THE RECOGNITION OF OCCUPATIONAL SAFETY AND HEALTH AS A FUNDAMENTAL PRINCIPLE AND RIGHT AT WORK

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Abstract In June 2022, the International Labour Organization (ILO) decided to amend the 1998 Declaration on Fundamental Principles and Rights at Work in order to include the right to a safe and healthy working environment among the core labour rights to which member States are committed by virtue of their membership. The amendment marks the successful completion of three years of negotiations initiated in response to the 2019 Centenary Declaration by which the ILO's tripartite constituency recognized that safe and healthy working conditions were fundamental to decent work. Adding occupational safety and health as a fifth pillar to the 1998 Declaration was generally welcomed as a commendable development although critics may still assert that as a soft law instrument the amended Declaration may not have decisive impact on workplace safety and health globally. Despite broad agreement about the timeliness and importance of recognizing occupational safety and health as a fundamental workers' right—especially in light of the pandemic experience—concerns were raised about the possible implications of the amended Declaration on existing trade agreements, and in particular whether it would create, directly or indirectly, new obligations for member States. This article looks into the origins and negotiating history of the amendment to the 1998 Declaration and addresses the scope and legal effect of a saving clause by which the Conference sought to ensure that the amended Declaration would not impact obligations and commitments of States set out in labour provisions of free trade agreements currently in force and would not be subject to dynamic interpretation in the context of a trade dispute.

Keywords: public international law, International Labour Organization, occupational safety and health, free trade agreements, Declaration on Fundamental Principles and Rights at Work, core labour standards, evolutive interpretation.

I. INTRODUCTION

On 10 June 2022, the International Labour Conference, the annual assembly of tripartite delegations from the 187 member States of the International Labour Organization (ILO), adopted by consensus a resolution amending the 1998

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[*ICLQ* vol 72, January 2023 pp 213–232] doi:10.1017/S0020589322000446

Declaration on Fundamental Principles and Rights at Work.[1] The amendment added 'a safe and healthy working environment' as a new fundamental principle and right at work alongside freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation. In addition, the resolution identified two of the most relevant international labour standards, the Occupational Safety and Health Convention 1981 (No. 155) and the Promotional Framework for Occupational Safety and Health Convention 2006 (No. 187), that should henceforth be recognized as fundamental within the meaning of the 1998 Declaration.[2]

It will be recalled that the 1998 Declaration has its roots in the post-Cold War debate about the linkages between trade liberalization and respect for basic workers' rights, or more prosaically, whether a 'social clause' should be part of global trade accords.[3] The Declaration marked an important evolution in the ILO's constitutional theory and practice, encapsulated in the notion that member States have an obligation to respect core labour principles enshrined in the ILO's Constitution by virtue of their membership and that correspondingly certain international labour Conventions that translate those core principles into rights and obligations should be given pride of place in the ILO's corpus juris.[4]

As a Conference resolution, the 1998 Declaration is a non-binding text that derives its authority from the solemn affirmation of principles of universal and lasting importance.[5] It is a prominent example of soft governance—as opposed

[1] Resolution on the inclusion of a safe and healthy working environment in the ILO's framework of fundamental principles and rights at work <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_848632.pdf>. For the report that served as a basis of the Conference deliberations, see ILC, 110th Session (2022) Report VII, *Inclusion of safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work* <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_844349.pdf>.

[2] Adding a 'fifth pillar' to the 1998 Declaration was generally hailed by the Conference as a historic achievement; see ILC, 110th Session (2022) Record of Proceedings, Record No 1E, Submission and noting of the second report of the General Affairs Committee, 5–22.

[3] For an insider's account of the negotiating history of the Declaration, see K Tapiola, 'The Teeth of the ILO – The Impact of the 1998 ILO Declaration on Fundamental Principles and Rights at Work' (2018); F Maupain, 'L'OIT, la justice sociale et la mondialisation' (1999) 278 *Recueil des cours* 262. See also J Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work' (2001) 17 International Journal of Comparative Labour Law and Industrial Relations 269.

[4] These conventions are the Forced Labour Convention, 1930 (No. 29); the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Equal Remuneration Convention, 1951 (No. 100); the Abolition of Forced Labour Convention, 1957 (No. 105); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); the Minimum Age Convention, 1973 (No. 138); the Worst Forms of Child Labour Convention, 1999 (No. 182); and the Protocol of 2014 to the Forced Labour Convention, 1930.

[5] To date, another five declarations have been adopted by the Conference; the Declaration concerning the Aims and Purposes of the ILO (known as the Declaration of Philadelphia) in

to a binding regulation—as a means to preserve and promote the relevance of the ILO's normative framework. It was devised as a response to increasing demands for flexibility and voluntary approaches to labour law and has been used as a tool for integrating core labour standards in frameworks, policies and strategies created by non-State actors—a process known as 'privatization' of labour law.[6] The Declaration was accompanied by a promotional follow-up principally consisting of annual reporting of those member States which have not ratified one or more of the fundamental Conventions with a view to identifying needs and offering technical cooperation and assistance.

The Declaration was initially criticized as marking a retrogression and unfairly distinguishing between first- and second-class standards.[7] Yet today there is little doubt that together with the corresponding notion of 'decent work agenda', the Declaration has helped to consolidate the international consensus on the fundamental workers' rights that must be respected, promoted and realized regardless of whether a member State has ratified the relevant ILO Conventions.

Twenty-five years after its adoption, the Declaration has found its way into a multitude of instruments, from bilateral free trade agreements (FTAs)[8] and

1944; the Declaration concerning the Policy of Apartheid of the Republic of South Africa in 1964; the Declaration on Equality of Opportunity and Treatment for Women Workers in 1975; the Declaration on Social Justice for a Fair Globalization in 2008; and the Centenary Declaration for the Future of Work in 2019 <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_428589/lang--en/index.htm>.

