rights and responsibilities, according to which employers should ensure that, so far as is reasonably practicable, workplaces are safe and without risk to health and workers are required to cooperate in the fulfilment by their employer of this obligation (Articles 16 and 19(a) of Convention No. 155); the progressive development and periodic review of a national system for occupational safety and health, which should include all the mechanisms and elements necessary to build and maintain a preventative safety and health culture (Article 4 of Convention No. 187); and the formulation, implementation, monitoring, evaluation and periodic review of a national programme on occupational safety and health aimed at both prevention and protection (Article 5 of Convention No. 187).

16. While the term "working environment" may seem like a broader concept, it does not imply a wider scope of responsibilities. It is simply more adapted to the way work is set out. It allows more clearly for the necessary consideration of different interactions in the workplace that impact safety and health at work and that need to be taken into account for the protection of workers against sickness, disease and injury arising out of employment. "Working conditions", on the other hand, which may seem more limited in scope, may be seen to include other matters traditionally referred to as working conditions such as wages, terms of employment and other "conditions" of work.

I.4. Conclusion

17. International labour standards do not provide a specific definition of the terms "safe and healthy working environment" or "safe and healthy working conditions". The most commonly used terminology in the ILO OSH Conventions is "safe and healthy working environment" or "occupational safety and health and the working environment". This is the case in Conventions Nos 155, 161 and 187. Articles 1 and 3(2) of Convention No. 187 specifically recognize the right of workers to a safe and healthy working environment. Non-binding ILO instruments tended to use the expression "safe and healthy working conditions". The terminology used by non-ILO international instruments makes reference to "safe and healthy working conditions" being interpreted as encompassing all that should be covered by a national policy on occupational safety, occupational health and the working environment. National legislation uses both terms, often interchangeably. The terminology to be used for the purpose of including OSH in the framework of fundamental principles and rights at work could be aligned with the terms used by the OSH Convention or Conventions to be recognized as fundamental.

[18] Risk assessment is the process of evaluating the risks to safety and health arising from hazards at work. It investigates the combination of the likelihood of an occurrence of a hazardous event and the severity of injury or damage to the health of people caused by this event.

▶ II. Occupational safety and health Convention(s) to be recognized as fundamental

II.1. Identification of OSH Conventions and relevant concepts and elements

18. The inclusion of the right to a safe and healthy working environment/conditions in the ILO's framework of fundamental principles and rights at work should be accompanied by a formal determination that one or more OSH Conventions should henceforth be considered as fundamental within the meaning of the 1998 Declaration and that their ratification should be promoted as such. [19]

19. International labour standards concerning OSH may be divided into those containing provisions of a general scope, those that relate to protection against specific risks [20] and those that focus on specific branches of activity. [21] The following four instruments may be classified as OSH standards containing provisions of a general scope:

(i) the Occupational Safety and Health Convention, 1981 (No. 155);

(ii) the Protocol of 2002 to the Occupational Safety and Health Convention, 1981;

(iii) the Occupational Health Services Convention, 1985 (No. 161);

(iv) the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

20. These instruments provide general concepts and principles on prevention and on national OSH policies, programmes and systems that set the basis for the management of safety and health at the national and workplace levels, including for the implementation of ILO sectoral or risk-specific Conventions. The three Conventions and the Protocol referenced above are of general scope and are applicable to all categories of hazards and all workers, while other OSH Conventions are limited in scope and apply to a specific branch of activity or address a specific occupational hazard.

21. The level of ratification of Convention No. 155, the Protocol of 2002 to Convention No. 155, Convention No. 161 and Convention No. 187 is low when compared to other labour rights covered by international labour standards. It is generally agreed, however, that ILO standards have an impact which goes beyond that measured through ratifications and the supervisory procedures. [22] In the last five years, there has been a growing pace of ratification, as shown in the table below. Africa and Europe are the regions with higher numbers of ratifications across the four Conventions (figure 1).

[19] GB.343/INS/6, para. 38.

[20] The White Lead (Painting) Convention, 1921 (No. 13); the Radiation Protection Convention, 1960 (No. 115); the Guarding of Machinery Convention, 1963 (No. 119); the Maximum Weight Convention, 1967 (No. 127); the Benzene Convention, 1971 (No. 136); the Occupational Cancer Convention, 1974 (No. 139); the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148); the Asbestos Convention, 1986 (No. 162); the Chemicals Convention, 1990 (No. 170); the Prevention of Major Industrial Accidents Convention, 1993 (No. 174); and the Violence and Harassment Convention, 2019 (No. 190).

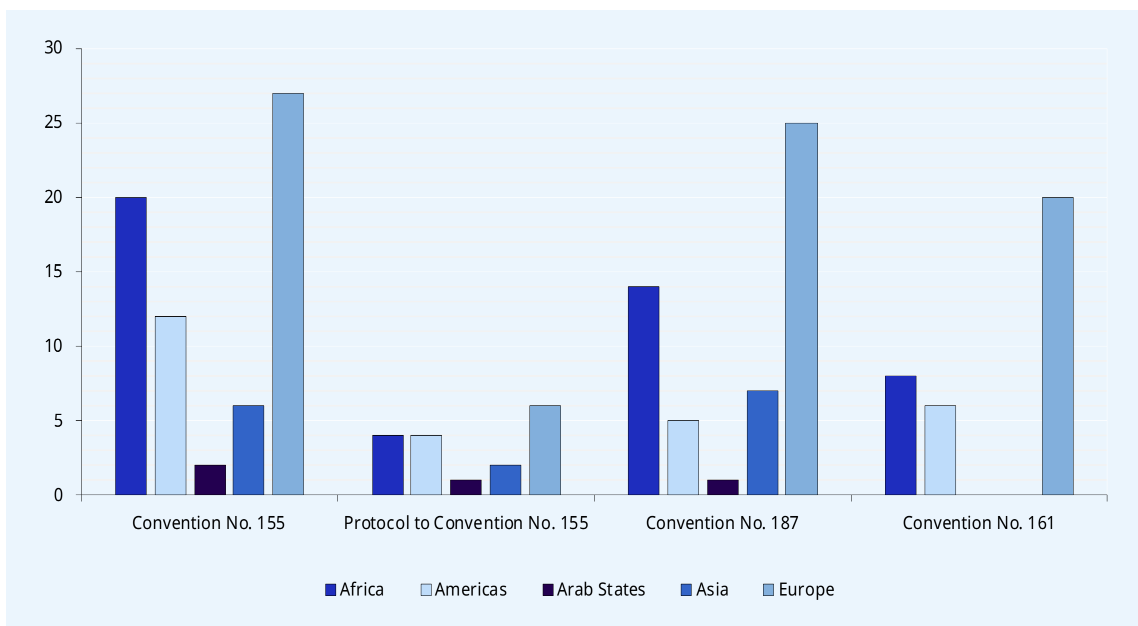
[21] The Hygiene (Commerce and Offices) Convention, 1964 (No. 120); the Occupational Safety and Health (Dock Work) Convention (No. 152); the Safety and Health in Construction Convention, 1988 (No. 167); the Safety and Health in Mines Convention, 1995 (No 176); and the Safety and Health in Construction Convention, 2001 (No. 184).

[22] ILO, Report VI, International Labour Conference, 91st Session, 2003, para. 11.

▶ Table. Ratification of OSH Conventions containing general provisions [23]

Convention	No. of ratifications	Ratifications in the last five years
Convention No. 155 (1981)	74	11 (14% of total)
Convention No. 161 (1985)	35	3 (8% of total)
Protocol to Convention No. 155 (2002)	17	6 (35% of total)
Convention No. 187 (2006)	57	19 (33% of total)

▶ Figure 1. Number of ratifications by region



22. The distinction between fundamental and other rights from the 1998 Declaration was made on the basis of several characteristics, [24] including their **constitutional origin** and **relevance** to the fundamental principles on which the Organization is based – which include the principle that labour is not a commodity; their nature as **human rights**; their functioning as **enabling conditions** or rights instrumental to the pursuit of the improvement of individual and collective conditions of work; and the fact that they have been **recognized** as fundamental both inside and outside of the organization. These matters were addressed by the Governing Body at its 340th Session (November 2020). [25]

23. The right to occupational safety and health has a constitutional origin. Indeed, the ILO Constitution recognizes the "protection of the worker against sickness, disease and injury

[23] International labour standards on OSH may be divided into three major types: those containing general provisions; those addressing protection against specific risks (such as the standards on ionizing radiation, benzene, asbestos, occupational cancer and chemicals); and those pertaining to specific branches of activity (such as industry, commerce and offices, agriculture and mining).

[24] GB.341/INS/6.

[25] GB.340/INS/4.

arising out of his employment" as a fundamental element of social justice [26] and refers to "the solemn obligation" of the ILO to further "adequate protection for the life and health of workers in all occupations" [27] as well as the "full cooperation of the [ILO]" for "the promotion of the health, education and well-being of all peoples". [28] On several other occasions, the ILO has referred to the fundamental importance of OSH for the objectives of the Organization. In 2003, the International Labour Conference recognized OSH as a fundamental requirement for achieving the objectives of the Decent Work Agenda, affirming that a "large number of areas of action presented under the major ILO objectives include an OSH or OSH-related component, such as employment, child labour, the informal economy, gender mainstreaming, labour statistics, standards, labour inspection and maritime safety, among others". [29] During the 2009 discussion of the General Survey on Convention No. 155, Recommendation No. 164 and the Protocol to Convention No. 155, the Committee on the Application of Standards recalled that the constitutional objective of protecting workers against sickness, disease and accidents at work is of crucial importance for the quality of work and human dignity. [30] In the 2017 General Survey on Convention No. 187, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) recognized that the prevention of accidents and diseases at work is a core element of the ILO's founding mission. [31] In 2019, the ILO Centenary Declaration for the Future of Work affirmed that safe and healthy working conditions are essential to decent work.

24. The importance of adequate protection for the life and health of workers has become even more evident in the context of the COVID-19 pandemic. The ILO Global call to action for a human-centred recovery from the COVID-19 crisis that is inclusive, sustainable and resilient calls for the protection of all workers, "including by strengthening policy advice, capacity-building and technical assistance in support of: i. sound labour relations and the promotion of legal and institutional frameworks based on international labour standards, including fundamental principles and rights at work, and a particular emphasis on occupational safety and health in the light of the experience of the COVID-19 pandemic". [32] In its 2020 General Report, the CEACR recognized that the pandemic presented an immense challenge to the protection of the safety and health of workers around the world. It noted that the pandemic brought renewed recognition of the importance of international labour standards on OSH, including Conventions Nos 155 and 187.

25. The right to a safe and healthy working environment/conditions is recognized as a human right outside the ILO. Article 7 of the International Covenant on Economic, Social and Cultural Rights provides that the right of everyone to the enjoyment of just and favourable conditions of work must ensure safe and healthy working conditions. Article 3 of the European Social Charter provides for the right to safe and healthy working conditions, and the European Committee of Social Rights, in its digest of case law, has stated that the right of every worker to safety and

[26] ILO Constitution, Preamble.

[27] Declaration of Philadelphia, III(g).

[28] Declaration of Philadelphia, IV.

[29] Report VI, International Labour Conference, 91st Session, 2003, para. 53.

[30] ILO, *ILO Standards on Occupational Safety and Health: Promoting a Safe and Healthy Working Environment*, General Survey, Report III (Part 1B), International Labour Conference, 98th Session, 2009.

[31] ILO, *Working Together to Promote a Safe and Healthy Working Environment*, General Survey, Report III (Part 1B), International Labour Conference, 106th Session, 2017, para. 573.

[32] ILO, Global call to action for a human-centred recovery from the COVID-19 crisis that is inclusive, sustainable and resilient, 2021, para. 13(b)(i).

health is a widely recognizable principle, stemming directly from the right to personal integrity, one of the fundamental principles of human rights. [33] The right to "safe and healthy working conditions" is now part of what is referred to as the International Bill of Human Rights. Target 8.8 of the UN Sustainable Development Goals aims to protect "labour rights and promote safe and secure working environments for all workers". The WHO Constitution recognizes that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being". [34] The right to safe and healthy working conditions has also been expressed in the G20 Labour and Employment Ministerial Declaration (2021), and the right of every human to the highest attainable standard of physical and mental health was expressed in a UN General Assembly resolution (A/RES/74/2)

26. Reference may also be made to the 2008 Seoul Declaration on Safety and Health at Work, reaffirmed by the 2011 Istanbul Declaration on Safety and Health at Work, which recalled that promoting the rights of workers to a safe and healthy working environment should be recognized as a fundamental human right, and explicitly referred to promoting a systems approach, taking into consideration the principles contained in Convention No. 155, while calling for the ratification of Convention No. 187 as a priority.

27. The following paragraphs give an overview of concepts and elements introduced by the four standards mentioned above and their importance for putting into practice the constitutional objective of protecting workers against sickness, disease and injury arising out of employment. This analysis is provided to assist in the identification of the Convention, or Conventions, to be recognized as fundamental through an amendment to the 1998 Declaration.

II.2. The preventative approach

28. A core principle that informs the four OSH Conventions analysed in this document is the concept of **prevention** of occupational injuries and diseases, according to which priority is given to preventative measures, protective measures being a last resort if hazards cannot be eliminated and risks cannot be prevented or minimized to an acceptable level, and which has been a driving force in the evolution of standard-setting and of scientific and technical work in the field of OSH. The demonstrated effectiveness of a preventative approach to the management of occupational safety and health is the reason why the central organizing theme of Convention No. 155 is the implementation of a national policy focused on prevention, rather than a reaction to the consequences of occupational accidents and diseases. This principle is also found in the Protocol of 2002 to Convention No. 155, in Convention No. 161 and in Convention No. 187. At the workplace level, prevention is the result of an adequate system of hazard identification and risk management according to a hierarchy of principles, [35] within a framework of defined rights and responsibilities, and with the aim of ensuring that, as far as reasonably practicable, workplaces, machinery, equipment, processes and chemical, physical and biological substances and agents are safe and without risk to health (Article 16(1) and (2) of Convention No. 155).

[33] Article 3 of the *Digest of the Case Law of the European Committee of Social Rights*, European Social Charter, December 2018.

[34] Preamble to the Constitution of the World Health Organization, Forty-ninth edition, Supplement, October 2006.

[35] As defined by the ILO *Guidelines on Occupational Safety and Health Management Systems, ILO-OSH 2001*, section 3.10, these consist of a hierarchy of measures giving preference to the elimination of the hazard if possible; controlling the risk at the source, through the use of engineering controls or organizational measures; minimizing the risk by the design of safe work systems, which include administrative control measures; and where residual hazards/risks cannot be controlled by collective measures, providing for appropriate personal protective equipment, including clothing, at no cost to workers.

II.3. Progressive realization of provisions of OSH Conventions

29. All OSH Conventions of general scope refer to **progressive development** in various ways, invoking the concept of progressive realization. The rationale behind this feature was made clear during the preparatory work for Convention No. 155, when it was recognized that the application of an instrument with such a wide scope could only be progressive and that the progressive assumption of the functions provided in the Convention did not necessarily depend on the enactment of legislation. [36] The same rationale was highlighted during the preparatory work for Convention No. 187, in terms of expressing that the development of a safety culture as the product of individual and group values, attitudes, perceptions, competencies and behaviours is a dynamic and progressive process. [37]

30. This approach is reflected in several provisions of OSH Conventions. Article 11 of Convention No. 155 states that various functions are to be "progressively carried out" regarding the implementation of the national policy described in Article 4. The national policy itself is to be "periodically" reviewed to prevent occupational injuries and diseases by minimizing hazards in the working environment as much as is "reasonably practicable". Under Article 2 of Convention No. 187, the objective of ensuring a safe and healthy working environment for workers is to be achieved "progressively", while the national system contained in Article 4 is also to be developed "progressively". Thus, much of what is required and envisaged to be achieved and reported upon by States in the improvement of OSH under key ILO instruments is to be achieved over a period of time and considering the availability of financial and other resources. [38]

31. The principle of progressive realization is frequently addressed by the CEACR in relation to the implementation of OSH Conventions. In one case, for instance, the Committee requested information in relation to Articles 4 and 7 of Convention No. 155 regarding any national programme proposed pursuant to the national OSH Act, including its goals in relation to the progressive development of occupational health services for all workers. [39] In another case, the Committee requested the Government concerned to indicate measures taken to ensure that the functions listed under Article 11(b) and (f) of Convention No. 155 are progressively carried out in sectors other than mining, in law or in practice. [40] In a direct request, the Committee sought information about measures taken or envisaged to establish support mechanisms for a progressive improvement of occupational safety and health conditions in microenterprises, in small and medium-sized enterprises, and in the informal economy. [41]

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[36] ILO, Provisional Record No. 25, International Labour Conference, 67th Session, 1981, 25/7, para. 55.