[6] See T Royle, 'The ILO's Shift to Promotional Principles and the ''Privatization'' of Labour Rights: An Analysis of Labour Standards, Voluntary Self-regulation and Social Clauses' (2010) 26 International Journal of Comparative Labour Law and Industrial Relations 249; U Liukkunen, 'The ILO and Transformation of Labour Law' in T Halonen and U Liukkunen, *International Labour Organization and Global Social Governance* (Springer 2021) 17; E Kocher, 'Transnational Labour Law? 'Corporate Social Responsibility' and the Law' in M Saage-Maaß et al, *Transnational Legal Activism in Global Value Chains. Interdisciplinary Studies in Human Rights*, vol 6 (Springer 2021) 187; R Zandvliet and P van der Heijden, 'The Rapprochement of ILO Standards and CSR Mechanisms: Towards a Positive Understanding of ''Privatization''' in A Marx et al, *Global Governance of Labour Rights* (Elgar 2015) 170.

[7] Critics pointed at the erosion of the entire corpus of international labour standards and their systematic replacement 'by a nebulous and essentially self-defined and self-evaluated system of so-called core labour standards'; see P Alston, ''Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15 EJIL 457; P Alston and J Heenan, 'Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?' (2004) 36 New York University Journal of International Law and Politics 221. *Contra*, see B Langille, 'Core Labour Rights – The True Story (Reply to Alston) (2005) 16 EJIL 409; F Maupain, 'Revitalization not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights' (2005) 16 EJIL 439. See also O Eren, 'Continuation of the ILO Principles in the 21st century Through the Compliance Pull of Core Labor Rights' (2008) 13 Journal of Workplace Rights 303.

[8] Free trade agreements are international treaties concluded between two or more States aimed at removing trade barriers and offering reciprocal preferential access to markers. According to the World Trade Organization's database on regional trade agreements, there are 353 free trade agreements in force today. Almost one third of the free trade agreements currently in effect contain labour provisions that generally aim at promoting international labour standards while 80

harmonized investment rules[9] to the UN Guiding Principles on Business and Human Rights,[10] and from the OECD Guidelines for Multinational Enterprises[11] to the UN Global Compact.[12] The Declaration continues to influence business ethics through International Framework Agreements (IFAs)[13] and private workplace initiatives such as corporate social responsibility (CSR) codes,[14] while the core labour standards reflected in the

free trade agreements include express references to the 1998 Declaration; see the ILO's database 'Labour Provisions in Trade Agreements Hub' <www.ilo.org/LPhub>.

[9] Under art 14 of the Rules on Investment and Modalities on their Implementation adopted by the Economic Community of West African States in 2008, 'investors and investments shall act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998'; see ECOWAS Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation <https://edit.wti.org/app.php/document/show/9030e714-3be3-48f2-93a1-69b5ec76d8bb>.
Similarly, art 15 of the Model Bilateral Investment Treaty Template adopted by the Southern African Development Community in 2012 provides that 'investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights at Work, 1998'. The Commentary adds that 'the ILO Declaration sets out what are considered as the minimum global standards. Almost all States have subscribed to these minimum standards. There is no evident rationale for any investor to operate in a manner than denies these standards, given the tripartite nature of the process by which ILO standards are adopted'; see SADC Model Bilateral Investment Treaty Template with Commentary <https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>.

[10] Foundational principle 12 refers to the 'responsibility of business enterprises to respect internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work'; see *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> 13–14.

[11] Chapter V of the Guidelines referring to Employment and Industrial Relations echoes the relevant provisions of the 1998 Declaration while the Commentary notes that the ILO is the competent body to set and deal with international labour standards and to promote fundamental rights at work as recognized in its 1998 Declaration on Fundamental Principles and Rights at Work; see *OECD Guidelines for Multinational Enterprises 2011 Edition*, paras 47–59 <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

[12] The Ten Principles of the UN Global Compact call upon businesses to operate in ways that, at a minimum, meet fundamental responsibilities in the areas of human rights, labour, environment and anti-corruption. Four of those principles reproduce the four categories of fundamental principles and rights at work set out in the 1998 Declaration <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

[13] Instruments negotiated between a multinational enterprise and a Global Union Federation (GUF) concerning the international operations of the company; see O Hernstadt, 'Are International Framework Agreements a Path to Corporate Social Responsibility?' (2007) 10 University of Pennsylvania Journal of Business and Employment Law 187.

[14] Written statements of principles adopted voluntarily by companies to express their commitment to particular management practices. See, for example, Apple's Supplier Code of Conduct and Human Rights Policy <https://www.apple.com/supplier-responsibility/pdf/Apple-Supplier-Code-of-Conduct-and-Supplier-Responsibility-Standards.pdf>; Ford's Supplier Code of Conduct <https://corporate.ford.com/content/dam/corporate/us/en-us/documents/operations/governance-and-policies/supplier-code-of-conduct/Ford%20Supplier%20code_Final_EN.pdf>; Shell Code of Conduct <https://coc.shell.com/en_gb/_jcr_content/root/main/containersection-0/list/list_item/links/item0.stream/1649352093386/907103b38da13e492535ee805fe6d997a51782c2/codeofconduct-english-2015.pdf>; Intel's Global Human Rights Principles <https://www.intel.com/content/www/us/en/policy/policy-human-rights.html>.

Declaration are now part of the World Bank's operations[15] and feature among the labour safeguards of regional multilateral development banks.

As regards the resonance of the ILO's normative discourse, in particular the Declaration has boosted the ratification rate of the eight fundamental Conventions with more than 580 new ratifications having been registered since its adoption in 1998—proof in itself that criticisms about the softening of international labour standards were unfounded.

The Declaration has amplified the legitimacy and impact of the ILO's voice in an unprecedented manner, has popularized the ILO's institutional specificity as a tripartite organization and has given fresh impetus to its mission and mandate.

II. WHY OCCUPATIONAL SAFETY AND HEALTH?

Seeking to justify the fundamental importance of occupational safety and health for the world of work is forcing an open door. Unsafe and unhealthy working conditions have an appalling human cost and accidents, such as the 1911 Triangle Shirtwaist Factory fire in New York[16] or the 2013 Dhaka garment factory collapse (known as Rana Plaza),[17] serve as tragic reminders. Global statistics are persistently alarming. According to the WHO/ILO Global Monitoring Report on the Work-related Burden of Disease and Injury 2000–2016,[18] a joint study published in September 2021 that details the impact on human health of 19 different occupational risk factors, found that work-related diseases and injuries were responsible for the deaths of 1.9 million people in 2016. The most significant risks were long working hours and workplace exposure to air pollution, which were linked to approximately 750,000 and 450,000 deaths respectively.[19]

[15] H Murphy, 'The World Bank and Core Labour Standards: Between Flexibility and Regulation' (2014) 21 Review of International Political Economy 399. See also ITUC, *The Labour Standards of the Multilateral Development Banks: A Trade Union Guide* (2019).

[16] The fire caused the death of 146 garment workers, 123 women and girls and 23 men. Many workers could not escape from the building as doors to exits were locked during working hours to prevent workers from taking unauthorized breaks. As a result of the fire, the American Society of Safety Professionals was founded in October 1911.

[17] The collapse of the eight-story building which housed five garment factories, killed at least 1,132 people and injured more than 2,500—the deadliest garment factory disaster in history <https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm>. According to reports, more than half of the victims were women, along with a number of their children who were in nursery facilities within the building. The building's owners ignored warnings to avoid using the building after cracks had appeared the day before the accident and workers were ordered to return the following day. To ensure that injured workers and dependants of the deceased were effectively compensated, a coordinated framework known as the Rana Plaza Arrangement was agreed with the ILO acting as a neutral chair. Between March 2014 and October 2015, the Arrangement distributed almost $30 million directly to victims <https://ranaplaza-arrangement.org/>.

[18] <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_819788.pdf> viii.

[19] ibid 12.

https://doi.org/10.1017/S0020589322000446 Published online by Cambridge University Press

According to figures published by the UN Global Compact,[20] workplace-related deaths exceed the average annual deaths from road accidents, war, violence and HIV/AIDS. On top of the 7,500 people who die from unsafe and unhealthy working conditions each day, a further 374 million workers suffer from non-fatal occupational accidents annually. Continents are impacted unevenly with about two-thirds of global work-related mortality occurring in Asia, and the rates of fatal occupational accidents per 100,000 workers being 4 to 5 times higher in Africa and Asia than in Europe.[21] The economic impact of gaps in occupational safety and health is equally significant with four per cent of global gross domestic product lost annually due to costs related to lost working time, interruptions in production, medical treatment and compensation.

Throughout 100 years of standard-setting at the ILO, there has been a constant focus on efforts to improve safety standards in specific sectors, such as construction (Convention No. 167), mining (Convention No. 176) or agriculture (Convention No. 184) and enhance workers' protection against specific occupational hazards, such as white lead (Convention No. 13), radiation (Convention No. 115), benzene (Convention No. 136), occupational cancer (Convention No. 139), asbestos (Convention No. 162) or chemicals (Convention No. 170).[22] The Violence and Harassment Convention 2019 (No. 190) is the most recent example of the ILO's attention to promoting occupational safety and health in the world of work.[23]

The recognition of the critical importance of occupational safety and health is already reflected in numerous international human rights instruments. The International Covenant on Economic, Social and Cultural Rights recognizes in Article 7 'the right of everyone to the enjoyment of just and favourable conditions of work [that] ensure, in particular, […] safe and healthy working conditions'. In its 2016 General Comment (No. 23) on Article 7, the Committee on Economic, Social and Cultural Rights stated that preventing occupational accidents and disease is a fundamental aspect of the right to just and favourable conditions of work.

The European Social Charter provides in Article 3 that all workers have the right to safe and healthy working conditions. In this connection, the European Committee of Social Rights states in its digest of case law that the right of every worker to a safe and healthy working environment is a widely recognized principle, stemming directly from the right to personal integrity, one of the

[20] New brief on safe and healthy working environment <https://www.unglobalcompact.org/take-action/safety-andhealth>.

[21] ibid.

[22] The ILO has adopted more than 40 Conventions specifically dealing with occupational safety and health, as well as over 40 Codes of Practice. Nearly half of international labour instruments deal directly or indirectly with occupational safety and health issues <www.ilo.org/dyn/normlex/en>.

[23] Convention No. 190 entered into force on 25 June 2021 and has so far received 20 ratifications <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_814507.pdf>.

fundamental principles of human rights. The principle is also enshrined in Article 31 of the Charter of Fundamental Rights of the European Union pursuant to which 'every worker has the right to working conditions which respect his or her health, safety and dignity'. Similarly, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights recognizes in Article 7 the right to work 'under just, equitable, and satisfactory conditions, particularly with respect to […] safety and hygiene at work [and] the prohibition of […] unhealthy or dangerous working conditions […] for persons under 18 years of age'.

On a more general level, mention should be made of the WHO Constitution, which recognizes in its preamble that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being' and Article 15 of the African Charter of Human and Peoples' Rights which provides that 'every individual shall have the right to enjoy the best attainable state of physical and mental health'.

There has also been growing awareness within the ILO of the need to upscale action in the field of occupational safety and health. For instance, in 2009 the Conference Committee on the Application of Standards—a tripartite body which oversees compliance of member States with ratified international labour conventions—recognized that occupational safety and health was of crucial importance for the quality of work and human dignity.[24] Similarly, the 2017 General Survey of the Committee of Experts on the Application of Conventions and Recommendations—an independent expert body supervising international labour standards—noted that the promotion of occupational safety and health and the prevention of accidents and diseases at work is a core element of the ILO's founding mission and further recalled that the 2030 Agenda for Sustainable Development shines a light on occupational safety and health, and ILO instruments will be a key tool for countries wishing to make progress over the next 15 years towards the achievement of Sustainable Development Goal target 8.8 in promoting safe and secure working environments for all workers.[25]

III. THE ROAD TO THE ELEVATION OF OCCUPATIONAL SAFETY AND HEALTH

Just as the original Declaration of 1998 was adopted three years after the 1995 Copenhagen World Summit for Social Development, the amendment that

[24] ILC, 98th Session (2009) *Record of Proceedings*, Provisional Record 16 part one, para 208 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_116491.pdf>.