[37] ILO, Promotional Framework for Occupational Safety and Health, Report IV(1), International Labour Conference, 93rd Session, 2005, paras 26–33.

[38] The concept of progressive realization describes a central aspect of States' obligations in connection with economic, social and cultural rights under international human rights treaties, including the right to safe and healthy working conditions. States are required to take appropriate measures towards the full realization of these rights to the maximum of their available resources. While recognizing differentiated capacities between States, progressive realization does not confer on States an option of inaction. According to the Office of the United Nations High Commissioner for Human Rights, "[a] lack of resources cannot justify inaction or indefinite postponement of measures to implement these rights. States must demonstrate that they are making every effort to improve the enjoyment of economic, social and cultural rights, even when resources are scarce" (OHCHR, Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33).

[39] CEACR, Croatia, direct request concerning Convention No. 155, adopted in 2018.

[40] CEACR, Zambia, direct request concerning Convention No. 155, adopted in 2019.

[41] CEACR, Côte d'Ivoire, direct request concerning Convention No. 187, adopted in 2020.

II.4. The shared responsibility of governments, employers and workers

32. OSH Conventions call for collective responsibilities for a sound management of occupational safety and health through a **well-defined framework of roles, rights and responsibilities**, dialogue and cooperation. As referenced by the 2003 Report on ILO standards-related activities in the area of occupational safety and health, modern OSH standards clearly reflect not only collective responsibilities towards workplace safety but also the respective roles, responsibilities and cooperation between employers, workers and their representatives. [42] An important element of the national OSH policy is precisely to indicate the functions and responsibilities in respect of OSH of public authorities, employers, workers and others, taking into account the complementary character of such responsibilities. At the workplace level, employers have a duty to ensure that work is safe and without risk to the health of workers, and workers have the duty to cooperate with management to the fulfilment of this obligation.

33. The following sections of the document will analyse each of the three OSH Conventions and the Protocol containing provisions of general scope and then reflect on the potential terminology to be considered to articulate this new principle and right. The document will describe the provisions of each Convention, ratification trends and the fundamental nature of each instrument, in addition to the complementarity among the Conventions and Protocol under consideration.

II.5. The Occupational Safety and Health Convention, 1981 (No. 155)

II.5.1. Action at the national level

34. Convention No. 155 works towards the realization of the obligation set out in the ILO Constitution for the "adequate protection for the life and health of workers in all occupations" by outlining the obligation of Member States to formulate, implement and periodically review a coherent **national policy on OSH**, in the light of national conditions and practice, and in consultation with the most representative organizations of employers and workers. This policy is aimed at guiding action at the national level and at the level of the undertaking "to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment" (Article 4(2)).

35. Convention No. 155 provides that the implementation of the national policy on OSH should occur at the national level and at the level of the undertaking. [43] It defines the functions required to give effect to the policy and a framework of rights and duties of employers and workers applicable to the workplace. The Convention requires States to adopt laws, regulations and standards on OSH, establish an adequate and appropriate system of inspection, and provide measures for guidance to employers and workers (Articles 8–10).

36. The importance of the national policy process has been continually emphasized by the CEACR in its examination of the application of Convention No. 155, underlining that it is not only the adoption of a policy promoting a safe and healthy working environment that is important, but also the process of its formulation, and its subsequent implementation and periodic review. A national policy can be formalized in many different ways, depending on the national situation. [44] Convention No. 155 does not prescribe any specific requirements as to the form of

[42] ILO, Report VI, International Labour Conference, 91st Session, 2003.

[43] Parts III and IV.

[44] ILO, Report III (Part 1B), International Labour Conference, 98th Session, 2009, para. 56.

such a policy, and provides that the national policy shall take into account "national conditions and practice" (Article 4(1)). It should also be highlighted that a national policy is defined by its function and not by its form. [45]

37. Article 7 of Convention No. 155 requires Member States to review the policy periodically "with a view to identifying major problems, evolving effective methods for dealing with them and priorities of action". The policy requirement is a dynamic and cyclical process, and a periodic review is required to ensure that scientific and technological progress and changes in working environments can be incorporated into the policy. In calling for a national policy on OSH, Convention No. 155 emphasizes that governments must consider OSH as a matter of national concern and be actively involved in securing it.

38. To give effect to the national OSH policy, Convention No. 155 asks States to ensure that the following functions are progressively carried out by the competent authority or authorities: (i)determination, where required, of conditions governing the design, construction and layout of undertakings, commencement of their operations and major alterations affecting them, safety of technical equipment used at work and the application of procedures determined by the competent authorities; (ii) determination of work processes, substances and agents the exposure to which is to be prohibited, limited or made subject to authorization or control by the competent authority; (iii) establishment and application of procedures for the notification of occupational accidents and diseases, the production of the corresponding annual statistics, and the holding of enquiries on their causes; (iv) the annual publication of information on measures taken in pursuance of the national policy; (v) the introduction or extension of systems, taking into account national conditions and possibilities, to examine chemical, physical and biological agents in respect of the risk to the health of workers (Article 11).

39. Convention No. 155 contains requirements on the dissemination of information, education and training (as does the Protocol of 2002). Article 11(e) of the Convention requires the competent authority to publish annually information on efforts to implement the national policy on OSH and data on occupational accidents, occupational diseases and other injuries to health which arise in the course of or in connection with work. Moreover, Article 12(b) calls for Member States to ensure that chemical manufacturers "make available" intrinsic hazard information, and that other businesses make available similar information on the hazards of their products as well as on their safe usage. Article 14 requires the integration of OSH into all levels of education and training, including higher technical, medical and professional education, in a manner meeting the training needs of all workers.

40. Convention No. 155 calls for the active engagement of public authorities, employers, workers and other stakeholders for the effective prevention of occupational accidents and diseases, as well as the coordination of all relevant parties, which, where appropriate, should happen through a central body (Article 15(2)). At the national level, various approaches have been taken to the creation of tripartite and other participatory labour bodies, including among countries of a similar economic level. [46] Some of the approaches include bodies to advise on legislative matters generally, and bodies specific to certain sectors, such as agriculture. The functioning of such bodies has periodically been reviewed by the CEACR, providing structured

[45] ILO, Building a Preventative Safety and Health Culture: *A guide to the Occupational Safety and Health Convention, 1981 (No. 155), its 2002 Protocol and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187),* 2013.

[46] See, for example, ILO, "National Level Tripartite and Bipartite Cooperation on Health and Safety", *Encyclopaedia of Occupational Health and Safety*, 2011.

opportunities for progressive improvements, where needed, [47] and for the identification of good practices. [48]

II.5.2. Action at the workplace level

41. The realization of the right of all workers to safety and health presupposes the recognition of a framework of rights and duties and their effectiveness in the workplace. Convention No. 155 refers to rights and principles including the right to prevention, to protection from disciplinary measures, to removal (from imminent danger), to information, to training and to participation, communication and cooperation. Under this Convention, employers are required to ensure, so far as is reasonably practicable, that workplaces, machinery, equipment, and processes under their control are safe and without risk to health, and that the chemical, physical and biological substances and agents under their control are without risk to health when the appropriate measures of protection are taken. They are also required to provide, where necessary, adequate protective clothing and protective equipment to prevent, so far as is reasonably practicable, risk of accidents or of adverse effects on health (Article 16). In addition, employers are required to provide for measures to deal with emergencies and accidents (Article 18).

42. Convention No. 155 provides that representatives of workers are to be given adequate information by employers regarding the hazards and risks to the health and safety of workers and may consult their representative organizations about such information if they do not disclose commercial secrets. Workers or their representatives and their representative organizations have the right to enquire into and are to be consulted by the employer on all aspects of OSH associated with their work. Workers and their representatives must also be given appropriate training in OSH by employers (Article 19). Furthermore, employers must refrain from externalizing the cost of these and other preventative measures on workers (Article 21).

43. According to Convention No. 155, workers have a general duty to cooperate with the employer on the fulfilment of OSH obligations. This includes the duty to report situations presenting imminent and serious danger, which is coupled with the right to refuse to return to a work situation where such danger persists (Article 19(f)). Part of the workers' right to be protected from disciplinary measures is their right to protection from "undue consequences" following a decision to remove themselves from imminent and serious danger to life or health (Article 13). In addition to Convention No. 155, numerous other OSH Conventions have subsequently incorporated this right. [49] [50] Under Convention No. 155, if a worker reports to their immediate supervisor any situation for which they have reasonable justification to believe presents an imminent and serious danger to life or health, until the employer has taken remedial action, if

[47] See, for example, the CEACR's observation, adopted in 2011, concerning the application of Convention No. 187 by Sweden.

[48] See, for example, the CEACR's observation, adopted in 2011, concerning the application of Convention No. 155 by Brazil, and Brazil, direct request concerning Convention No. 155, adopted in 2015; the CEACR's direct request, adopted in 2016, concerning the application of Convention No. 155 by Ethiopia; and the CEACR's observation, adopted in 2013, concerning the application of Convention No. 155 by Nigeria.

[49] These include the Safety and Health in Construction Convention, 1988 (No. 167), the Safety and Health in Mines Convention, 1995 (No. 176), and the Safety and Health in Agriculture Convention, 2001 (No. 184).

[50] In the context of the 2017 General Survey, the CEACR concluded that this right of removal "remains an essential foundation for the prevention of occupational accidents and diseases and must not be undermined by any action by the employer. It is linked to the duty of workers to inform their employer about such situations, although this obligation should not be seen as a prerequisite for the exercise of the right of removal."

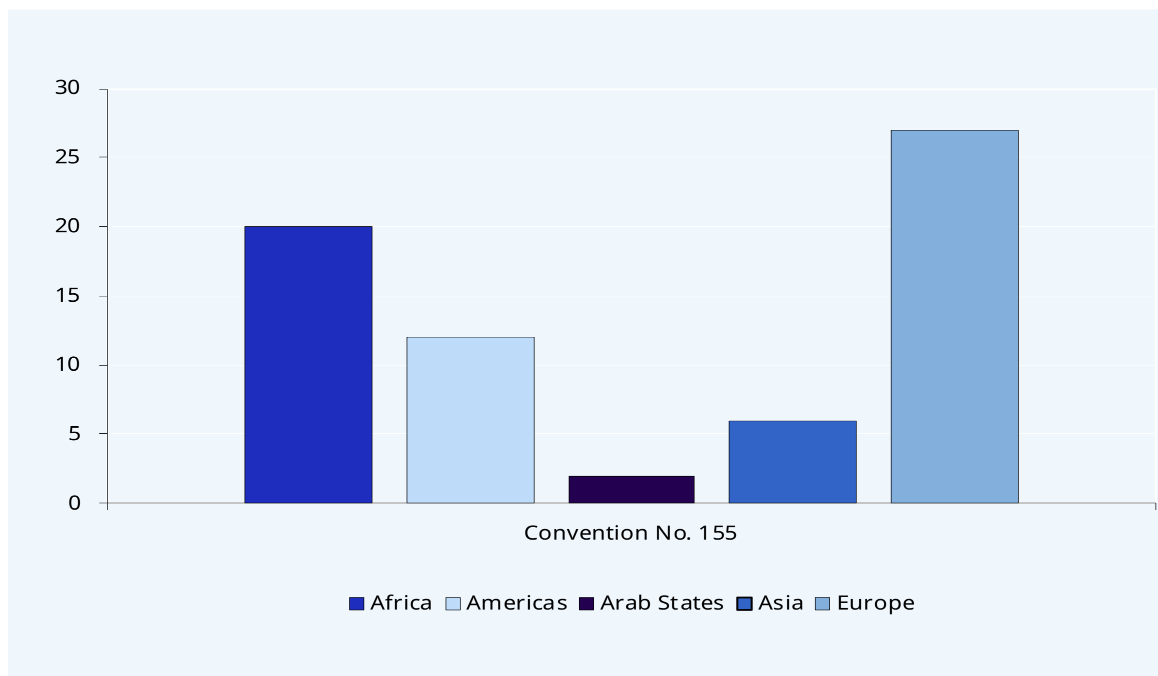
necessary, the worker cannot be required to return to work if the situation persists (Article 19(f)).

44. Cooperation between management and workers at the level of the undertaking is enshrined as an “essential element” of OSH management in Convention No. 155 (Article 20). The application of these provisions is related to the realization of the right to freedom of association and to organize, including the implementation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Workers' Representatives Convention, 1971 (No. 135). Article 19 of Convention No. 155 implies that employers are to cooperate with workers and their representatives with respect to OSH. The duty to cooperate for a preventative purpose extends to other actors. Article 17 requires that whenever two or more undertakings engage in activities simultaneously at one workplace, they shall collaborate in applying the requirements of the Convention.

II.5.3. Level of ratification

45. To date, Convention No. 155 has been ratified by 74 Member States, [51] with 11 of those ratifications (14 per cent) having occurred in the past five years. No Member States have denounced their ratification. The majority of ratifications have been in Europe (27), followed by Africa (20), the Americas (12), Asia (6) and the Arab States (2).

▶ Figure 2. Ratification of Convention No. 155 by region



[51] Ratifications of Convention No. 155: Albania, Algeria, Antigua and Barbuda, Argentina, Australia, Bahrain, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Cabo Verde, Cameroon, Central African Republic, China, Croatia, Cuba, Cyprus, Czechia, Côte d’Ivoire, Denmark, El Salvador, Ethiopia, Fiji, Finland, Gabon, Grenada, Guyana, Hungary, Iceland, Ireland, Kazakhstan, Latvia, Lesotho, Luxembourg, Malawi, Mali, Mauritius, Mexico, Mongolia, Montenegro, Netherlands, New Zealand, Niger, Nigeria, North Macedonia, Norway, Portugal, Republic of Korea, Republic of Moldova, Russian Federation, Rwanda, Saint Lucia, Sao Tome and Principe, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Somalia, South Africa, Spain, Sweden, Syrian Arab Republic, Tajikistan, Turkey, Ukraine, Uruguay, Venezuela (Bolivarian Republic of), Viet Nam, Zambia and Zimbabwe.

II.6. The Protocol of 2002 to the Occupational Safety and Health Convention, 1981

46. As noted in other sections of this document, both Convention No. 155 (Article 11(c) and (e)) and Convention No. 187 (Article 4(3)(f)) contain general provisions on the recording and notification of occupational accidents and diseases. The Protocol of 2002 to Convention No. 155 further highlights the crucial importance of tracking progress in the implementation of national OSH policies through the collection and analysis of data on their practical application and statistics on occupational accidents and diseases with the aim of identifying their causes and establishing preventative measures.

II.6.1. Action at the national level

47. The Protocol defines the obligations of Member States to determine and periodically review, in consultation with the most representative organizations of employers and workers, the requirements and procedures for the recording and notification of occupational accidents,[52] occupational diseases[53] and, as appropriate, dangerous occurrences,[54] commuting accidents[55] and suspected cases of occupational disease, as well as to periodically publish and analyse the related statistics.

48. The strengthening of recording and notification procedures and systems strongly contributes to the objective of the ILO Constitution related to "the protection of [workers] against sickness, disease and injury arising out of [their] employment", as the information about the national incidence and frequency of occupational injuries and diseases is fundamental to the national OSH architecture. Competent authorities require such information to periodically review the national OSH policy, and prioritize and direct resources, while employers need this information to prioritize action in undertakings. The principle of prevention is also well reflected in the Protocol to Convention No. 155, as the responsibilities of employers for recording measures have as main objective to assess the causes of injuries and diseases and continuously improve OSH management.

49. National requirements and procedures should determine the information to be recorded, the duration for maintaining the records, and measures to ensure confidentiality of personal and medical data (Article 3(b)–(d)). Furthermore, governments are bound to determine the responsibility of employers to notify the competent authorities, and to inform workers and their representatives of the notified cases, the criteria according to which these events are to be notified and the time limits for notification (Article 4). Finally, Member States are required to publish annual statistics following classification schemes compatible with the latest relevant

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[52] An occupational accident is defined as "an occurrence arising out of, or in the course of, work which results in fatal or non-fatal injury" (Article 1(a)).