[25] ILC, 106th Session (2017) *General Survey on the occupational safety and health instruments concerning the promotional framework, construction, mines and agriculture*, Report III (Part 1B) para 573 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_543647.pdf>.

includes occupational safety and health in the framework of fundamental principles and rights at work comes three years on from the adoption of the ILO Centenary Declaration on the Future of Work 2019.

While the 1998 Declaration finds its origins in the ILO's effort to position itself in the debate centred on the World Trade Organization around the social dimension of globalization, the 2022 amendment to the Declaration draws upon the work of the Global Commission for the Future of Work, which first gave prominence to the idea that the time had come for occupational safety and health to be recognized as a fundamental principle and right at work.

Indeed, the Global Commission's report, published in January 2019, introduced the notion of a 'Universal Labour Guarantee' as a protection floor for all workers, regardless of their contractual arrangement or employment status, as part of the broader human-centred agenda, and in this context, indicated that 'this proposal also allows for safety and health at work to be recognized as a fundamental principle and right at work'.[26] The Commission's key recommendations were later taken up in the draft of the Centenary Declaration, that is, the outcome document that was submitted to the Conference for consideration at its 108th (Centenary) Session, and which read in part: 'The Conference declares that: […] occupational safety and health is a fundamental principle and right at work in addition to those specified in the ILO Declaration on Fundamental Principles and Rights at Work (1998)'.[27]

Discussions at the Conference proved difficult, with some constituents raising questions about process and considering that a decision on this matter was premature. The divergent views included a proposed amendment from the Employers' group to refer to the 'promotion of occupational safety and health as an important foundation of decent work'; the EU member States were in favour of adding to the 1998 Declaration 'the right to safe and healthy working conditions'; the group of Latin American and Caribbean countries preferred to omit any reference to the 1998 Declaration, while the Workers' group supported wording stating that 'occupational safety and health should be recognized as a fundamental principle'.[28]

[26] ILO, *Work for a brighter future – Global Commission on the future of work* (2019) 12.

[27] ILC, 108th Session (2019) Report IV, *ILO Centenary outcome document* 7. There was also an earlier proposal made by the EU member States in the context of a Conference discussion in 2017 for 'the ILO to explore the feasibility to include occupational safety and health in fundamental principles and rights at work as this was an issue referring to the life, health and dignity of workers, and would be completely in line with the spirit of the Declaration'; see ILC, 106th Session (2017) Provisional Record 11-2(Rev.) para 331.

[28] ILC, 108th Session (2019) Provisional Record 6B(Rev.), *Report of the Committee of the Whole*, para 986. Regarding process, it was explained that nothing prevented the Conference from recognizing a new fundamental principle and right at work through the Centenary Declaration as this would involve the same sovereign organ, the same procedure and the same constitutional logic as that of the 1998 Declaration, ibid, para 1011. Nonetheless, many governments felt that more certainty was needed, especially as regards the selection of

In the event, the compromise negotiated between the two non-governmental groups and accepted by governments was to include in the Centenary Declaration a statement of principle that safe and healthy working conditions are fundamental to decent work, whereas an action-oriented paragraph in the accompanying resolution would request the Governing Body to consider, as soon as possible, proposals for including safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work.[29] The compromise text reflected the general agreement that the recognition of occupational safety and health as a new fundamental principle and right at work required further analysis but needed to be addressed as a matter of priority.

Delayed by the outbreak of the COVID-19 pandemic and the cancellation of the March 2020 session of the Governing Body session and the June 2020 session of the International Labour Conference, the process had to be kick-started again in March 2021 with the adoption of a revised road map.[30] A further two Governing Body meetings equipped the tripartite constituents with all the necessary information to facilitate the consideration of the subject at the 110th Session of the Conference in June 2022.[31]

The discussions of the Governing Body focused on three main issues. The first was a procedural one, namely whether the inclusion of occupational safety and health in the ILO's framework of fundamental principles and rights at work should take the form of a targeted amendment to the existing 1998 Declaration or, alternatively, a stand-alone declaration.[32] The second question was the possible effects of an amended 1998 Declaration on the labour clauses incorporated in free trade agreements. The third question was the exact wording that should be used to give expression to the new fundamental principle and the identification of one or more occupational safety and health Conventions that should henceforth be promoted and monitored as core ILO Conventions.

With respect to the first question, it was argued convincingly that the principle of workers' protection against sickness and injury shared the same constitutional basis as the existing four categories of fundamental principles, and therefore there was no valid reason to address occupational safety and health in a separate instrument. In other words, occupational safety and

occupational safety and health Conventions to be recognized as fundamental, before a formal amendment of the 1998 Declaration could be undertaken.

[29] ILC, 108th Session (2019) Provisional Record 6B(Rev.), *Report of the Committee of the Whole*, paras 1327, 1330.

[30] GB.341/INS/6, para 45 and GB.341/INS/PV, para 195.

[31] GB.343/INS/PV, paras 177–215 and GB.344/INS/PV, paras 200–242.

[32] The dilemma arose from the fact that the drafters of the Centenary Declaration made general reference to the inclusion of occupational safety and health in the ILO's framework of fundamental principles and rights at work without specifying the 1998 Declaration, which, theoretically speaking, left room for different options. It soon became clear, however, that the expression 'the ILO's framework of fundamental principles and rights at work' could only be meaningfully perceived as referring to the 1998 Declaration. A proposal that certain key occupational safety and health Conventions could be granted the status of 'priority' rather than fundamental Conventions found no support and was not further pursued.

health is explicitly referred to in the Preamble of the ILO Constitution and the Declaration of Philadelphia[33]—just like the other core principles—and thus the obligation to respect and promote that principle is as much inherent in ILO membership as the principles of freedom of association, non-discrimination and the abolition of child labour. As it was clarified at the time of the adoption of the 1998 Declaration, 'fundamental rights are not fundamental because the Declaration says so; the Declaration says that they are fundamental because they are'.[34] Or, as it has been metaphorically put, 'the Declaration is like the "wisdom tooth" of the Constitution, which was already there but finally pierced through the gum in its maturity'.[35]

It was also argued that inserting occupational safety and health into the existing framework would preserve its overall coherence, resonance and visibility. Even more so, as from a practical perspective adding a new, fifth category of fundamental principle would call for a minimally intrusive amendment to paragraph 2 of the 1998 Declaration, as opposed to drafting a tailor-made declaration on occupational safety and health and drawing up an ad hoc follow-up mechanism.