[53] An occupational disease is defined as "any disease contracted as a result of an exposure to risk factors arising from work activity" (Article 1(b)). The Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980] (No. 121) and the List of Occupational Diseases Recommendation, 2002 (No. 194), updated in 2010, provide further guidance on criteria for recognition of occupational diseases.

[54] A dangerous occurrence is defined as a "a readily identifiable event as defined under national laws and regulations, with potential to cause an injury or disease to persons at work or to the public" (Article 1(c)).

[55] A commuting accident is defined as "an accident resulting in death or personal injury occurring on the direct way between the place of work and: (i) the worker's principal or secondary residence; or (ii) the place where the worker usually takes a meal; or (iii) the place where the worker usually receives his or her remuneration" (Article 1(d)).

schemes established under the ILO or other international organizations, and that are representative of the country, as well as the analysis thereof (Articles 6 and 7).

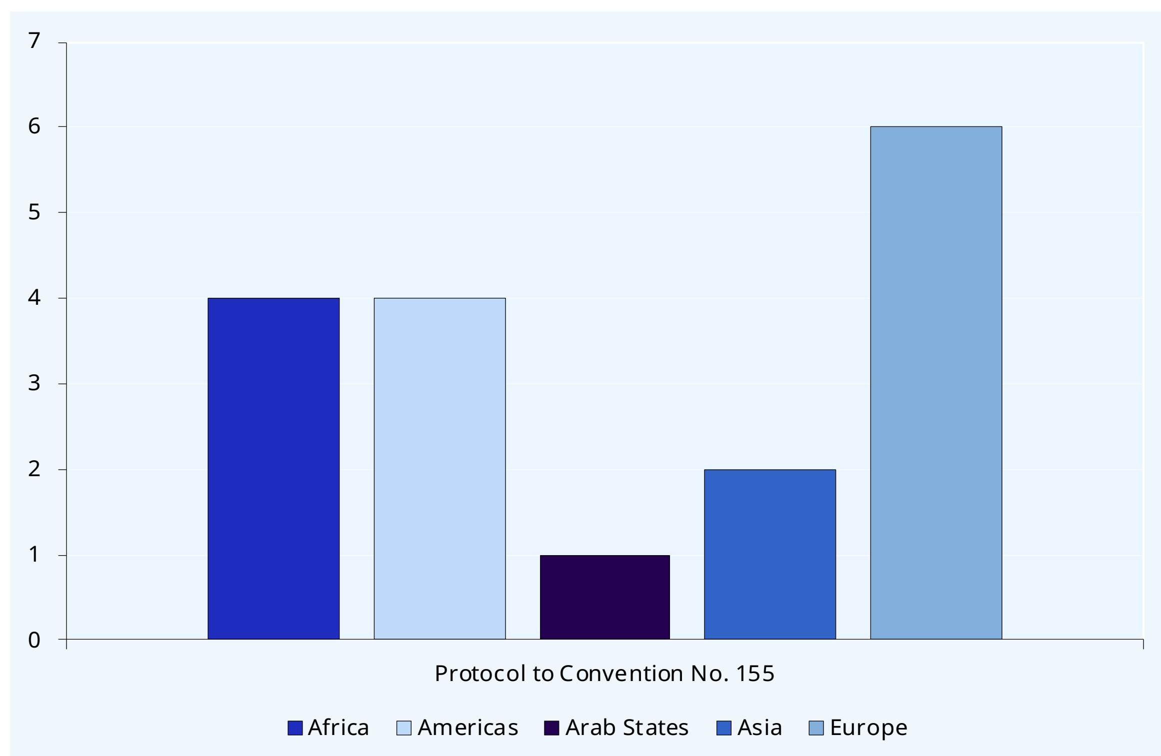
II.6.2. Action at the workplace level

50. The Protocol establishes that employers are responsible for recording occupational accidents and diseases and, as appropriate, dangerous occurrences, commuting accidents and suspected cases of occupational diseases, informing workers and their representatives concerning the recording system, ensuring that records are properly maintained and used for preventative purposes, and refraining from sanctioning workers for reporting such events (Article 3(a)). Employers are also responsible for notifying the competent authorities in case such as event occurs, and to inform workers and their representatives of notified cases (Article 4(a)).

II.6.3. Level of ratification

51. The Protocol of 2002 to Convention No. 155 currently has 17 ratifications, [56] six of which have taken place in the last five years (35 per cent of the total). The majority of ratifications have been in Member States in Europe (6), followed by Africa (4), the Americas (4), Asia (2) and the Arab States (1).

▶ Figure 3. Ratification of the Protocol to Convention No. 155 by region



[56] Ratifications of the Protocol to Convention No. 155: Albania, Antigua and Barbuda, Argentina, Australia, Côte d'Ivoire, El Salvador, Fiji, Finland, Luxembourg, Mali, Niger, Portugal, Saint Lucia, Senegal, Slovenia, Sweden and the Syrian Arab Republic.

II.7. The Occupational Health Services Convention, 1985 (No. 161)

52. Convention No. 161 details international labour standards for occupational health services, which are defined as services entrusted with essentially preventative functions and responsible for advising the employer, the workers and their representatives on the requirements for establishing and maintaining a safe and healthy working environment which will facilitate optimal physical and mental health in relation to work, and the adaptation of work to the capabilities of workers in the light of their state of physical and mental health (Article 1). The Convention contains key provisions regarding the development of these services, which requires a well-developed infrastructure at both the national and enterprise levels that provides flexibility in respect of national circumstances and in respect of how such services are organized. [57]

53. Convention No. 161 helps to fulfil the aims of the ILO Constitution, as occupational health services are necessary in order to identify the risks for and causes of occupational safety and health accidents, injuries, diseases and deaths, thus contributing to the "protection of the worker against sickness, disease and injury arising out of his employment". Occupational health services can provide early detection of OSH risks and incidence of work-related accidents and diseases and can contribute to lower costs for insurance and healthcare at the enterprise level. Estimates released by the WHO and ILO in 2021 found that occupational diseases accounted for 81 per cent of worker deaths, [58] evidencing that detection and treatment is necessary to fulfil the "solemn obligation" for the "adequate protection for the life and health of workers in all occupations" set out in the ILO Constitution. The CEACR further emphasized that the pandemic has highlighted the key role of occupational health services in the monitoring of workers' health and the provision of guidance for adapting workplace procedures and practices and developing safety protocols. In this respect, the Committee recalled the important provisions contained in Convention No. 161. [59]

II.7.1. Action at the national level

54. Convention No. 161 requires States to formulate, implement and periodically review a national policy on occupational health services, in light of national conditions and practice, and in consultation with the most representative organizations of employers and workers (Article 2). Member States should develop progressively these services, which should be adequate and appropriate to the specific risks of workplaces, covering all workers and all organizations, public or private (Article 3). Member States are also to designate by law or regulations the authority or authorities responsible for supervising the operation of and for advising occupational health services once they have been established (Article 16).

II.7.2. Organization and functions of occupational health services

55. Occupational health services can be organized as a service for a single undertaking or common to a number of undertakings, as appropriate, and may be provided by the undertakings or groups of undertakings concerned, public authorities or official services, social security

[57] The Occupational Health Services Recommendation, 1985 (No. 171), and the List of Occupational Diseases Recommendation, 2002 (No. 194), provide more detailed guidance on the development of occupational health services.

[58] *WHO/ILO Joint Estimates of the Work-related Burden of Disease and Injury, 2000–2016: Global Monitoring Report*.

[59] ILO, *Application of International Labour Standards 2021*, Addendum to the 2020 Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III/(Addendum (Part A), International Labour Conference, 109th Session, 2021, paras 55, 58 and 59.

institutions, any other bodies authorized by the competent authority, or a combination of any of the above (Article 7). Part IV of Convention No. 161 refers to the conditions of operation of these services, namely that they should be multidisciplinary, and that their personnel are to be independent from employers, workers and their representatives.

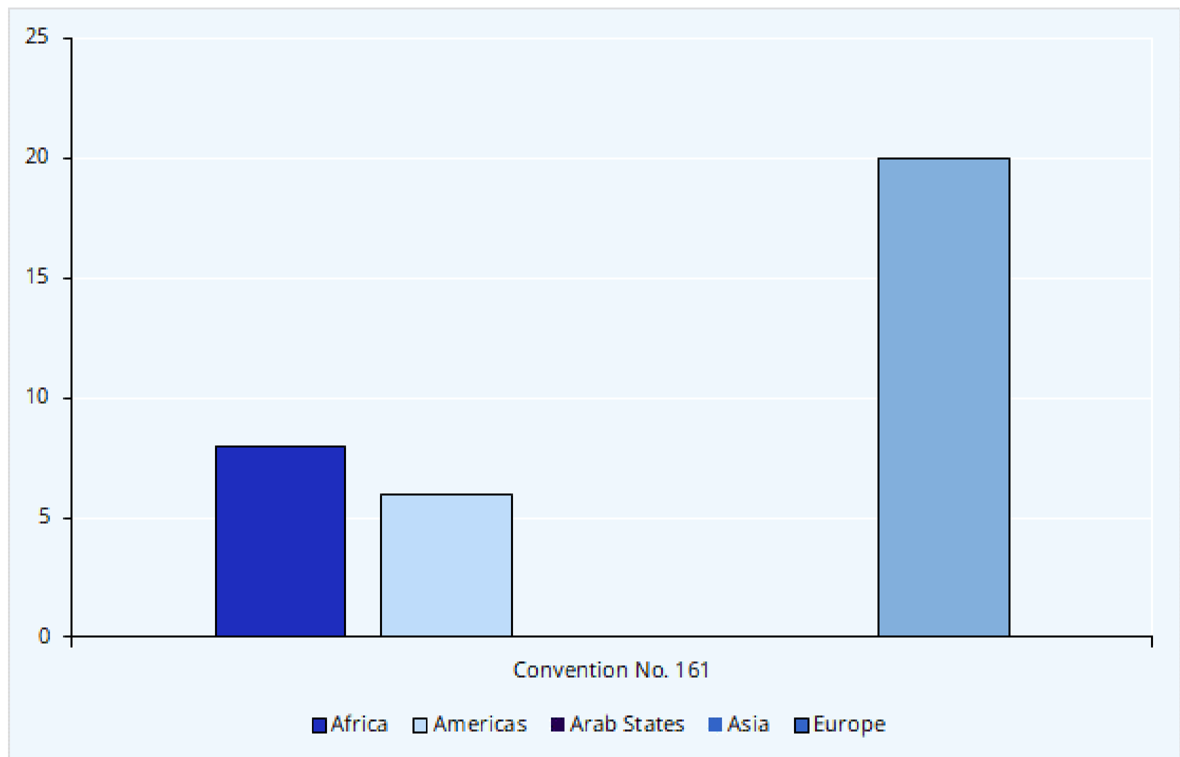
56. The functions of occupational health services are defined to include, among others: identification and assessment of the risks from health hazards; surveillance of workers' health and the factors that may affect their health; advisory functions throughout the planning and organization of work; participation in efforts to improve working practices and the analysis of occupational accidents and diseases; collaboration in providing information, training and education; and organization of first aid and emergency treatment (Article 5). Through periodic surveillance of workers' health, early detection of occupational diseases and by advising the employer, the principle of prevention is advanced. The personnel providing occupational health services are to be independent from employers, workers and their representatives regarding these functions (Article 10).

57. Convention No. 161 calls for collaboration between employers and workers, as it establishes that the employer, together with workers and their representatives, where they exist, "shall cooperate and participate in the implementation of the organisational and other measures relating to occupational health services on an equitable basis" (Article 8). Both employers and workers have a duty to inform occupational health services of any known and suspected health risks (Article 14).

II.7.3. Level of ratification

58. Convention No. 161 has been ratified by 35 Member States to date, with three of those ratifications (8 per cent) having taken place in the past five years. The majority of ratifications have been in Member States in Europe (20), followed by Africa (8) and the Americas (6).

▶ Figure 4. Ratification of Convention No. 161 by region



II.8. The Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)

59. Convention No. 187 has the objective to "promote continuous improvement of occupational safety and health to prevent occupational injuries, diseases and deaths" through the development of a national OSH policy, system and programme (Article 2). This objective is in line with the call of the Preamble to the ILO Constitution for "the protection of the worker against sickness, disease and injury arising out of [their] employment", as the policy, programme and system are the combined and necessary instruments at a national scale to effectively advance the right to a safe and healthy working environment/conditions. A core principle that informs Convention No. 187 is the concept of prevention of occupational injuries and diseases, which recognizes that the principle of prevention is to be accorded the highest priority, through a preventative safety and health culture, while requiring cooperation between workers, workers' representatives and employers. As analysed previously, this principle is also found in Convention No. 155, the Protocol of 2002 to Convention No. 155, and Convention No. 161.

60. Convention No. 187 introduces the concepts of a **national system** for OSH and a **national programme** on OSH as important tools for implementing the national policy. Article 2(2) provides that a safe and healthy working environment shall be progressively achieved by taking into account the principles set out in ILO instruments relevant to the promotional framework for OSH. This provision emphasizes the role that national governments play in the management of OSH through a combination of related parts, organized into a related whole or system. A systems approach to OSH means that emphasis is placed on the interdependence and interactive nature of its different components and on the overall outcome of efforts to improve it.

II.8.1. The national policy

61. Convention No. 187 builds on the concept of the national OSH policy introduced by Convention No. 155, re-emphasizing it as a key mechanism for the promotion of a safe and healthy working environment and underlining the importance of having a framework (national system) for the implementation of such a policy. Convention No. 187 details the cyclical nature of the national policy process and how such policies, through national programmes, contribute to building and maintaining a preventative safety and health culture. The importance of the national policy process has been continually emphasized by the CEACR in its examination of the application of Convention No. 187, underlining that it is not only the adoption of a policy promoting a safe and healthy working environment that is important, but also the process of its formulation, and its subsequent implementation and periodic review. [60] Convention No. 187 does not prescribe any specific requirements as to the form of such a policy, and provides that the national policy shall take into account "national conditions and practice" (Article 3(3)).

II.8.2. The national system

62. Under Convention No. 187, Member States are required to establish, maintain, progressively develop and periodically review their **national system** for OSH. The term "national system for occupational safety and health" or "national system" refers to the infrastructure which provides the main framework for implementing the national policy and national programmes on OSH

[60] Report III (Part 1B), International Labour Conference, 98th Session, 2009, para. 56.

(Article 1(b)). Article 4(2) of the Convention details the components of such a system, which shall include in all cases: laws and regulations, collective agreements where appropriate, and any other relevant instruments on OSH; an authority or authorities responsible for OSH; mechanisms for ensuring compliance, including systems of inspection; and arrangements to promote cooperation between management, workers and their representatives at the workplace level. Article 4(3) identifies the elements that the national system shall include, where appropriate, which are: a national tripartite advisory body or bodies; information and advisory services; occupational health services; research on OSH; [61] a mechanism for the collection and analysis of data on occupational injuries and diseases; provisions for collaboration with insurance or social security schemes covering occupational injuries and diseases; and support mechanisms for a progressive improvement of OSH conditions in micro, small and medium-sized enterprises and in the informal economy.

II.8.3. The national programme

63. In addition to the infrastructure required to give practice to the national OSH policy, Convention No. 187 requires Member States to develop, in consultation with employers' and workers' organizations, a **national programme** on OSH, which should "promote the development of a national preventative safety and health culture" (Article 5(2)(a)), [62] and which shall include objectives to be achieved in a predetermined time frame, priorities and means of action formulated to improve OSH, and means to assess progress (Article 1(c)). In addition, a national programme should contribute to the protection of workers by eliminating or minimizing, so far as is reasonably practicable, work-related hazards and risks, in accordance with national law and practice, in order to prevent occupational injuries, diseases and deaths (Article 5(2)(b)).

64. The programme is to be formulated and reviewed based on the analysis of the national situation regarding occupational safety and health, including analysis of the national system for occupational safety and health, [63] and must include objectives, targets and indicators of progress, and be supported by other complementary national programmes and plans which will assist in achieving progressively a safe and healthy working environment (Article 5(2)(c)–(e)).

65. Article 7 of Convention No. 155 requires a review of the situation regarding OSH and the working environment at appropriate intervals. Convention No. 187 also implicitly refers to a

[61] References to research on OSH are also made in other standards, highlighting the need for up-to-date scientific knowledge on new sources of hazards and the risks related to new machinery, substances and work processes, and to continuously improve knowledge on preventative measures. Convention No. 155 provides for certain types of research relating to OSH. For example, Member States are required to compel those who design, manufacture, import, provide or transfer machinery, equipment or substances for occupational use to be satisfied that such products not entail dangers for the safety and health of those using it correctly (Article 12(a)). In addition, Member States are required to hold inquiries where cases of occupational accidents, occupational diseases or any other injuries to health which arise in the course of or in connection with work appear to reflect situations which are serious (Article 11(d)), so as to help ensure non-repetition. Article 6 of the Protocol of 2002 to Convention No. 155 refers to the obligation of Member States not only to publish national statistics on occupational accidents and diseases and, as appropriate, dangerous occurrences and commuting accidents, but also to analyse the data.

[62] A "national preventative safety and health culture" is defined as a culture in which the right to a safe and healthy working environment is respected at all levels, where government, employers and workers actively participate in securing a safe and healthy working environment through a system of defined rights, responsibilities and duties and where the principle of prevention is afforded the highest priority (Article 1(d)).

[63] Part IV of Recommendation No. 197 provides a list of relevant information to include in a national OSH profile, which is defined as a summary of "the existing situation on occupational safety and health and the progress made towards achieving a safe and healthy working environment".

national profile, in Article 5(2).[64] The CEACR has found that many Member States have formulated programmes with objectives, time frames, provisions regarding modalities for collaboration and other aspects required under Convention No. 187.[65] Member States have also developed national programmes regardless of whether they have ratified this standard.

II.8.4. Other action at the national level

66. Convention No. 187 requires the adoption of laws, regulations and standards on OSH, adequate systems for compliance, including an enforcement mechanism through labour inspection and penalties for non-compliance.[66] Convention No. 187 contains a general reference to the dissemination of information in Article 4(3)(b), which requires Member States to include, as part of the national system, "information and advisory services" on OSH, where appropriate. Furthermore, Article 3(3) mentions information as part of a national preventative safety and health culture. The Convention also requires Member States to ensure the provision of OSH training where appropriate (Article 4(3)(c)) but does not contain provisions on education.

67. Dialogue and consultation are key elements of Convention No 187. The definition of a national preventative safety and health culture under Convention No. 187 reinforces this point. It is defined as a culture where government, employers and workers actively participate in securing a safe and healthy working environment through a system of defined rights, responsibilities and duties. Convention No. 187 requires the establishment of a tripartite body, where appropriate, under the national system (Article 4(3)(a)).[67] It also expressly provides that the establishment, maintenance, progressive development and periodic review of the national system for OSH, namely the implementation of the national policy, shall be done "in consultation with the most representative organizations of employers and workers" (Article 4(1)). In addition, the national policy should be developed to advance basic principles, such as the promotion of a national preventative safety and health culture that includes consultation (Article 3(3)). While the key concepts of "national policy", "national programme" and "national system" outlined in Convention No. 187 refer to action at the national level, Convention No. 187 also underlines the importance of cooperation on OSH at the workplace level (Article 4(2)(d)). It identifies arrangements to promote, at the level of the undertaking, cooperation between management, workers and their representatives as an essential element of workplace-related prevention measures.

II.8.5. Level of ratification

68. To date, Convention No. 187 has been ratified by 57 Member States,[68] with 19 of those ratifications (33 per cent of the total) having taken place in the past five years. The majority of

[64] For information on national OSH profiles, see the Country profiles on occupational safety and health.

[65] See, for example, the direct requests adopted by the CEACR in 2020 concerning Burkina Faso, Kazakhstan and Turkey.

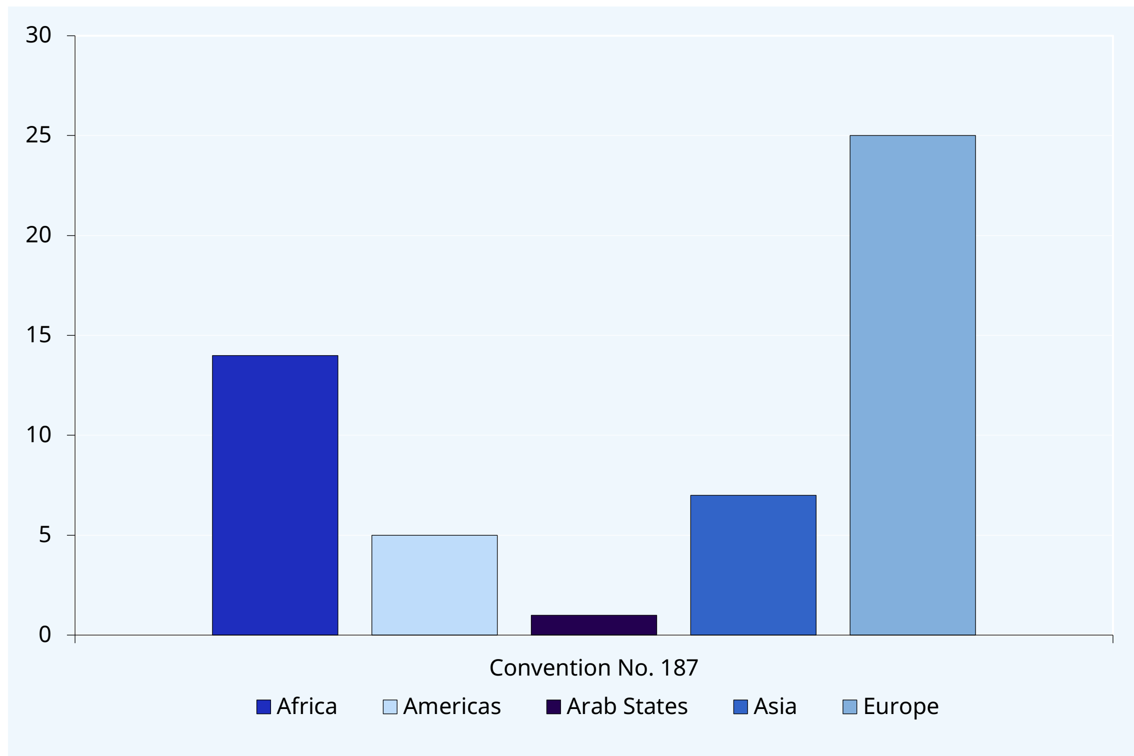
[66] The ILO's Global Database on occupational safety and health legislation (LEGOSH) demonstrates that all 132 countries listed have at least one legal instrument that refers broadly to safety and health at work.

[67] The ILO catalogues the establishment of such bodies in over 90 States, including parties and non-parties to Convention No. 187, representing all geographic regions and levels of development, see ILO, LEGOSH, 8.1 National OSH committee, commission, council or similar body.

[68] Ratifications of Convention No. 187: Albania, Antigua and Barbuda, Argentina, Austria, Belgium, Bosnia and Herzegovina, Burkina Faso, Canada, Chile, Cuba, Cyprus, Czechia, Côte d'Ivoire, Denmark, Dominican Republic, Finland, France, Germany, Greece, Guinea, Iceland, Indonesia, Iraq, Japan, Kazakhstan, Luxembourg, Malawi, Malaysia, Mauritius, Montenegro, Morocco, Niger, North Macedonia, Norway, Philippines, Portugal, Republic of Korea, Republic of Moldova, Russian Federation,

ratifications have been in Member States in Europe (25), followed by Africa (14), Asia (7), the Americas (5) and the Arab States (1).

▶ **Figure 5. Ratification of Convention No. 187 by region**



II.9. Complementarity of OSH Conventions with general provisions

69. Conventions Nos 155 and 187 are complementary in defining the general principles of OSH. They underline the importance of applying a systems approach to the management of OSH and progressively establishing and maintaining the long-term goal of a preventative safety and health culture through awareness-raising, training, education and information. Both Conventions can be articulated around the following key principles: (a) prevention of occupational injuries, diseases and deaths; (b) progressive realization of OSH principles; (c) dialogue and consultations; (d) development, implementation and revision of an OSH legal and policy framework; and (e) creation of a system of defined rights, duties and responsibilities. While Convention No. 187 focuses on the elements of an OSH system and action at the national level, Convention No. 155 also includes action at the workplace level. Convention No. 187 introduces the obligation of States to develop and implement a national OSH programme and to establish and maintain a national infrastructure as necessary means for the realization of the national OSH policy introduced by Convention No. 155. Convention No. 187 addresses only the obligations of States to ensure safe and healthy working environments, with Convention No. 155 also including responsibilities at the level of the undertaking (Articles 16–21). In the 2009 General Survey, the CEACR concluded that Convention No. 187 reaffirmed the policy, principles and processes defined in Convention No. 155 and provided further guidance for

Rwanda, Senegal, Serbia, Sierra Leone, Singapore, Slovakia, Slovenia, Somalia, Spain, Sweden, Thailand, Togo, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, Uzbekistan, Viet Nam, Zambia.

Member States to develop the national policy envisaged in Article 4 of the latter instrument. [69] In the 2017 General Survey on the occupational safety and health instruments concerning the promotional framework, construction, mines and agriculture, the CEACR concluded again that Conventions Nos 155 and 187 are fully complementary, together constituting an important blueprint for progressive and sustained improvements towards the provision of safe and secure working environments. [70]

70. In the 2009 General Survey, the CEACR indicates that the Protocol of 2002 to the Occupational Safety and Health Convention, 1981, is of crucial importance in tracing progress in the implementation of national OSH policies. [71] Article 4(b) of the Protocol refers to "arrangements for notification of occupational accidents and occupational diseases by insurance institutions, occupational health services, medical practitioners and other bodies directly concerned". Mechanisms for the recording and notification of occupational accidents and diseases are part of national systems for OSH, where appropriate, according to Convention No. 187.

71. Occupational health services perform a core function for the implementation of the national OSH policy described under Convention No. 155. Convention No. 161 covers in detail the functions, organization and conditions of operation of these services, which are defined as services entrusted with essentially preventative functions and responsible for advising the employer, workers and their representatives in the workplace on the requirements for establishing and maintaining a safe and healthy working environment. An important role of occupational health services as set out in Convention No. 161 is the "surveillance of workers' health in relation to work" (Article 5(f)) and the "participation in analysis of occupational accidents and occupational diseases" (Article 5(k)), thus contributing to the implementation of the provisions of the Protocol to Convention No. 155. Occupational health services as covered by Convention No. 161 are part of the national OSH system as defined by Convention No. 187 (Article 4(3)).

II.10. Conclusion

72. The four OSH instruments containing provisions of general scope cover all branches of activity and all workers, regardless of the type of hazards. They are classified as up-to-date and reflect the relevant principles and rights to ensure a safe and healthy working environment. In contrast, the scope of other OSH instruments is limited to specific risks or branches of economic activity.

73. Convention No. 155 provides the key elements for the formulation of a national policy on OSH, including the functions and responsibilities of governments, employers and workers, and sets out foundational principles related to action on OSH. It reflects the protection dimension emphasized in the ILO Constitution and is centred on the principle of prevention of occupational accidents, diseases and death. ILO constituents have previously confirmed the status of Convention No. 155 as a key instrument on OSH. [72]

74. Convention No. 187 promotes the principles of Convention No. 155 further by expanding beyond the formulation of a national policy to also outline the development and maintenance

[69] Report III (Part 1B), International Labour Conference, 98th Session, 2009, paras 294–295.

[70] Report III (Part 1B), International Labour Conference, 106th Session, 2017.

[71] Report III (Part 1B), International Labour Conference, 98th Session, 2009, para. 296.

[72] It was, for example, one of the only Conventions chosen for the Plan of Action (2010–2016) to achieve widespread ratification and effective implementation of the occupational safety and health instruments (Convention No. 155, its 2002 Protocol and Convention No. 187), adopted by the Governing Body at its 307th Session (March 2010).

of a national OSH system, and provides provisions for the elements of such a system. Convention No. 187 also expands upon Convention No. 155 to discuss the formulation of an OSH national programme which promotes the development of a national preventative safety and health culture. Together, these Conventions set out the general principles for the establishment of a systems approach to the management of OSH and describe the core principles and rights that serve as the basis for the safety and health measures provided for in other OSH instruments. The provisions of Convention No. 187 complement the foundational principles of Convention No. 155, and together they constitute a blueprint for setting up and implementing national OSH systems that are comprehensive and adaptable to national conditions.

75. The Protocol of 2002 to Convention No. 155 focuses on the recording and notification of occupational accidents and diseases, which are vital to quantifying the scope of OSH risks and taking subsequent measures to ensure "adequate protection for the life and health of workers in all occupations", as set out in the ILO Declaration of Philadelphia. [73] The analysis of these data by a Member State is a key function to identify priority areas for OSH action and to assess the effectiveness of the action taken. At the workplace level, the information on events that occurred due to exposure to occupational hazards is equally important for management decisions regarding preventative action to undertake. Therefore, the Protocol, which aims at strengthening technical capacity for effective data collection, is crucial to better detecting and prioritizing action. This is done in line with the general principles set out in Convention No. 155.

76. Convention No. 161 contains general OSH principles and highlights a key element of any OSH system, namely, the establishment of enterprise-level occupational health services that are entrusted with essentially preventative functions. Occupational health services are essential for fulfilling the aspirations of the ILO Constitution to protect workers against sickness, disease and injury, as they help with prevention, surveillance and treatment. [74] According to Convention No. 187, the national OSH system should include occupational health services in accordance with national law and practice.

[73] ILO Declaration of Philadelphia, III(g).

[74] Preamble to the ILO Constitution.

▶ III. Possible legal effects, direct and indirect, on existing trade agreements concluded by Member States

77. In the context of the Governing Body's discussions concerning the inclusion of safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work, questions have been raised with respect to the legal effects that a Conference resolution amending the ILO Declaration on Fundamental Principles and Rights at Work (1998 Declaration) might have on trade agreements concluded by Member States, and in particular on bilateral or plurilateral free trade agreements containing labour provisions. [75]

78. In response to those questions, it has been explained that a non-binding Conference resolution amending the 1998 Declaration cannot affect as such the scope or content of free trade agreements – or other international treaties – negotiated and concluded by Member States outside the Organization. An amended 1998 Declaration that would include the effective protection of safe and healthy working conditions/a safe and healthy working environment as a new fundamental principle and right at work cannot be incorporated into existing trade agreements unless the States parties to those agreements so decide. It is for the States parties to free trade agreements to decide if, when and how they wish to take steps to align the relevant labour provisions with the Conference resolution recognizing safe and healthy working conditions/a safe and healthy working environment as a fundamental principle and right at work.

79. It has also been indicated that the fact that ILO Member States express support for the adoption of a Conference resolution amending the 1998 Declaration does not in itself create a legal obligation for those Member States to revise the free trade agreements to which they are parties. [76] Moreover, even if the Conference resolution were to call upon Member States to amend the free trade agreements to which they are parties to incorporate occupational safety and health alongside the four other categories of fundamental principles and rights at work, this would be, legally speaking, no more than a recommendation without any binding effect. Just as the adoption of the 1998 Declaration did not create a legal obligation for Member States to include labour clauses in the free trade agreements that either existed at that time or were concluded in the following years, its revision will not create a legal obligation to amend any such labour clauses in order to include safe and healthy working conditions/a safe and healthy working environment as an additional fundamental principle.

80. Furthermore, it was recalled that during the Conference discussions that led to the adoption of the 1998 Declaration, it was clarified "[w]ith respect to the language on effects outside the ILO ... the Declaration would not create new legal obligations, nor would it release States from other obligations under international law, particularly those arising under multilateral treaties". [77] Likewise, when considering the ILO Declaration on Social Justice for a Fair Globalization (2008 Declaration), the Conference had before it a report that noted: "While it would seek to underscore the importance of the principles enshrined in the Constitution and Declaration of Philadelphia, a Declaration would not establish, nor be capable of establishing, new or more detailed obligations, either directly or indirectly. Its very nature, which is in essence declaratory, is incapable of imposing or modifying legal obligations under the

[75] GB.343/INS/PV, paras 183, 191, 194, 197 and 201; GB.341/INS/PV, paras 174 and 187; GB 337/PV, para. 81.