The second aspect which the Governing Body sought to refine ahead of the Conference deliberations was the exact wording of the fundamental principle that should appear in the amended Declaration. Focus was placed on 'effective protection of safe and healthy working conditions' and 'effective protection of a safe and healthy working environment' and each of the two expressions found equal support from various sources. The term working 'conditions' is found in, among other instruments, the 1949 Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1961 European Social Charter, whereas the term working 'environment' is used in both Conventions Nos. 155 and 187 and the Occupational Health Services Convention 1985 (No. 161). Alternatively, it was proposed that there was no reason to depart from the wording as it appears in the Declaration of Philadelphia, and that reference should therefore be made

[33] The Preamble of the ILO Constitution notes that 'the protection of the worker against sickness, disease and injury arising out his employment' is among the improvements that are 'urgently required' while the Declaration of Philadelphia identifies a 'solemn obligation' of the Organization to further programmes that will achieve 'adequate protection for the life and health of workers in all occupations' <http://www.ilo.ch/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO>.

[34] ILC, 86th Session (1998) Report VII, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism* 10. Likewise, the Office report submitted to the Conference in 2008 for the purposes of considering the ILO Declaration on Social Justice for a Fair Globalization 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 Constitution or ratified Conventions'; see ILC, 97th Session (2008) Report VI, *Strengthening the ILO's capacity: Continuation of the discussion and possible consideration of an authoritative document*, para 68.

[35] Maupain (n 7) 444.

https://doi.org/10.1017/S0020589322000446 Published online by Cambridge University Press

to 'adequate protection of the life and health of workers in all occupations'. This would reinforce the premise that the Conference was not creating a new constitutional principle but simply reaffirming the fundamental nature of an existing one.

It should be noted, in this respect, that not all the fundamental principles and rights in the 1998 Declaration use wording from the ILO Constitution: the terms 'forced and compulsory labour' are nowhere to be found in the founding document. If anything, this confirms the latitude the Conference has in this matter, including using well-established terminology such as 'occupational safety and health'. Lastly, it is worth recalling that the wording of fundamental principles as such has not given rise to any difficulties thus far, which should put the terminological debate into perspective.

And finally, the third question arose from doubts expressed by some constituents that, despite its non-binding nature, a Conference resolution amending the 1998 Declaration might indirectly create new obligations for member States through the unsolicited amendment of all those free trade agreements that currently refer to core labour standards, to obligations arising from ILO membership or to the eight fundamental Conventions.

Despite the largely exaggerated and legally unfounded concerns about the possible legal effects on existing trade agreements, most constituents sought reassurances that the resolution would operate *pro futuro* and that no trade partner could claim that labour clauses in free trade agreements concluded prior to the adoption of the resolution had somehow been modified to align with the expanded list of core labour standards.[36]

Rational and self-evident legal arguments were put forward, such as the fact that a non-binding Conference resolution could not amend treaties negotiated and concluded among States outside the Organization or that it is for the States parties to free trade agreements to decide if, when and how they may amend those agreements to bring them into line with an expanded list of fundamental principles and rights.

Some concerns remained that an evolutive or dynamic interpretation[37] could possibly modify labour clauses in free trade agreements without the consent of

[36] There is considerable diversity in labour clauses varying from binding obligations to soft commitments and non-committal policy statements. For more on the scope and content of labour provisions in free trade agreements, see B Melo Araujo, 'Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality (2018) 67 ICLQ 233; J Harrison, 'The Labour Rights Agenda in Free Trade Agreements' (2019) 20 Journal of World Investment & Trade 705. See also ILO, *Social Dimensions of Free Trade Agreements* (2015); ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* (2017); ILO, *Labour Provisions in G7 Trade Agreements: A Comparative Perspective* (2019).

[37] Among the numerous academic writings on evolutive interpretation, see J Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 The Law and Practice of International Courts and Tribunals 443; M Dawidowicz, 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on *Cost Rica v. Nicaragua*' (2011) 24 LJIL 201.

the States parties, or that the Conference resolution could be considered as a subsequent agreement or subsequent practice for the purposes of interpreting those labour clauses. In response, it was indicated that evolutive intent could only be presumed when generic terms were used, as opposed to a specific enumeration of the four categories of fundamental rights,[38] and that amending international treaties through subsequent agreement and subsequent practice was not generally recognized.[39]

Yet despite their obvious merits, legal arguments did not allay concerns that additional labour-related conditionalities might be imposed on developing countries without their consent, in return for the removal of trade barriers. It was generally felt that only a saving clause providing that nothing in the Conference resolution would affect the rights and obligations arising from existing trade agreements to which States are parties could offer the clarity and certainty needed.

It is worth noting that little or no attention was paid to the fact that a saving clause is intended to resolve a conflict between divergent or contradictory provisions of two or more treaties, and that including such as clause in a non-binding resolution would therefore be stating the obvious. It is also indicative that a saving clause was mistakenly understood as having a controlling effect on unilateral incentive arrangements such as the Generalized System of Preferences.

If anything, the saving clause that is included in the final operative paragraph of the draft resolution amending the 1998 Declaration leaves no doubt that the intent of the drafters of the resolution was to 'shield' the web of trade agreements currently in force from any attempt to read into the resolution anything more than a strong policy commitment.[40]

[38] The case of labour provisions using exclusively generic terms such as 'core labour standards' remains exceptional. For instance, the EU-South Africa agreement of 2000 refers to 'basic social rights' or 'pertinent standards of the ILO' and the EU-Chile agreement of 2003 refers to 'fundamental social rights'. In contrast, most free trade agreements include a specific reference to the 1998 Declaration and/or name the four fundamental principles; see, for instance, EU-Japan Economic Partnership Agreement, art 16.3; EFTA-Georgia Free Trade Agreement, art 10.5; Republic of Korea-Colombia Free Trade Agreement, art 16.6; Australia-Republic of Korea, art 17.1; Republic of Korea-Turkey Free Trade Area Framework Agreement, art 5.4. It should also be noted that many free trade agreements list occupational safety and health alongside the current fundamental principles and rights as part of 'internationally recognized labour rights' that need to be recognized and protected by domestic law; see, for instance, Canada-Ukraine Free Trade Agreement, art 13.3; US-Singapore Free Trade Agreement, art 17.7.