[76] Provisional Record No. 6B(Rev.), para. 1011; GB.341/INS/6, paras 38–40; GB.343/INS/6 paras 28–31; GB 343/INS/PV, para. 207.

[77] ILO, Report of the Committee on the Declaration of Principles, International Labour Conference, 86th Session, 1998, para. 297.

Constitution or ratified Conventions, nor of providing an authoritative interpretation of the constitutional obligations of its Members ... A Declaration could thus serve as a guide for action by Members in consonance with the commitments already undertaken and for cooperation both with each other and through the Organization as it strives to fulfil the aims and purposes of its original mandate in the contemporary context." [78]

81. In the most recent Governing Body discussions, reference was made to the possible "indirect" effects the current process for the amendment of the 1998 Declaration might have on the application of bilateral or plurilateral trade agreements to which a large number of Member States are parties. Concretely, three aspects of that process seem to be a source of concern for some Governing Body members: first, there seems to be uncertainty as to whether following the adoption of the amendment to the 1998 Declaration, labour provisions in free trade agreements referring to "core labour standards" or "fundamental workers' rights" could be deemed – through the interpretation method known as "evolutive" interpretation – to have incorporated the new fundamental principle on safe and healthy working conditions/a safe and healthy working environment. Second, clarifications have been sought with regard to any impact the new fundamental principle might have on the conditionalities for accessing trade preference programmes such as the Generalized System of Preferences (GSP). Third, attention is drawn to the possible legal significance of views formally expressed by Government representatives during the discussions at either the Governing Body or the Conference, as these might create binding legal obligations.

82. This part of the document is divided into four sections. Section 1 contains general information about free trade agreements and a broad typology of the labour provisions which are often incorporated in those agreements. Section 2 discusses any "direct" legal effects that the Conference resolution amending the 1998 Declaration might have on existing free trade agreements. Section 3 examines three separate issues as possible "indirect" effects of the Conference resolution: first, the post-amendment interpretation of labour provisions in existing free trade agreements in the light of relevant international law theory and practice in matters of treaty interpretation, in particular article 31 of the 1969 Vienna Convention on the Law of Treaties; second, the impact of the recognition of one or more occupational safety and health Conventions as fundamental on the conditions for being granted tariff preferences under existing trade arrangements; and third, the relevance of the theory of unilateral acts of State as a possible source of binding obligations arising from the adoption of the Conference resolution amending the 1998 Declaration. Finally, section 4 draws a number of concluding observations that may serve as a basis for the Governing Body's deliberations on this matter.

III.1. Free trade agreements

III.1.1. General – Labour provisions

83. As the main focus of the debate around the legal effects of a Conference resolution amending the 1998 Declaration is the labour clauses included in the proliferating free trade agreements, it would be useful to consider at the outset the general characteristics and different forms of those labour provisions.

84. Free trade agreements, sometimes also known as economic trade agreements or economic partnership agreements, are international treaties concluded between two or more States that seek to remove barriers to trade and offer preferential access to markets on a reciprocal

[78] Report VI, International Labour Conference, 97th Session, 2008, paras 68–69.

basis.[79] Free trade agreements have become one of the main features of the system of international trade relations.[80] Since the early 1990s, these agreements have increased significantly in number as well as in depth and complexity.[81]

85. Labour provisions incorporated in free trade agreements generally aim at promoting international labour standards in pursuance of economic development and trade liberalization. Labour provisions broadly cover: (i) any principle or standard or rule which addresses labour relations or minimum working conditions and terms of employment; (ii) any mechanism to ensure compliance with the standards set under national law or in the trade agreement; and (iii) any framework for cooperative activities, dialogue and/or monitoring of labour issues.[82] The normative content of labour provisions varies from clear-cut, binding obligations requiring parties to undertake specific action or obtain specific results to "soft" commitments and non-committal policy statements expressed in aspirational terms.[83]

86. The majority of labour provisions make reference to the 1998 Declaration and/or to the eight fundamental Conventions. A number of agreements provide for dispute settlement through third-party intervention, such as a panel of experts or an arbitration panel, while a limited number provide for sanctions in case of a breach, for instance in the form of compensation, suspension of benefits, monetary contribution or border access restrictions.[84]

III.1.2. Typology of labour provisions – A summary overview

References to the ILO framework of fundamental principles and rights

87. According to the ILO database *Labour Provisions in Trade Agreements Hub*, among 321 bilateral or plurilateral free trade agreements, 103 contain diverse clauses related to international labour standards. A significant number of those 103 agreements expressly refer to the ILO's

[79] International Trade Centre, World Customs Organization and World Trade Organization, "Rules of Origin Facilitator". Free trade agreements should not be confused with unilateral trade arrangements or preferential trade arrangements, such as the Generalized System of Preferences, whereby one country removes barriers to trade for the benefit of another country or countries without obtaining reciprocal preferential treatment. Free trade agreements should also be distinguished from bilateral investment agreements, which focus on investment protection and usually do not provide for explicit standards on labour matters; see Bertram Boie, *Labour related provisions in international investment agreements*, ILO, 2012.

[80] See Rohini Acharya, "Regional trade agreements: recent developments" in Rohini Acharya (ed.), *Regional Trade Agreements and the Multilateral System*, 2016, 1–17.

[81] According to the WTO database on regional trade agreements, there are 352 free trade agreements in force today.

[82] While in 1995 only four trade agreements contained labour provisions, their number increased to 58 by 2013, 77 in 2016 and 103 in 2021; see ILO database, *Labour Provisions in Trade Agreements Hub*. See also ILO, *Social dimensions of free trade agreements*, 2015, 10. Almost two thirds of the trade agreements with labour provisions came into existence after 2008; see ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, 2017, 2. To date, as many as 146 Member States have concluded at least one trade agreement that includes labour provisions. The United States and the EU remain the principal proponents of the linkage between trade and labour. All trade agreements concluded by the EU since 1999 contain labour provisions; since 2010, those provisions have been packaged in a Trade and Sustainable Development chapter. As for the United States, the 1994 North American Free Trade Agreement (NAFTA) was the first to include labour provisions, while as from 2004 labour provisions have been set out in a dedicated Labour Chapter; see James Harrison, "The Labour Rights Agenda in Free Trade Agreements", *Journal of World Investment & Trade*, Vol. 20, 2019, 705–725; Billy Melo Araujo, "Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality", *International and Comparative Law Quarterly*, Vol. 67, 2018, 233–253.

[83] ILO, *Labour Provisions in G7 Trade Agreements: A Comparative Perspective*, 2019, 11, 23.

[84] One of the key differences between free trade agreements concluded by the US and the EU is that the former allow for suspension of benefits against a trading partner if it is shown that non-observance of the terms of the agreement has occurred in manner affecting trade between the parties, whereas the latter do not permit to withdraw negotiated trade concessions in case of violations of labour rights.

framework of fundamental principles and rights at work, and enumerate the fundamental principles or the eight fundamental Conventions. In most cases, the four fundamental principles are listed exhaustively (as indicated by words such as “namely” or “the following rights”), while in others the list of fundamental principles appears to be non-exhaustive (through the use of words such as “in particular”).

88. It is noteworthy that 26 those agreements include references to occupational safety and health alongside the four fundamental principles and rights at work. In 17 cases, occupational safety and health is listed as part of “internationally recognized labour rights”, while in three others, reference is made to “the prevention of occupational injuries and illnesses”, or to “compensation in cases of occupational injuries or illnesses”.

89. In some cases, agreements refer generically to “high labour standards” (Canada–Chile, 1997), “basic social rights” or “pertinent standards of the ILO” (EU–South Africa, 2000) “fundamental social rights” (EU–Chile, 2003), “internationally recognized core labor standards and workers’ rights” (United States–Ghana, 1999) or just to “labour standards” (EU–Cameroon, 2014).

Obligations and commitments

90. In general, labour provisions in free trade agreements seem to be articulated around four types of obligations or commitments: (i) obligations arising out of the ILO Constitution or ILO membership; (ii) commitments to adopt or maintain labour laws consistent with certain labour standards; (iii) commitments not to waive or derogate from labour laws; and (iv) commitments not to fail to enforce domestic labour laws.

91. First, in a significant number of trade agreements (51), the parties reaffirm or recall their obligation to respect fundamental workers’ rights, the principles of the 1998 Declaration or their obligations as Members of the ILO (for instance, see article 277 of the UK–Ukraine Political, Free Trade and Strategic Partnership Agreement of 2020 or article 9.6 of the Chile–Indonesia agreement of 2019). In 21 other cases, States parties commit or recall their obligation to give effect or implement the ILO Conventions they have ratified.

92. Second, the commitment to adopt or maintain labour laws consistent with the fundamental principles and rights at work is expressed in many different forms. In eight cases, the parties are bound to ensure that their labour laws and practices “embody and provide protection” for the internationally recognized labour principles and rights, defined to include the existing fundamental principles and rights at work as well as occupational safety and health (for instance, see article 1 of the Canada–Colombia agreement on labour cooperation of 2011).

93. In nine other cases, the parties are required to “adopt and maintain” in their laws and practices the fundamental rights set out in the 1998 Declaration (for instance, see article 17.2 of the United States–Peru Trade Promotion Agreement of 2009). In 15 other cases, the parties undertake the commitment to “respect, promote and realise” in domestic laws and practices, the fundamental principles or the internationally recognized core labour standards (for example, see article 274 of the EU–Armenia Comprehensive and Enhanced Partnership Agreement of 2018). Finally, in two cases the parties commit to ensuring adherence to and effective implementation of the ILO fundamental Conventions.

94. It is noted that commitments are often formulated as best effort obligations, and not as obligations of result (in 24 cases), by using expressions such as “strive to ensure”, “endeavour” or “seek to” (for instance, see article 6 of the United States–Jordan Agreement on the Establishment of a Free Trade Area). In a similar manner, three agreements lay down an undertaking to “work actively” to ensure that labour laws “are in keeping with their respective

international labour commitments" or "in harmony with their international labour commitments".

95. The positive obligation to adopt and maintain labour laws consistent with the ILO's framework of fundamental principles and rights is often accompanied by other aspirational commitments, such as striving to improve labour standards (in 12 cases), making continued and sustained efforts towards ratifying the ILO fundamental Conventions (12 cases), or simply considering the ratification of ILO Conventions (ten cases) (for example, see article 35(3) of the EFTA–Montenegro Free Trade Agreement of 2012 or article 2(2) of the Hong Kong, China–Chile Memorandum of understanding on Labour Cooperation of 2012).

96. Third, with reference to commitments not to waive or derogate from labour laws, the parties to free trade agreements often undertake not to derogate from labour laws as a means of encouraging trade or foreign investment in a manner that weakens or reduces adherence to internationally recognized labour principles and rights (17 cases), or in a manner that would be inconsistent with the ILO Declaration and the four fundamental principles and rights (18 cases) (for example, see article 23.4 of the United States–Mexico–Canada agreement of 2020). Some agreements (17 cases) merely recognize the inappropriateness of such practices or contain a commitment to strive not to waive or derogate from labour laws.

97. Several agreements contain another negative obligation not to invoke or otherwise use the violation of fundamental principles and rights at work as a comparative advantage (13 cases), or not to use labour standards for trade protectionist purposes (19 cases), and yet others (4) simply recognize the inappropriateness of such practices (for example, see article 16.2(3) of the UK–Japan Comprehensive Economic Partnership Agreement of 2020 or article 16.2(5) of the Free Trade Agreement between the Republic of Korea and the Republics of Central America).

98. Fourth, as regards the obligation not to fail to enforce domestic labour laws, the parties frequently commit (11) to effectively enforcing those labour laws that give expression to internationally recognized labour rights, including the four fundamental principles and rights and occupational safety and health (for example, see article 16.3 of the United States–Panama agreement of 2012). In some cases (4), the commitment appears qualified as parties undertake to "strive" or "endeavour" not to fail to enforce labour laws reflecting the fundamental principles. Many agreements (12) refer to enforcement of domestic labour legislation in general without any specific reference to ILO instruments or core labour rights.

Dispute settlement clauses

99. Among the free trade agreements that provide for dispute resolution mechanisms, only a limited number (42) foresees the possibility for States parties to refer disputes relating to the labour clauses to those mechanisms that are often named "panels", "panels of experts", "review panels" or "panels of arbitrators".[85] Two agreements allow for the settlement of labour disputes under the general dispute chapter of the trade agreement (for instance, see article 17(c) of the United States–Jordan trade agreement of 2001) whereas the majority of trade agreements provide that the dispute resolution mechanisms specified therein will be

[85] For a general taxonomy of free trade agreements according to the model of dispute settlement proposed, see Claude Chase, Alan Yanovich, Jo-Ann Crawford, Pamela Ugaz, "Mapping of dispute settlement mechanisms in regional trade agreements – innovative or variations on a theme?" in Rohini Acharya (ed.), *Regional Trade Agreements and the Multilateral System*, 2016, 608–702.

only partially accessible for labour disputes (for instance, see article 13.16 of the EU–Viet Nam trade agreement of 2020). [86]

100. Agreements providing for formal dispute resolution mechanisms can be divided into those in which panels are called to issue non-binding recommendations and those which ultimately give the panel the authority to make a final determination on the dispute (for instance, a non-binding settlement clause is in article 12.17 of the EU–Singapore free trade agreement of 2019 and a binding arrangement is in article 83 of the 2021 agreement between the United Kingdom and the Southern African Customs Union and Mozambique).

101. Furthermore, among the 42 agreements allowing States parties to have recourse to formal dispute resolution, 23 provide for some form of sanctions in the event of a breach of labour provisions, including compensation, suspension of benefits, monetary contributions for non-compliance or border access restrictions.

Conclusion

102. The above summary overview calls for three main remarks. First, despite their considerable diversity, labour provisions in free trade agreements present distinct commonalities and many seem to follow the same or similar design, structure and content.

103. Second, notwithstanding the striking commonalities, there are also differences – often subtle – in the terminology used, which may affect the nature and scope of the obligations undertaken under the agreement. It is not uncommon, for instance, that trade agreements entered into by the same country to contain seemingly identical obligations that are expressed in one text as obligations of result and in another as best effort obligations. In the same vein, one may note differences between "affirming" and "recalling" commitments or between assuming an obligation not to derogate from labour laws and recognizing the inappropriateness of doing so, which are more than semantic nuances. These may be seen as clear signs that trade agreements are negotiated texts between sovereign and formally equal States and as such remain the reflection of their particular needs, priorities and preferences.

104. Third, from an interpretation perspective, it is apparent that the 103 trade agreements containing labour clauses do not allow for generalizations, or a "one size-fits-all" approach. Any determination as to the exact scope and content of the obligations set out in those agreements needs to proceed on a case-by-case basis having regard also to the unique characteristics of the trade relations of the parties concerned.

III.2. Direct legal effects of a Conference resolution amending the 1998 Declaration

105. It is understood that the question of "direct" legal effects that a Conference resolution amending the 1998 Declaration may have on the labour provisions in free trade agreements concerns in essence the extent to which this resolution could be deemed to amend labour provisions mirroring the 1998 Declaration in a corresponding manner. In contrast, the question of "indirect" legal effects relates to the interpretation of labour provisions in the

[86] It is assumed that for those agreements that contain no specific dispute settlement provisions, parties may have recourse to any of the generally recognized amicable methods of settlement of disputes, for instance negotiation, mediation and conciliation.

context of a dispute concerning the application of a given free trade agreement. [87] Interpretation seeks to shed light on the meaning of a text retrospectively, while the purpose of an amendment is to modify the meaning of a text for the future. [88]

106. The rules for the amendment of treaties are enshrined in article 39 of the 1969 Vienna Convention on the Law of Treaties ("the 1969 Vienna Convention"), which provides that "[a] treaty may be amended by agreement between the parties". [89] Article 39 further provides that the rules laid down in Part II of the 1969 Vienna Convention apply to the agreement of the parties to modify a treaty unless otherwise provided in the treaty. In other words, unless specific amendment procedures are agreed upon by the parties to a treaty, the 1969 Vienna Convention rules on the conclusion of treaties would apply to the amendment of the treaty, for instance article 7 on full powers of representatives or articles 11 and 17 on means of expressing consent to be bound by a treaty.

107. With regard to the question of full powers, it should be noted that to be able to act on behalf of a State insofar as the amendment of a treaty is concerned, a person must be invested with the power to do so either by virtue of his or her position and functions (for example, as Head of State or Government, or Minister of Foreign Affairs) or if "it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes". According to the 1969 Vienna Convention, this is the case for "representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ".

108. In this connection, it will be recalled that delegates at the International Labour Conference are accredited only for the specific purposes of participating in the deliberations concerning the items on the agenda of the Conference, and have no authority to modify international trade agreements or any other legal text adopted outside the Organization. They merely represent their State for the duration of a specific session of the Conference. ILO records show that no delegate has ever suggested that the adoption of a Conference resolution could produce legal effects with respect to State treaty obligations.

109. Beyond the question of the full powers of State representatives, article 40 of the 1969 Vienna Convention requires the State's clear consent as a prerequisite for the modification of treaties. Indeed, any proposal to amend a treaty must be notified to all contracting States to enable them to express their views and participate in the negotiations. Moreover, the same article provides that the amending agreement does not bind any State already party to the treaty

[87] The difference between amendment and interpretation of treaties has been the subject of extensive doctrinal debate. The International Law Commission has recognized that the "dividing line between the interpretation and the amendment or modification of a treaty is in practice sometimes 'difficult, if not impossible, to fix'"; see International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, 60. See also Philippe Sands, "Article 39, 1969 Vienna Convention" in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties – A commentary*, Vol. I, 2011, 969.

[88] Jean Combacau and Serge Sur, *Droit international public,* 6th ed., 2004, 141.

[89] The use of the term "agreement" is intended to allow a degree of flexibility to States parties and was selected with the clear intention to move away from the theory of the "acte contraire" according to which a treaty may only be amended by an act of exactly the same legal nature. In fact, scholars recognize that international treaties may be modified through various means, the common requirement always being, however, that the parties must consent to such modification; see James Crawford, *Brownlie's Principles of Public International Law,* 8th ed., 2012, 386.

which does not become a party to the amending agreement. In other words, a State cannot be bound by any amendment to a treaty to which it is party without its express consent.

110. Notwithstanding the above, the possibility to amend treaties through subsequent agreement or subsequent practice is a separate question that continues to solicit debate. In this regard, the International Law Commission recently concluded that "[i]t is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized." [90]

111. If, then, States parties to a treaty may not be deemed under international law to have intended to modify it through subsequent practice, the issue of consent becomes determinant. Such consent must be clearly expressed or otherwise established. In this sense, Conference resolutions that do not give rise to new obligations for ILO Members cannot be construed as having any legal effect on international treaties adopted outside the ILO. [91] There is no legal basis, therefore, for the view that delegates to the International Labour Conference may validly express their State's consent to modify the terms of a free trade agreement to which their State is a party through the adoption of a non-binding Conference resolution.

112. Accordingly, the protection of safe and healthy working conditions/a safe and healthy working environment as a fundamental principle and right arising from ILO membership could be reflected in existing free trade agreements only through a common sovereign decision of the States parties to those agreements. [92] Despite its undeniable political resonance and importance as a milestone in the Organization's history, a non-binding Conference resolution amending the 1998 Declaration cannot and will not produce any direct legal effects with respect to rights and obligations of Member States arising out of free trade agreements to which they are parties. [93]

III.3. Indirect legal effects of a Conference resolution amending the 1998 Declaration

III.3.1. General – Rules of treaty interpretation

113. For the purposes of this document, "indirect legal effects" are understood to refer to (i) the manner in which the labour provisions in free trade agreements might possibly be interpreted by adjudicatory bodies in the event of disputes subsequent to the adoption of the Conference

[90] International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries 2018, Conclusion 7(3), *Yearbook of the International Law Commission,* 2018, Vol. II, Part Two, 51.

[91] The International Court of Justice has ruled, nonetheless, that although not binding, resolutions may have normative value; see Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, para. 70. See also Alain Pellet, "Le rôle des résolutions des organisations internationales à la lumière de la jurisprudence de la Cour internationale de Justice" in George P. Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO*100 – *Law for Social Justice*, 2019, 149–160.

[92] In this connection, it should be noted that most free trade agreements either expressly provide that are concluded for indefinite period of time (for instance, see article 16.14 of the EU–Singapore trade agreement of 2021), or merely refer to the date of entry into force without specifying an expiration date (for instance, see article 22.4 of the Republic of Korea–Colombia agreement of 2016). In addition, free trade agreements usually contain specific provisions regulating the amendment procedure (for instance, see article 142 of the United Kingdom–Kenya trade agreement of 2021).

[93] The fact that a Conference resolution cannot *ipso jure* amend international treaties is precisely the reason why document GB.344/INS/6 proposes a formal process for the partial revision of existing international labour instruments that contain references to the four categories of fundamental principles and rights.

resolution amending the 1998 Declaration; (ii) the possible impact the Conference resolution may have on GSP conditionalities; and (iii) the weight that adjudicatory bodies might possibly attribute to unilateral acts such as position statements made by representatives of Member States in the context of the adoption of that resolution.

114. These matters are interpretative issues and should therefore be analysed using the basic rule of treaty interpretation that is codified in article 31 of the 1969 Vienna Convention and which reads as follows:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
>   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>   (c) any relevant rules of international law applicable in the relations between the parties.

115. According to this general rule, the purpose of interpretation is to establish the intention of the parties by understanding the meaning of the words they used, in the overall context, and taking into account the object and purpose of their agreement. There is broad acceptance that article 31, a sort of “sacrosanct” core of the 1969 Vienna Convention, is a particularly successful synthesis of remarkably complex principles and processes. [94]

116. Article 31 of the 1969 Vienna Convention is generally recognized as reflecting existing international customary law, and is therefore binding for all States whether they have ratified the 1969 Vienna Convention or not. [95] At the same time, article 31 allows enough latitude to interpreters in the application of the means of interpretation to a given case since “rules are not a set of simple precepts that can be applied to produce a scientifically verifiable result [but much is] left to nuance”, [96] or as the International Law Commission has put it, “the interpretation of documents is to some extent an art, not an exact science”. [97] It should also be

[94] Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties – A Commentary*, 2011, Vol. I, 805–806. Article 31 of the 1969 Vienna Convention is almost identical to article 27 of the International Law Commission’s Draft Articles on the Law of Treaties prepared in 1966. Article 27 was entitled “general rule of interpretation” and sought to underline that the application of the different means of interpretation constituted a single operation; see International Law Commission, Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission*, Vol. II, 1966, 219–220.

[95] The International Court of Justice has acknowledged the customary character of this rule on numerous occasions; see, for instance, *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment of 20 April 2010, ICJ Reports 2010, para. 65; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment of 26 February 2007, ICJ Reports 2007, para. 160. See also Ulf Linderfalk, *On the Interpretation of Treaties*, *The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties,* 2010, 3.

[96] Jean-Marc Sorel and Valérie Boré Eveno, “Article 31, 1969 Vienna Convention” in Olivier Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties, A Commentary*, Vol. I, 2011, 817, and Richard Gardiner, *Treaty Interpretation*, 2008, 7.

[97] International Law Commission, Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission*, Vol. II, 1966, 218.

remembered that treaty interpretation may vary depending on the specific parameters of each case. As has been observed, "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of Parties and travaux préparatoires". [98]

III.3.2. Post-amendment interpretation of labour provisions in existing free trade agreements

117. By way of a preliminary remark, it is noted that the interpretation and application of free trade agreements is a matter, in the first instance, for the States parties concerned and, in some cases, for those dispute-settlement bodies which are specifically empowered to this effect under the terms of the agreements in question. This means that even where the terms used suggest that the parties might have intentionally opted for a broad formulation that could accommodate future evolutions, the fact remains that it would be for the authors of the agreement, or competent adjudicatory bodies, to interpret the text *lato* or *stricto sensu*.

118. In the event of a dispute about the meaning of certain labour clauses (typically those which do not exhaustively enumerate the fundamental principles and rights), an arbitrator would need to establish whether the parties intended to leave room for future evolution of terms such as "core labour rights" or whether the parties consented to such dynamic interpretation through subsequent practice – concepts and methods of interpretation that are outlined separately below.

Evolutive or dynamic interpretation – article 31(1) of the 1969 Vienna Convention

119. Evolutive interpretation is not expressly provided for in the 1969 Vienna Convention, but the reference to "object and purpose" in article 31(1) of the Convention implicitly recognizes evolutive interpretation as an interpretation technique. As with all other means of interpretation, evolutive interpretation seeks to establish first and foremost the true intention of the parties.

120. Evolutive, or dynamic, interpretation is where a term is given a meaning that changes over time, thus allowing certain treaty provisions to adapt to evolving economic, political, cultural and technological realities. [99] The concept of dynamic interpretation is often equated with teleological interpretation [100] and the principle of effectiveness. [101] It proceeds on the premise that certain terms are not static and therefore need to be understood according to the principles and rules prevailing at the time of interpretation ("intertemporal" interpretation) as opposed to the rules prevailing at the time of conclusion of the treaty in question ("contemporaneous" interpretation).

[98] International Tribunal for the Law of the Sea, Order of 3 December 2001, *Mox Plant Case (Ireland v. United Kingdom),* Provisional Measures, para. 51.

[99] Sondre Trop Helmersen, "Evolutive treaty interpretation: legality, semantics and distinctions", *European Journal of Legal Studies*, Vol. 6, 2013, 127–148. Among the numerous academic writings, see Erik Bjorge, *The Evolutionary Interpretation of Treaties*, 2014; Julian Arato, "Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences", *Law and Practice of International Courts and Tribunals*, Vol. 9, 2010, 443–494.

[100] The teleological approach to interpretation of treaties places the emphasis on the object and purpose of the treaty and favours an interpretation that advances the treaty's aims.

[101] The principle of effectiveness *(ut res magis valeat quam pereat)* is based on the assumption that a treaty is meant to achieve something and therefore an interpretation which would reduce part of the text to a pleonasm or would make the text ineffective to achieve its object should not be retained.

121. There is a considerable body of case law of international tribunals where recourse is made to evolutive or dynamic interpretation. The jurisprudence of the International Court of Justice offers prominent examples, such as the *Namibia* case, where the Court held that concepts embodied in the Covenant of the League of Nations, such as “strenuous conditions of the modern world” and the “well-being and development” of the peoples concerned, were not static but were by definition evolutionary, and that therefore the Court had to take into consideration the changes which had occurred in the supervening half-century and its interpretation could not remain unaffected by subsequent developments. [102]

122. The International Court of Justice has developed over the years an interpretative “principle” according to which an evolutive approach should be favoured under certain conditions, notably in relation to generic terms used in treaties entered into for a very long time. [103]

123. Dynamic interpretation is frequently used by the European Court of Human Rights, which since the *Tyrer* case of 1978 refers to the European Convention on Human Rights as a living instrument which needs to be interpreted in the light of present-day conditions. [104] The same interpretation method has occasionally been used by other bodies, such as the Inter-American Court of Human Rights, [105] the International Tribunal for the Law of the Sea [106] and the Appellate Body of the World Trade Organization. [107]

124. According to some scholars, the risk of evolutive interpretation is over-interpretation. [108] Moreover, evolutive interpretation of a treaty should not be confused with its revision, which

[102] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970),* Advisory Opinion of 21 June 1971, ICJ Reports 1971, para. 53. See also *Aegean Continental Shelf Case*, Judgment of 19 December 1978, ICJ Reports 1978, para. 80; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua),* Judgment of 13 July 2009, ICJ Reports 2009, para. 64; *Case concerning Pulp Mills on the River Uruguay,* Judgment of 20 April 2010, ICJ Reports 2010, para. 204.

[103] In the words of the Court, “where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is of continuing duration, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning”; see *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua),* Judgment of 13 July 2009*,* para. 66.

[104] *Tyrer v. United Kingdom*, Judgment of 25 April 1978, para. 31. However, the Court has also ruled that it cannot by means of an evolutive interpretation derive from the Convention a right that was not included therein at the outset; see *Johnston and Others v. Ireland*, Application No. 9697/82, Judgment of 18 December 1986, para. 53.

[105] See Advisory Opinion OC-16/99 of 1 October 1999 requested by the United Mexican States, Inter-American Court of Human Rights Series A No. 16, paras 114–115.

[106] See *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, para. 117.

[107] See WTO, United States – Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R, 12 October 1998, paras 129–130, and China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products, WT/DS363/AB/R, 21 December 2009, para. 396. Yet another example is the 1996 arbitral panel decision on the US–Canada tariff dispute under the North American Free Trade Agreement (NAFTA). For a critical analysis of the panel decision, see Dale E. McNiel, “The NAFTA Panel Decision on Canadian Tariff-Rate Quotas: Imagining a Tariffying Bargain”, *Yale Journal of International Law*, Vol. 22, 1997, 345–379.

[108] In particular, the rationale underlying the “general rule” of presumptive evolutive intent put forward by the International Court of Justice in the *Navigational Rights Case* has been criticized since it seems to imply that because certain treaty provisions are capable of holding an evolutive meaning, they actually do so, with or without reference to actual intention of the parties. Yet, recognition of the evolutionary character of a term is not sufficient to presume evolutive intent; see Duncan French, “Treaty Interpretation and the Incorporation of Extraneous Legal Rules”, *International and Comparative Law Quarterly*, Vol. 55, 2006, see 296–297. See also Hugh Thirlway, “The Law and Procedure of the International Court of Justice 1960-1989 Part One”, *British Yearbook of International Law*, Vol. 60, 1989, 143.

can only be undertaken by the parties themselves. [109] As the International Court of Justice has stated, its role is to interpret treaties, not to revise them, and therefore it cannot adopt a construction which would go beyond the scope of the treaty's declared purpose and object or which would involve radical changes and additions to its provisions. [110] Amending a treaty through evolutive interpretation would practically mean circumventing its specific provisions on amendment and would also raise constitutional concerns about the legitimacy of a text that would no longer correspond to the text ratified by national parliaments.

125. There is a strong body of opinion that suggests that terms in human rights instruments, including texts on social protection and workers' rights, are inherently evolutionary, and therefore susceptible to dynamic interpretation. One may think, for instance, of the International Covenant on Economic, Social and Cultural Rights or the International Covenant on Civil and Political Rights and terms such as "fair trial", "degrading treatment" or "respect, protect and fulfil" as examples of provisions with a potentially evolving meaning.

126. On the basis of the above, it cannot be excluded that within a particular context and set of circumstances, an interpreter could determine that the intention of the States parties to a free trade agreement was to use the term core labour rights" or the expression "fundamental principles and rights at work" – in particular when no reference to the 1998 Declaration or any other relevant ILO instruments is made – as having an evolving meaning, or that these are generic terms, inherently evolutionary, and that therefore they should be interpreted by reference to the legal and factual circumstances prevailing at the time of interpretation and not at the time of conclusion of the free trade agreement.

127. It is precisely in order to exclude any such unintended consequences that it is proposed to include a saving clause in the Conference resolution amending the 1998 Declaration. As further explained in document GB.344/INS/6, the introduction of a saving clause in the Conference resolution would seek to ensure that the obligations undertaken under existing free trade agreements may not be modified without the express consent of the contracting parties.

Subsequent agreement and subsequent practice – article 31(3)(a) and (b) of the 1969 Vienna Convention

128. Under article 31(3)(a) and (b) of the 1969 Vienna Convention, in considering the context of treaty provisions, the interpreter shall take into account subsequent agreements and subsequent practice of the parties.

129. According to the International Law Commission's Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted in 2018, [111] subsequent agreements and subsequent practice are authentic means of interpretation in the application of the general rule reflected in article 31 of the 1969 Vienna Convention, as they provide objective evidence of the understanding of the parties as to the meaning of the treaty (Conclusion 3).

[109] As Judge Bedjaoui noted in his separate opinion in the *Gabčikovo-Nagymaros* case, the "interpretation" is not the same as the "substitution", for a negotiated and approved text, of a completely different text, which has neither been negotiated nor agreed. Although there is no need to abandon the "evolutionary interpretation", which may be useful, not to say necessary in very limited situations, it must be said that it cannot automatically be applied to any case"; see *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, 120.

[110] *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of 27 August 1952, ICJ Reports 1952, 176.

[111] International Law Commission, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018), A/73/10.