[39] International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, with Commentaries, UNYBILC, vol II, (2018) Part Two, 58–63.

[40] It should be recalled that at the time of the Conference discussion of the 1998 Declaration, a proposal to include a similar saving clause on trade that ultimately became operative paragraph 5, gave rise to heated debate and resulted in the adoption of the Declaration being put to a vote; see ILC, 86th Session (1998) Record of Proceedings, 20/70–20/111.

IV. THE CONFERENCE IMPRIMATUR FOR THE INCLUSION OF THE FIFTH FUNDAMENTAL PRINCIPLE

The report prepared by the ILO Secretariat to serve as a basis for the Conference discussions emphasized three parameters: first, the *urgency* to deliver, following the Conference's call some years previously for action to be taken as soon as possible. Secondly, the clear and uncontested *constitutional articulation* of the amendment exercise, which would consist in reaffirming the prominence of an existing constitutional principle and placing it alongside the principles already designated as fundamental in 1998. And thirdly, the singular *simplicity* of the proposed amendment, which would be limited to the insertion of half a dozen words in paragraph 2 of the 1998 Declaration.[41]

Deliberations proved uncomplicated and consensus was reached fairly smoothly and rapidly, which proves that, in the eyes of most constituents, this was a well-matured undertaking.

At the request of one constituent group, a preambular paragraph of the draft resolution sought to affirm that the responsibility for ensuring workers' safety and health does not lie exclusively with employers but involves corresponding obligations for public authorities and workers. The proposed wording was based on relevant provisions of Conventions Nos. 155 and 187 referring to 'complementary functions and responsibilities' or, alternatively, to 'a system of defined rights and responsibilities and duties'.

Another preambular paragraph that gave rise to no substantive discussion recalled the profound and transformative impact that the COVID-19 pandemic had had on the world of work and how the public health crisis had served as a compelling reminder of the vital importance of occupational safety and health. It is worth noting, in this respect, that the decision to include occupational safety and health in the framework of fundamental principles predates the pandemic and therefore the holding of the Conference discussion amidst a global sanitary crisis was simply coincidental.

Regarding the formulation of the additional fundamental principle, which had initially appeared to be divisive, quasi-unanimous support was expressed for a simple and straightforward reference to 'a safe and healthy working environment'. The drafters apparently realized that debating the wording of the principle had little practical effect, as the abstract principles enshrined in the Declaration are only translated into specific rights and obligations through the relevant fundamental Convention(s), and hence, the choice of words to give expression to the recognition of occupational safety and health as a fundamental principle and right was not decisive.

[41] ILC, 110th Session (2022) Report VII, *Inclusion of safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work* 14.

It was only natural, therefore, that the main focus of the discussions was the identification of the ILO instruments which should be granted the elevated status of fundamental Conventions within the meaning of the 1998 Declaration. There is an abundance of ILO standards on occupational safety and health, but very few are of a general scope. Agreement was finally reached on the recognition of the Occupational Safety and Health Convention 1981 (No. 155), and the Promotional Framework for Occupational Safety and Health Convention 2006 (No. 187), as fundamental due to their complementary nature and the combination of technical prescriptions with a systems approach to the management of occupational safety and health.[42]

Concerning the trade implications, discussions revealed a large convergence of views that a saving clause was legally unnecessary, yet politically indispensable. Recognizing the diversity of modern economic cooperation agreements that combine trade facilitation with investment protection and include labour chapters, the Conference decided to affirm that nothing in the resolution amending the 1998 Declaration would affect trade and investment agreements concluded prior to the adoption of the resolution. It also decided that the saving clause would only relate to inter-State agreements and not to agreements signed with private actors, while any reference to unilateral trade incentive schemes, such as the Generalized System of Preferences, was wisely avoided.

Moreover, the Conference decided that in the future the Declaration should be cited with both the year of original adoption and the year of its amendment. Finally, the Conference agreed that the Governing Body should initiate the process for updating all international labour standards (seven Conventions, one Protocol and seven Recommendations) that contain references to the 1998 Declaration and to the four categories of fundamental principles and rights that existed at the time of their adoption.[43]

From a legal and institutional perspective, there are three aspects of the Conference discussions that call for comment.

First, the inclusion of occupational safety and health in the ILO's framework of fundamental principles and rights at work puts an end to a largely academic

[42] The complementarity of these Conventions has been acknowledged by the ILO Committee of Experts; see for instance *ILO standards on occupational safety and health,* ILC, 98th Session (2009) Report III (Part 1B), paras 294–295, and *Working together to promote a safe and healthy working environment*, ILC, 106th Session (2017) Report III (Part 1B) para 37. To date, Conventions Nos 155 and 187 have received 75 and 58 ratifications respectively but their upgrading to fundamental status is expected to increase these figures significantly.

[43] This would require the formal adoption of a Convention and a Recommendation partially revising the instruments concerned. In practical terms, by ratifying the revising Convention, a member State that had previously ratified any of the eight instruments concerned would recognize that it would continue to be bound by that instrument in its amended version, whereas a member State that ratified any of those instruments after the entry into force of the revising Convention would be deemed to have ratified it as amended by that Convention. A draft revising Convention and Recommendation as well as other consequential amendments are now before the Governing Body for consideration; see GB.346/INS/3/3.

debate as to how the original four categories of fundamental principles and rights at work were selected. Scholars have doubted, for instance, that specific criteria (for instance, legal, philosophical or economic criteria) were used to determine the four categories and have questioned in particular the purported omission of safety and health.[44]

It was in an attempt to rationalize the recognition of four constitutional principles as being fundamental, to the exclusion of other principles also spelled out in the Constitution, that one of the architects of the Declaration noted that 'the fundamental workers' rights category enjoys a functional coherence which relates to their impact on the achievement of other rights […] As enabling rights, they empower workers with the tools that are necessary for the conquest of other rights'.[45]

However plausible or convincing this may have been at the time of the adoption of the 1998 Declaration, the explanation that fundamental rights are, and can only be, enabling rights has lost much of its relevance. As the record shows, no objection was raised by tripartite constituents to the inclusion of safety and health as an additional fifth fundamental principle, which proves that at no point was the Declaration perceived as a self-contained and exclusive list of enabling rights.

Furthermore, with the benefit of hindsight and based on the discussions that led to the adoption of the resolution amending the 1998 Declaration, it should now be clear that the 1998 Declaration should not be seen as a static list, but rather as a document that reflects the ILO constituents' shared understanding as to what membership entails in terms of bedrock commitments. The amendment to the 1998 Declaration confirms that the list of fundamental principles and rights at work may, in fact, be reviewed by the Organization's supreme executive and legislative body and that there is no established hierarchy among the foundational principles set out in the ILO Constitution.

Secondly, the debate around the saving clause generated a strong sense of déjà vu. Indeed, if there is one question in relation to which the Conference discussion was astonishingly reminiscent of that which led to the adoption of the original 1998 Declaration, it is the possible ramifications of the Declaration on trade relations. In 1998, the Conference deliberations were almost stalled—to the point that one delegate observed that the Committee had been discussing trade policy more than protection of core labour standards[46]—around the possible nexus between the respect of fundamental principles and rights at work and trade sanctions. In 2022, there was scepticism related to the effects that an amended Declaration might have on the labour clauses that have massively populated free trade agreements and

[44] See, for instance, Alston (n 7) 485; E de Wet 'Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work' (2008) 9 German Law Journal, 1438.
[45] Maupain (n 7) 448.
[46] ILC, 86th Session (1998) Provisional Record 20, para 355.

https://doi.org/10.1017/S0020589322000446 Published online by Cambridge University Press

other trade facilitation arrangements in recent years. In both cases, developing countries showed disbelief that a 'soft law' instrument such as a Conference resolution cannot generate, directly or indirectly, new obligations and they called for express reassurances to be built into the negotiated instrument.

During the preparatory work of the 1998 Declaration, it was repeatedly explained that the safeguard clause aiming at excluding the possibility of adopting trade sanctions against a member that might be in breach of fundamental principles and rights was redundant from a legal point of view.[47] In a similar fashion, ample clarifications were provided at the Governing Body and Conference discussions prior to the adoption of the 2022 resolution to the effect that a non-binding Conference resolution cannot affect the scope and content of bilateral or plurilateral trade agreements negotiated outside the Organization and that a saving clause would therefore serve no purpose in this regard.[48] Even though the need for a saving clause was in both cases overstated, it reflects the degree of discomfort of some member States about the political fallout of the Declaration.

What made the question of a saving clause topical this time was the proliferation of free trade agreements which directly link trade privileges with respect for fundamental workers' rights. The debate around the relevance and limits of evolutive interpretation was indicative of the uneasiness among many constituents. Concretely, the question was raised as to whether terms contained in existing free trade agreements such as 'core labour standards' or 'fundamental principles and rights at work' could—in the context of third-party settlement of a possible dispute among States parties—be subject to an evolutive interpretation, that is to say, as incorporating all the ILO fundamental principles recognized at the time of interpretation rather than only those recognized at the time of the conclusion of the trade agreement in question.

In the light of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, the International Law Commission's work on subsequent agreements and subsequent practice in relation to treaty interpretation, and the rule developed by the International Court of Justice,[49] the ILO Secretariat

[47] ILC, 86th Session (1998) Report VII, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism* 20. As one government had observed, including a safeguard clause in the Declaration was 'tantamount to building a dam in the desert', while the Workers' group considered the clause to be totally inappropriate and wondered how a safeguard clause in a non-binding document could be seen to protect anyone in any event; ILC, 86th Session (1998) *Record of Proceedings*, 20/88–20/89 and 20/110.

[48] ILC, 110th Session (2022) Report VII, *Inclusion of safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work*, para 32. See also ILC, 110th Session (2022) Record of Proceedings, *Third report of the General Affairs Committee Summary of proceedings concerning the draft resolution to amend the ILO Declaration on Fundamental Principles and Rights at Work* (1998) para 233.

[49] 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

had put forward the view that the theoretical possibility of an arbitral panel engaging in an evolutive interpretation of generic terms such as 'core labour standards' could not be excluded but remained highly unlikely. It was noted, for instance, that whereas there is no axiomatic method for determining whether treaty provisions are to be interpreted in a 'contemporaneous' or an 'intertemporal' manner, those generic 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.[50]

This is all the more true as the vast majority of labour clauses in free trade agreements enumerate exhaustively the current fundamental principles and rights at work, and hence reading additional provisions into those clauses would be tantamount to amending rather than interpreting them. It was further indicated that even if the resolution amending the 1998 Declaration could be deemed to constitute 'subsequent agreement' or 'subsequent practice' within the meaning of Article 31(3) of the Vienna Convention, it is generally accepted that such agreement or practice may only have the effect of clarifying the meaning of the labour clauses in question but not amending them.[51]

As for unilateral trade incentive schemes, such as the Generalized System of Preferences, it was explained that the conditions for access to those non-reciprocal trade preferences may be modified at the sole discretion of the State having established the scheme, and there can therefore be no dispute to settle through third-party intervention and hence no room for interpretation, evolutive or otherwise.[52]

It follows that, legally speaking, even without the explicit saving clause included in the fifth operative paragraph of the resolution amending the 1998 Declaration, none of the 103 free trade or economic partnership agreements currently in effect that contain labour clauses could be deemed to have been modified to incorporate occupational safety and health as a fundamental workers' right.[53]

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, ICJ Rep 2009, para 66. Other *loci classici* of evolutive interpretation in the jurisprudence of the ICJ include *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 Rep 1971, para 53; *Aegean Continental Shelf Case*, Judgment of 19 December 1978, ICJ Rep 1978, para 80; *Case concerning Pulp Mills on the River Uruguay*, Judgment of 20 April 2010, ICJ Rep 2010, para 204.

[50] GB.344/INS//6(Add.1), *Issues relating to the inclusion of safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work*, para 175.