130. A subsequent agreement is defined as "an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions", whereas subsequent practice "consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty" (Conclusion 4). Subsequent agreement and subsequent practice may therefore be distinguished based on whether the shared position of the parties can be established through a single act or through a series of separate acts.

131. As the International Law Commission's commentary explains, the term "subsequent agreement" should not be construed to mean a subsequent treaty formally concluded in written form; it may take whatever form, not necessarily binding, that the parties to the treaty may choose. Nonetheless, subsequent agreements have to reflect unequivocally a "meeting of the minds" and must pertain to the interpretation or the application of the treaty in question. Conflicting positions regarding interpretation expressed by different parties to a treaty preclude the existence of an agreement.

132. Subsequent practice may consist of any conduct (actions or omissions) of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions (Conclusion 5). The International Law Commission's commentary indicates that subsequent practice within the meaning of article 31(3)(b) must be conduct "in the application of the treaty", which includes, among others, "official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty". [112]

133. The conduct of non-State actors, for instance decisions and resolutions of international organizations, does not constitute subsequent practice but may be relevant when assessing the subsequent practice of parties to a treaty (Conclusion 5). The Commission's commentary refers, for instance, to reports of international organizations, handbooks and guidelines reviewing State practice which can provide valuable information about subsequent practice of parties, contribute to assessing this information and even solicit its coming into being. Statements or conduct of other States, international organizations or non-State actors can thus initiate relevant subsequent practice of the parties to a treaty but should not be conflated with the practice by the parties to the treaty themselves.

134. According to the International Law Commission, the identification of subsequent agreements and subsequent practice under article 31(3) of the 1969 Vienna Convention requires a determination on whether the parties, by an agreement or practice, have taken a position regarding the interpretation of the treaty (Conclusion 6). The Commission further specifies that subsequent practice at the international level does not necessarily need to be joint conduct and that subsequent agreements can be found in legally binding treaties as well as in non-binding instruments such as memoranda of understanding or decisions of conferences of States parties. [113]

135. As for the effects of subsequent agreements and subsequent practice, it is presumed that the parties to a treaty intend to clarify its meaning, in the sense of either narrowing down or

[112] International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, with Commentaries, *Yearbook of the International Law Commission*, Vol. II, 2018, Part Two, 32.

[113] Practice may also comprise manuals, diplomatic correspondence, press releases or transactions; see Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties – A Commentary,* 2012, 555.

confirming a wider interpretation, but not to amend the treaty (Conclusion 7). The International Law Commission's commentary clarifies that the possibility of amending a treaty through subsequent practice of the parties is not generally recognized and that if an informal means of identifying agreement as subsequent practice could easily modify a treaty, the stability of treaty relations and the principle *pacta sunt servanda* could be put at risk.

136. Moreover, subsequent agreements and subsequent practice may assist in determining whether the presumed intention of the parties at the time of conclusion of a treaty was to give a term used a meaning which is capable of evolving over time (Conclusion 8). The Commission's commentary clarifies, in this respect, that the interpretative weight of a subsequent agreement or subsequent practice depends on criteria such as its clarity and specificity, or on whether and how it is repeated (Conclusion 9).

137. On the basis of the above, it cannot be excluded that within a certain context and set of circumstances, a Conference resolution amending the 1998 Declaration could be taken into account by an interpreter as being part of subsequent practice for the purposes of interpreting the labour provisions of a free trade agreement referring to "core labour rights" or "fundamental principles and rights at work". However, to be relevant under article 31(3)(b) of the 1969 Vienna Convention, all States parties to a free trade agreement – and not merely some of them – would need to apply the agreement concerned in such a concordant manner that would leave no doubt as to their common understanding regarding the meaning to be given to its terms.

Relevant rules of international law – article 31(3)(c) of the 1969 Vienna Convention

138. Article 31(3)(c) of the 1969 Vienna Convention provides that a treaty shall be interpreted taking into account any relevant rules of international law applicable in the relations between the parties. It embodies the principle of "systemic integration", which rests upon the premise that an international agreement is not concluded nor does it produce its effects in *vacuo juris* but in an existing legal order. [114] For some authors, the principle of systemic integration has the status of a constitutional norm, a "master-key" of the international legal system, [115] or an important tool to maintain coherence between what would otherwise be self-contained systems. [116]

139. The relevance of this article in relation to the effects of a Conference resolution on existing treaties also raises the question of the nature of Conference resolutions, and in particular whether they may be deemed to constitute "rules of international law". The question of what the term "rule" encompasses under the 1969 Vienna Convention is complex and remains somewhat unresolved. In principle, "rules of international law" within the meaning of article 31(3) correspond to "sources" of international law as defined in article 38(1) of the Statute of the International Court of Justice, and therefore include other treaties, customary rules and general principles of international law. [117]

[114] Giovanni Distefano, "Les techniques interprétatives de la norme internationale", *Revue Générale du Droit International Public,* Vol. 115, 2011, 383.

[115] Campbell MacLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention", *International and Comparative Law Quarterly*, Vol. 54, 2005, 280–281.

[116] James Crawford, *Brownlie's Principles of Public International Law,* 2012, 383.

[117] Richard Gardiner, *Treaty Interpretation*, 2008, 259–275; Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 2009, 433.

140. It is noteworthy, however, that the arbitral panel constituted under article 20.6.1 of the Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR) to examine a dispute between the United States of America and Guatemala considered a "soft law" instrument such as the 1998 Declaration as a relevant rule of international law to be taken into account to interpret the labour provisions of that free trade agreement.

141. In fact, the arbitral panel stated that in accordance with article 31(3)(c) of the 1969 Vienna Convention, it should take into account, together with the context, "any relevant rules of international law applicable in relations between the parties" to the CAFTA-DR in interpreting and applying its provisions. As the panel reasoned, "[a]ll CAFTA-DR Parties are members of the ILO. By virtue of their membership in that Organization, they are bound by an obligation enunciated in the ILO's Declaration on Fundamental Principles and Rights at Work and grounded in the ILO Constitution". [118]

142. It cannot be excluded, therefore, that a Conference resolution amending the 1998 Declaration could be taken into account as a relevant source of law within the meaning of article 31(3)(c) of the 1969 Vienna Convention. This would not mean, however, that the resolution would be automatically incorporated in existing free trade agreements, but that it would only constitute a relevant rule to consider in interpreting the labour provisions in those agreements. Should a saving clause be added to the Conference resolution amending the 1998 Declaration, it would also be part of the "relevant rule" and should be properly taken into account.

Enforcement of labour provisions – Precedents of third-party dispute settlement

143. States have thus far rarely had recourse to third-party intervention for settling disputes concerning the application or interpretation of labour provisions in free trade agreements. [119] To date, only two disputes about alleged non-compliance with labour provisions have given rise to formal proceedings, namely the dispute between the United States and Guatemala brought before an Arbitral Panel under the Dominican Republic–Central America–United States Free Trade Agreement, [120] and the dispute between the European Union (EU) and the Republic of Korea submitted to a Panel of Experts under the EU–Republic of Korea Free Trade Agreement. [121]

144. The two cases provide interesting insights as to the manner in which labour provisions are interpreted in general, but offer no immediate guidance as to the possibility of contextual interpretation of such provisions in the event of disputes that might arise after the amendment of the 1998 Declaration.

[118] CAFTA-DR, Arbitral panel established pursuant to chapter twenty, *In the Matter of Guatemala – Issues in relation to the obligations under article 16.2.1(a) of the CAFTA-DR*, Final report of the panel, 14 June 2017, para. 427.

[119] Robert McDougall, *Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution*, 2018, 10; Geraldo Vidigal, "Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement", *Journal of International Economic Law*, Vol. 20, 2017, 927–932; Claude Chase et al., "Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?" in Rohini Acharya (ed.), *Regional Trade Agreements and the Multilateral System*, 2016.

[120] See Arbitral Panel Established Pursuant to Chapter Twenty of the Dominican Republic–Central America–United States Free Trade Agreement, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR,* Final Report of the Panel, 14 June 2017.

[121] See Panel of Experts Proceeding Constituted Under Article 13.15 of the EU–Korea Free Trade Agreement, Report of the Panel of Experts, 20 January 2021.

(a) The case of the United States and Guatemala

145. The CAFTA–DR free trade agreement, which entered into force on 1 March 2006, regulates matters related to labour in Chapter 16. The dispute between the United States and Guatemala related to the application of article 16.2.1(a), which provides that "a Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties". The United States alleged that by failing to enforce court orders, impose sanctions and conduct proper labour inspections, Guatemala had breached its obligations under article 16.2.1(a).

146. In its final report, the Arbitral Panel concluded that although Guatemala had indeed failed to effectively enforce its labour laws, the United States had not proven that this constituted "a course of inaction that was in a manner affecting trade" and therefore no breach of article 16.2.1(a) of the CAFTA-DR could be established. [122] Under the terms of the agreement, the complaining party must demonstrate that labour violations occur in a manner affecting trade and through sustained or recurring action. [123] For the Government of the United States, the "affecting trade" clause should be understood as any action that modifies conditions of competition, whereas for Guatemala, unambiguous proof was required that the failure to enforce labour laws had an observable effect on trade between the parties. Drawing upon the general rule of treaty interpretation under the 1969 Vienna Convention, the Panel found on a textual basis that "affecting trade" was more specific than merely trade-related and that actual evidence was required demonstrating effects sufficient to confer some competitive advantage on the enterprise concerned.

147. In addition, the Panel briefly referred to the 1998 Declaration and considered that the obligations of the parties as Members of the ILO should be taken into account as "relevant rules of international law applicable in relations between the parties". Accordingly, the Panel relied on the 1998 Declaration and on the views of ILO committees to confirm that the lack of proper enforcement of Guatemala's labour laws could be expected to affect the internationally recognized labour laws which had been referred to in the CAFTA-DR. Whether such internationally recognized labour rights had been violated, however, was not a question put before the Panel.

(b) The case of the EU and the Republic of Korea

148. The report of the Panel of Experts of 25 January 2021 in the labour dispute between the EU and the Republic of Korea [124] marked the first time that the EU sought to enforce labour commitments under a free trade agreement. [125] Contrary to the United States–Guatemala case,

[122] Final Report of the Panel, para. 594. For more, see June Namgoong, "Two Sides of One Coin: The *US-Guatemala* Arbitration and the Dual Structure of Labour Provisions in the CPTPP", *International Journal of Comparative Labour Law*, Vol. 35, 2019, 483–509; Kathleen Claussen, "Reimagining Trade-Plus Compliance: The Labor Story", *Journal of International Economic Law*, Vol. 23, 2020, 25–43; Tequila J. Brooks, "U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement", *International Labor Rights Case Law* , Vol. 4, 2018, 45–51.

[123] Those conditions have been criticized as being very stringent and making it difficult for a labour claim to succeed. In the words of one commentator, "it illustrates how limiting the use of FTAs can before achieving social justice in these types of cases [...] Such a narrow formulation of the enforceability of labor law provisions in this FTA allow for blatant and systematic violations of the freedom of association to be tolerated"; Phillip Paiement, "Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute", *Georgetown Journal of International Law*, Vol. 49, 2018, 690.

[124] *Report of the Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement*, 20 January 2021.

[125] As is common in the free trade agreements that the EU concludes with its trading partners, disputes relating to compliance with labour provisions cannot be submitted to arbitration but may only be referred to a Panel of Experts. The panel adopts non-binding recommendations but a Committee on Trade and Sustainable Development is established to monitor the

the EU's panel request was not based on an alleged breach of the obligation not to fail to implement and enforce domestic laws in a manner affecting trade. Instead, the EU alleged, first, that the Korean Trade Union and Labour Relations Act did not comply with the Republic of Korea's commitment to respect, promote and realize freedom of association and the effective recognition of collective bargaining and, second, that the Republic of Korea had made insufficient efforts to ratify fundamental ILO Conventions, since four of those Conventions remained unratified.

149. The report of the Panel of Experts contains a number of observations regarding the applicable interpretative framework. The Panel decided that each provision of the free trade agreement would be examined and interpreted in accordance with the general rule of treaty interpretation set out in article 31 of the 1969 Vienna Convention. The Panel indicated, in this connection, that it would follow the prevailing holistic approach based on examining the ordinary meaning of the terms together with their context in light of the object and purpose of the treaty, all under the rubric of good faith (paragraph 46).

150. The Panel of Experts concluded that three aspects of the Korean legislation were inconsistent with the principles concerning freedom of association, as defined within the ILO system, which the Republic of Korea is obliged to respect, promote and realize under article 13.4.3 of the agreement (paragraphs 196, 208, 227). The Panel reasoned that the explicit references to the ILO Constitution, to the 1998 Declaration and to specific principles concerning fundamental rights clearly indicate that any obligation arising from the first sentence of article 13.4.3 has been defined by the Parties to the full extent of their internationally accepted meaning (paragraph 64). As regards the ratification of ILO Conventions, the Panel considered that article 13.4.3 laid down an obligation of effort, not result, and found that the Republic of Korea had not breached its obligation to make its best effort towards ratifying the Conventions in question (paragraphs 288 and 293).

151. In relation to the 1998 Declaration, the parties agreed that it was not, in itself, legally binding, but the Panel observed that the parties assumed a separate binding commitment to respect, promote and realize the fundamental principles and rights arising from article 13.4.3 and not from the 1998 ILO Declaration per se (paragraphs 121–122). This was in line with the view that the incorporation into the free trade agreement of obligations deriving from ILO membership created "separate and independent obligations under Chapter 13 of the Agreement" (paragraph 107).

152. The Panel clarified the meaning of several terms used in article 13.4.3, considering for instance that the term "commit to" was not aspirational but represented a legally binding obligation (paragraph 127). As for the "principles concerning the fundamental rights", the Panel rejected the view that these principles were not sufficiently clear and concrete and decided that those principles – as distinct to the rights in the corresponding Conventions – were commonly understood to provide a basis for the examination of the domestic legislation in question (paragraph 141).

153. The Panel went on to unravel the ordinary meaning of the parties' core commitments to respecting, promoting and realizing fundamental principles: "respecting" refers to a negative obligation not to injure, harm, insult, interfere or interrupt freedom of association; "promoting" reflects a positive obligation for States to ensure that third parties do not disrupt workers

implementation of those recommendations; see Marco Bronckers and Giovanni Gruni, "Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously", *Common Market Law Review*, Vol. 56, 2019, 1591–1622; James Harrison, "The Labour Rights Agenda in Free Trade Agreements", *The Journal of World Investment & Trade*, Vol. 20, 2019, 710–715.

exercising their freedom of association rights; and "realizing" conveys a binding requirement to give effect to fundamental principles as opposed to complying with the terms of fundamental Conventions (paragraphs 131–133).

(c) Conclusion

154. The United States–Guatemala and the EU–Republic of Korea cases differ in many respects. Indeed, given that each related to a different type of labour provision, the Panel of Experts in the dispute between the EU and the Republic of Korea had to note that "[t]he CAFTA-DR Panel Report does not assist the Panel in interpreting and applying Chapter 13 of the EU-Korea FTA" (paragraph 90). In addition, the Panel of Experts noted that "the CAFTA–DR Agreement's Chapter 16 … does not have the same contextual setting of sustainable development as the EU-Korea FTA, nor does it refer to the range of multilateral and international agreements and declarations which the Parties have included in the EU-Korea FTA" (paragraph 93).

155. This shows that each specific case depends, to a large degree, on the scope of the labour clause in question. As previously mentioned, labour clauses can vary considerably from one trade agreement to another. The CAFTA–DR and the EU–Republic of Korea free trade agreements are good examples of this diversity. In the former, the parties undertake to "strive to ensure" that "internationally recognized labor rights … are recognized and protected by its law"; alleged breaches of this provision can give rise, at most, to consultations. In the latter agreement, the parties clearly "commit to respecting, promoting and realising [the fundamental principles and rights], in their laws and practices"; non-respect of that commitment can be referred to a Panel of Experts.

156. Notwithstanding those differences, it is important to note that both panel reports are grounded on the general rule of interpretation codified in the 1969 Vienna Convention as the sole basis for determining the meaning of the labour provisions in question. Notably, the panels did not attempt to develop any reasoning detached from the joint intention of the parties as reflected in the plain text of the respective trade agreements.

III.3.3. Conditions for access to trade preferences schemes

157. As indicated above, bilateral or plurilateral free trade agreements are to be distinguished from incentive arrangements, such as the Generalized System of Preferences. Contrary to free trade agreements, these arrangements are not negotiated agreements but schemes of tariff preferences unilaterally applied by developed countries (or a group of developed countries such as the European Union) to developing countries, as long as the human and labour rights record in those beneficiary countries meets certain conditions. [126]

158. Given the unilateral nature of those arrangements, it is clear that any modification of the GSP conditionalities will be entirely at the discretion of the grantor State. By way of example, if,

[126] For more on the trade–labour linkage under the GSP regime, see Jan Orbie and Ferdi de Ville, "Core Labour Standards in the GSP Regime of the European Union: Overshadowed by Other Considerations" in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work – Perspectives on Law and Regulation*, 2010, 487–508; Samantha Velluti, "The Trade-Labour Linkage in the EU's Generalized System of Preferences", *Studia Diplomatica*, Vol. 67, 2014, 93–106; Jeffrey Vogt, "A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)", *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 31, 2015, 285–304; Ludo Cuyvers and Weifeng Zhou, "Linking International Trade and Labour Standards: The Effectiveness of Sanctions under the European Union's GSP", *Journal of World Trade*, Vol. 45, 2011, 63–85; George Tsogas, "Labour Standards in the Generalized Systems of Preferences of the European Union and the United States", *European Journal of Industrial Relations* Vol. 6, 2011, 349–370.

under the current GSP+ arrangement,[127] the European Union requires the ratification of 27 human rights conventions, including the eight ILO fundamental Conventions, it will be for the European Union to determine if and when that arrangement should be modified, or whether a new arrangement should be established, so as to reflect any amendments to the 1998 Declaration and the recognition of one or more occupational safety and health Conventions as fundamental.

159. Besides, States proposing incentive arrangements in the form of trade preferences could decide to put more emphasis on occupational safety and health even in the absence of a Conference resolution amending the 1998 Declaration. It should also be made clear that any modification to GSP conditionalities could only be done prospectively and not retroactively, which means that the adoption of a Conference resolution amending the 1998 Declaration will not create, directly or indirectly, new conditions for beneficiary countries under existing GSP arrangements.

III.3.4. The relevance of the theory of unilateral acts of States

160. In seeking to understand how the doctrine of unilateral acts of States might be connected with the current process of amendment of the 1998 Declaration, one should consider, first, whether the Conference resolution amending the 1998 Declaration per se could qualify as a "unilateral declaration of States capable of creating legal obligations". In this respect, there can be no doubt that the resolution will be a statutory act of the International Labour Conference, the supreme deliberative organ of the Organization. Since, according to its Constitution, the Organization possesses full juridical personality, such act is attributable to the ILO itself and may not be attributed to individual Member States. In contrast, acts of Government representatives, such as oral and written statements or votes cast, performed in the context of the relevant Conference discussion, can be attributed to the respective Member States.

161. Accordingly, a clear distinction should be made between, on the one hand, the legal nature of the Conference resolution, which may under no circumstances be deemed to be a unilateral declaration of each and every Member that has supported, explicitly or implicitly, its adoption, and on the other, the views expressed by individual Government delegates, which may not be void of legal and political significance but could hardly qualify as unilateral acts of the States concerned.

162. In this connection, it will be recalled that reference has been made to the 1974 judgment of the International Court of Justice in the *Nuclear Tests* cases and the 2006 International Law Commission's *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*.

[127] In accordance with EU Regulation No. 978/2012 of 25 October 2012, the European Union provides access to its market through the application of tariff preferences to those developing countries considered to be vulnerable, which: have ratified all the 27 international conventions specifically listed in the Regulation and the most recent available conclusions of the monitoring bodies under those conventions do not identify a serious failure to effectively implement any of those conventions; have not formulated reservations which are prohibited by any of those conventions or which are considered to be incompatible with the object and purpose of that convention; give a binding undertaking to maintain ratification of the relevant conventions and to ensure their effective implementation; accept without reservation the reporting requirements imposed by each convention and give a binding undertaking to participate in and cooperate with the monitoring procedure (art 9). The EU Regulation also provides for the temporary withdrawal of the arrangement in respect of all or of certain products originating in a GSP+ beneficiary country, where in practice that country does not respect its binding undertakings, and that the burden of proof for compliance shall be on the GSP+ beneficiary country (art. 15).

163. The *Nuclear Tests* cases opposing New Zealand and Australia to France concerned, among other matters, the legal effect of various statements, such as a letter from the President of France, a communiqué from the Office of the President of France, a diplomatic note or a statement made by the French Foreign Minister to the General Assembly, all referring to the suspension by France of its nuclear tests in the South Pacific. According to the Court's judgment, "declarations made by way of unilateral acts … may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding." [128]

164. As for the 2006 Guiding Principles, the International Law Commission was tasked in 1996 with the formulation of general rules applicable to unilateral acts of States capable of producing legal effects with a view to promoting stability and predictability of their mutual relations. [129] In examining the practice of States with regard to unilateral acts, the Commission considered a number of precedents, including the 1919 oral declaration of the Foreign Minister of Norway, known as the Ihlen declaration, concerning Denmark's sovereignty over Greenland, the 1945 declaration of the United States President Harry S. Truman concerning the exploitation of natural resources of the continental shelf by the coastal State, and the Note of 1952 addressed by the Foreign Minister of Colombia to the Ambassador of the Bolivarian Republic of Venezuela to Colombia concerning the Bolivarian Republic of Venezuela's sovereignty over the Los Monjes archipelago. [130]

165. A valid unilateral engagement under international law is a juridical act of a State authority within the limits of its powers, such as a "promise" to act or not to act, performed with the clear intention to assume an obligation and confer a corresponding right to other States. [131] Accordingly, policy statements do not contain a unilateral engagement of any sort and therefore may not be deemed to represent unilateral acts of the State. [132]

166. Turning to the International Law Commission's Guiding Principles, it should be recalled that unilateral acts of States such as declarations may have the effect of creating legal obligations if they are publicly made and they manifest the will to be bound. Furthermore, it would be

[128] *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, para. 43. The implications of the judgment insofar as unilateral declarations of States are concerned have been extensively analysed. As one author has observed, "thanks to the Court's decision, each State must now recognize that what it solemnly says it will, or will not do, becomes a part of that trellis of reciprocal expectations on which the fragile international system grows"; Thomas M. Franck, "Word Made Law: The Decision of the ICJ in the Nuclear Test Cases", *American Journal of International Law*, Vol. 69, 1975, 616. See also Alfred P. Rubin, "The International Legal Effects of Unilateral Declarations", *American Journal of International Law*, Vol. 71, 1977, 1–30.

[129] International Law Commission, *Report of the International Law Commission*, 58th session, A/61/10, paras 160–177.

[130] International Law Commission, Eighth report on unilateral acts of States, A/CN.4/557.

[131] As it has been written, "international law requires that certain conditions be met before the declarant is regarded as having assumed an enforceable duty … There must be evidence that the declarant acted with the intention of being legally bound … If it is the declarant's conduct which is asserted against it as a binding unilateral act, that conduct must clearly constitute an acceptance of any resultant duties. In the absence of such explicit conduct no contractual obligations arise"; A. Gigante, "The Effect of Unilateral State Acts in International Law", *New York University Journal of International Law and Politics*, Vol. 2, 1969, 336.

[132] As one scholar has cautioned, "because of the variety of forms, unilateral acts must be carefully evaluated to determine whether they are intended to have legal effects under international law or whether they are only statements of policy"; Karl Zemanek, "Unilateral Acts Revisited" in Karel Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Erik Suy*, 1998, 210.

necessary to take account of their content, all the factual circumstances in which they were made as well as any reactions to which they may have given rise. The International Law Commission has further clarified that, in order to be capable of creating a binding legal obligation, a unilateral declaration must be stated in clear and specific terms, and that in case of doubt, the scope of the obligation resulting from the declaration should be interpreted in a restrictive manner.

167. In the case of a Conference resolution amending the 1998 Declaration, it is assumed that delegates would express their support through speeches, a possible record vote or by silently joining a consensus.[133] The essence of such acts or "declarations" would be to recognize that, by virtue of their ILO membership, Member States are bound to respect, promote and realize, in good faith and in accordance with the Constitution, the fundamental principle regarding safe and healthy working conditions/a safe and healthy working environment. This would not seem to include, however, an obligation incumbent upon those States to incorporate that same principle in existing or future bilateral agreements. Indeed, by virtue of the principle of freedom of contract, States would be, legally speaking, free to negotiate trade agreements incorporating the ILO's original framework of fundamental principles and rights at work, and not the extended one after the possible inclusion of safe and healthy working conditions/a safe and healthy working environment.

168. In addition, should the Conference resolution include a saving clause, the support expressed through unilateral "declarations" of Members would have to be understood to apply to the Conference resolution in its entirety, and would therefore also cover the intended exemption of existing trade agreements from any legal effects of the resolution.

169. One final point of clarification is whether statements during the Conference deliberations might be considered as part of State practice capable of establishing a principle of customary international law. In theory, unilateral acts by Member States could be regarded as the expression of an *opinio juris* by that State.[134] In particular, in its draft conclusions on the identification of customary international law, the International Law Commission noted that "forms of State practice include, but are not limited to: … conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference".[135] By definition, the emergence of a new rule of customary international law requires repetition and a certain amount of time to crystallize.[136] Thus, the adoption of a Conference resolution amending the 1998 Declaration would at best initiate a process of formation of a customary rule, on the condition, of course, that the existence of consistent practice and *opinio juris* could be ascertained over time.

170. In view of the preceding considerations, there seem to be no good reason to believe that an adjudicatory body might consider that, by supporting a Conference resolution amending the 1998 Declaration, a Member State would have unilaterally committed to implementing the provisions of previously concluded free trade agreements as if they had incorporated the constitutional principle of protecting safe and healthy working conditions/a safe and healthy

[133] Indeed, according to the International Law Commission's Guiding Principles, unilateral declarations may be formulated orally or in writing; in other words, the form does not affect their validity or legal effects. The Commission has expressly indicated that in some cases, these even involve statements made at meetings of international bodies; Eighth report on unilateral acts of States, para. 177.

[134] Jan Kolasa, "Unilateral Acts of a State in the Process of Forming Customary International Law," *Wroclaw Review of Law, Administration & Economics*, Vol. 8, 2018, 59–71.

[135] International Law Commission, *Report of the International Law Commission at its Seventieth Session*, 2018, A/73/10, 133–134.

[136] Patrick Daillier, Alain Pellet and Mathias Forteau, *Droit international public*, 8th ed., 2009, para. 210.

working environment. This would amount to conflating political support for a non-binding Conference resolution with conduct expressly manifesting an intention of being legally bound on the international plane.

III.4. Concluding observations

171. In the light of the preceding overview of the relevant international law theory and practice, especially with respect to treaty interpretation and the effects of unilateral acts of States, a number of observations may be made concerning the possible legal implications, direct and indirect, of an amended 1998 Declaration on trade agreements.

172. As a non-binding text, a Conference resolution amending the 1998 Declaration cannot in itself produce legal obligations for Member States outside the Organization, in particular insofar as their trade relations are concerned. International treaties, including bilateral or plurilateral free trade agreements, may only be amended with the consent of the contracting parties.

173. Whether a Conference resolution amending the 1998 Declaration may indirectly affect those trade agreements, and in particular the manner in which any labour clauses might be interpreted over time, calls for an in-depth examination, on a case-by-case basis, of an array of factors, such as the object and purpose of the agreement concerned, the context of its conclusion, preparatory work, subsequent conduct of the parties, relevant jurisprudence and the evolution of the law, with a view to decoding the true will of the parties.

174. There is no axiomatic method for determining whether treaty provisions must be interpreted in a "contemporaneous" or an "intertemporal" manner. Under the general rule developed by the International Court of Justice to determine when an evolutive intention must be presumed, the parties to a treaty must have used generic terms, in which case they have necessarily been aware that the meaning of these terms is likely to evolve over time. Accordingly, one could assume that by using generic terms such as "core labour standards" without associating them with specific ILO instruments or principles, the parties to a free trade agreement have intended to establish an evolutive framework of commitments. In contrast, an exhaustive list of fundamental principles and rights would suggest a priori that the parties intended that the list be understood as "closed" rather than open to future evolution.

175. While it may be reasonable to assume that an adjudicatory body might tend to interpret terms such as "core labour rights" in free trade agreements through a dynamic or teleological rather than a static interpretation, it should be remembered that those terms may be regarded as having an evolutive meaning only if it is established that such has been the true intention of the parties to the agreement concerned.

176. Accordingly, it appears unlikely that an adjudicatory body called upon to interpret the labour provisions of a free trade agreement which would contain no reference to occupational safety and health matters might nonetheless determine that protecting safe and healthy working conditions/a safe and healthy working environment has found its way into that agreement as a result of the adoption of a Conference resolution recognizing safe and healthy working conditions/a safe and healthy working environment as an additional fundamental principle and right within the meaning of the 1998 Declaration.

177. In any event, the possible inclusion of a saving clause in the Conference resolution amending the 1998 Declaration would exclude any unintended use of the resolution for the purpose of a dynamic or teleological interpretation of labour provisions in free trade agreements concluded prior to the adoption of the resolution. Such a saving clause would clarify that governments, in full awareness of the interpretative issues that the Conference resolution might raise with

respect to labour provisions in free trade agreements, specifically sought to ensure that the amendment to the 1998 Declaration could not be construed as modifying the scope of obligations undertaken under the trade agreements to which they are parties.

178. Moreover, to be taken into account in an interpretative process involving the labour provisions of a free trade agreement, a Conference resolution amending the 1998 Declaration should either: (i) encapsulate a "subsequent agreement" – within the meaning of article 31(3)(a) of the 1969 Vienna Convention – between the parties regarding the interpretation of the trade agreement; or (ii) be part of "subsequent practice" – within the meaning of article 31(3)(b) of the 1969 Vienna Convention – in the implementation of the trade agreement; or (iii) embody a "relevant rule of international law" – within the meaning of article 31(3)(c) of the 1969 Vienna Convention – applicable in the relations between the parties.

179. It is generally accepted that any conduct may constitute "subsequent agreement" or "subsequent practice" and that there is no need to take the form of a binding instrument. Accordingly, the non-binding nature of a Conference resolution amending the 1998 Declaration would not in itself preclude such resolution being relevant to the interpretation of labour provisions in free trade agreements.

180. According to the prevailing view, an international treaty may not be modified through subsequent agreement or subsequent practice. Accordingly, a Conference resolution amending the 1998 Declaration may not be deemed to reflect a "subsequent agreement" or "subsequent practice" for the purposes of interpreting labour provisions in an existing free trade agreement, if this would result in the modification, rather than the interpretation, of existing obligations under the free trade agreement.

181. It is generally agreed that subsequent agreements must reflect a "meeting of the minds" of the parties and must pertain to the interpretation or the application of the treaty that is subject to interpretation. Even though a Conference resolution amending the 1998 Declaration shall certainly reflect a meeting of the minds of all government delegates concerning the recognition of safe and healthy working conditions/a safe and healthy working environment as an additional fundamental principle, it cannot be inferred from the adoption of the resolution that governments would also be acting with the intention to clarify the meaning of the trade agreements to which they may be parties.

182. Considering that the GSP and GSP+ are unilateral trade schemes under which developed countries offer trade incentives in return for, inter alia, a human rights and workers' rights record meeting certain requirements, any modification of those requirements (such as the ratification of additional ILO Conventions) entirely depends on the free decision of the States concerned. The Conference resolution amending the 1998 Declaration cannot affect the conditionalities for gaining access to the GSP or GSP+ unless and until the countries having established those schemes decide to introduce new requirements.

183. As for position statements of individual governments, or votes cast, in favour of a Conference resolution amending the 1998 Declaration, such acts may not be presumed to create legal commitments that go beyond the scope of the resolution, that is, the recognition of the protection of safe and healthy working conditions/a safe and healthy working environment as a fundamental principle and right at work.

184. Any unilateral declaration confirming in clear and specific terms a government's intention to be bound by the new fundamental principle and right in its trade relations with other States, whether made in the context of the Conference discussions or otherwise, may produce binding legal effects for the future but cannot be taken to unilaterally transform existing trade

agreements without the consent of the trading partner concerned, and certainly cannot turn the Conference resolution amending the 1998 Declaration, or any Conference resolution for that matter, into a binding instrument.