[51] ibid, para 180.

[52] ibid, para 182. For instance, beneficiaries under the European Union's GSP+ arrangement established by EU Regulation No. 978/2012 are required, inter alia, to have ratified 27 international conventions, including the eight ILO fundamental Conventions listed in the Regulation.

[53] Apparently based on the questionable premise that the new fundamental right would have been automatically transposed in trade agreements and preference programs had a savings clause not been inserted, one commentator argued that 'ILO members decided not to give occupational safety and

Thirdly, in striking contrast to the disproportionate importance attached to the need for a saving clause and the possibility of labour clauses in free trade agreements being subject to an evolutive interpretation in the context of future disputes, very little attention was paid during the Conference or the Governing Body discussions to the related question of whether the ILO should be involved in the settlement of such trade disputes and seek to have a say, especially with regard to the interpretation of international labour standards and the practice of its supervisory bodies. The proliferation of dispute settlement clauses in free trade agreements entrusting responsibility for the interpretation of labour provisions to expert panels,[54] not necessarily familiar with the various ILO supervisory procedures and the voluminous case law they generate, represents in the long-term a direct risk for the authority of the ILO's voice in the global regulatory framework and the integrity of its supervisory system.[55]

While the panel that examined the trade dispute between the European Union and the Republic of Korea interpreted the terms 'to respect', 'to promote' and 'to realize' fundamental principles by essentially reproducing the 'definitions' developed by ILO supervisory bodies such as the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association,[56] there is no guarantee that other bodies would follow the same approach.

The differing views on the legal nature of the 1998 Declaration expressed by the respective panels that examined the EU–Korea and the US–Guatemala disputes is another illustration of the same point. Whereas the panel of experts in the EU–Korea labour dispute held the view that the 1998 Declaration was not in itself binding but that the parties assumed a separate binding commitment arising from Article 13.4.3 of their bilateral agreement and not from the Declaration per se,[57] the arbitral panel constituted under

health instruments parity with the ILO's other fundamental rights [since the saving clause] relegates the enforcement of occupational safety and health to the ILO's enforcement mechanisms while subjecting commitments to the ILO's other fundamental rights to trade enforcement, including potential trade sanctions [and] the result is a new, fragmented regime of fundamental labour rights'; see D LeClercq, 'Occupational Safety and Health as a New Fundamental Labour Right: Opportunities and Challenges' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4161060>.

[54] Most free trade agreements provide for dispute resolution through diplomatic means, recommendations issued by advisory groups or experts, or binding arbitral award. A certain number of free trade agreements exclude labour clauses, wholly or partially, from the scope of application of dispute settlement mechanisms; see C Chase et al 'Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?' in R Acharya (ed), *Regional Trade Agreements and the Multilateral System* (CUP 2016) 608.

[55] In the words of one commentator, 'when other institutions become involved with enforcing ILO standards, the ILO to some extent loses ownership. If such "outsourcing" is not done sensibly, the ILO's governance model may suffer'; M Bronckers and G Gruni, 'Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously' (2019) 56 CMLRev 1591.

[56] 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, paras 128–133.

[57] ibid, paras 107, 121–122.

https://doi.org/10.1017/S0020589322000446 Published online by Cambridge University Press

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 and Guatemala considered the 1998 Declaration to be a 'relevant rule of international law' within the meaning of Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[58]

As long as the requirement for prior consultations with the ILO is not codified in free trade agreements to ensure its meaningful participation in any interpretative process, independent bodies may unwillingly deviate from well-established ILO guidance, leading to cacophony and uncertainty. The ILO needs to rise to the challenge and undertake timely initiatives to avoid marginalization in such a crucial area of its mandate.

V. CONCLUSION

In prefacing the new edition of the Declaration of Fundamental Principles and Rights at Work, as amended, the ILO Director-General wrote:

> occupational safety and health is a moving target. While some improvements take place, new occupational risks emerge due to technical innovation or organizational change. Physical hazards can be compounded by mental health problems and harassment and violence at work. Increased distance work and varying forms of labour contracts create new challenges for health and safety regulations and their application. At times of economic downturn or health emergencies, safety and health at work tend to come under threat.[59]

The elevation of the right to a safe and healthy working environment to the level of fundamental principle some 24 years after the adoption of the original ILO Declaration on Fundamental Principles and Rights at Work is timely and attests to the Organization's resourceful pursuit of its noble goals of decent work and social justice.

In responding to the ILO Centenary Declaration's call for the inclusion of occupational safety and health in the framework of fundamental principles and rights at work, the ILO's tripartite constituency showed pragmatism and sagacity. They opted to elevate occupational safety and health to a fundamental principle through a minimally intrusive and procedurally simple amendment to paragraph 2 of the 1998 Declaration. This was a judicious choice, since drawing up a separate instrument on occupational safety and health would have negatively impacted the resonance and visibility of the ILO's framework of fundamental principles and rights at work.

By declaring that States are obliged—by virtue of their membership of the ILO—to respect, promote and realize an additional, fifth, fundamental

[58] 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. [59] <https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_467653.pdf>.

https://doi.org/10.1017/S0020589322000446 Published online by Cambridge University Press

principle and right, ILO constituents have confirmed that they do not view the 1998 Declaration as a closed list. Had the assumption been different, the inclusion of a safe and healthy working environment would simply not have been possible. By the same token, the amended 1998 Declaration has shown that the controversy over whether fundamental principles and rights were meant to be limited to 'enabling rights' is of academic interest only.

Although a soft law instrument with no binding legal effect, the amended Declaration represents a powerful political statement of exceptional outreach that encapsulates the ILO's core mandate and the core responsibilities of its member States. In this sense, it furthers institutional coherence. It will keep the issue of unsafe and unhealthy working conditions in the spotlight, thereby encouraging public authorities to improve legislative frameworks, sensitizing businesses to the need to redress unsustainable or deficient practices, and promoting a culture of prevention at all levels.

It will provide a fresh impetus to efforts to consolidate occupational safety and health standards. Most importantly, it will reinforce occupational safety and health as a basic human right, as ILO Conventions Nos. 155 and 187 come out of the shadows and join the restricted circle of the ILO's most influential legislative texts.